

# All Change: THE NEW TRIBUNAL RULES

A new set of employment tribunal procedural rules came into force on 1st October 2004, the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 (SI2004/1861).

## The main changes in outline

Overall the new rules have a rather different feel to them. They have been recast in "plain English" - by way of example out goes "notice of appearance" and in comes "response form". 61 separate rules replace the current 23 so the overall structure is somewhat more elaborate. In terms of substance the main changes are as follows:

- New, more detailed, prescribed forms for starting and responding to claims.
- Stricter provisions as to time limits for putting in a response.
- A "pre-acceptance" procedure to sift out claims and responses that should not go forward at all for one reason or another.
- Ability to issue a default judgment in uncontested cases.
- New fixed periods for ACAS conciliation.
- Power on the part of the ET Presidents to issue Practice Directions.
- Provision for cases to be struck out at a pre-hearing review.
- Two main changes to the costs rules: "preparation time" awards and "wasted costs" orders.

## Starting claims

All employees will be required to use a new prescribed claim form when issuing a complaint. Use of the new form becomes obligatory from 6 April 2005. There is also a new prescribed response form to defend a claim, that will become obligatory on the same day.

The time limit for filing a response is 28 days from the day on which the claim form is sent out by the tribunal office. This gives greater certainty than the present rule (21 days from receipt) as the former date will be a matter of record. No extension of the period for submitting a response will ordinarily be permitted unless the respondent applies within the 28 day period itself, however, and it is deemed just and equitable to grant an extension. If no response form is received within the 28 days, or any further time that has been granted, the case will be treated as uncontested and a default judgment will be issued. The tribunal does have a residual power to review default judgments.

## Pre-acceptance procedure

Under this procedure either a claim form or response form may not be accepted by the tribunal. In the former case the claim will simply not be served on the respondent. In the latter a default judgment may be entered.

Claim forms and response forms may be rejected if they fail to give certain basic information prescribed by the rules, and after 6th April 2005 if they are not in the prescribed form. Again, they may be rejected if served out of time where the tribunal has no power to extend the time limit. If the claimant does not qualify for a right he or she is seeking to assert, or if the tribunal has no jurisdiction to determine the complaint, then the claim form will be returned to the claimant following determination by a chairman without service upon the respondent.

## Default judgment

Failure to enter a response within the time limit, or rejection of a response form under the pre-acceptance procedure, will result in a default judgment being entered unless the claimant has indicated that this is not desired. A default judgment may determine liability, or liability and remedy if the chairman decides the latter appropriate on the information before him. As already indicated, there is a power for both claimant and respondent to apply for review of any default judgment.

## Pre-hearing reviews

The new rules incorporate clearer and fuller provisions for all or part of a claim or response to be struck out at a pre-hearing review. This may be on the grounds that it is scandalous, vexatious or has no reasonable prospects of success; that the proceedings have been conducted in an unreasonable manner; that the claim has not been actively pursued; that there has been non-compliance with a direction or practice direction.

## Costs changes

Two basic changes to the current position come into effect, implementing provisions introduced by the Employment Act 2002. First, representatives may themselves incur a "wasted costs" order on account of their own improper, unreasonable or negligent conduct. Second, the concept of a "preparation time" award is introduced.

The wasted costs provisions do not extend to representatives who are not acting "in pursuit of profit with regard to the proceedings". On the face of it, in-house and/or local authority solicitors will not be susceptible to wasted costs orders, though the matter may be open to argument.

The provisions as to preparation time awards are relatively convoluted, but the essential feature of such awards is that they will enable the tribunal to compensate non-legally represented parties for time spent preparing for a case i.e. compensate "litigants in person" who have not incurred legal fees in the ordinary sense.

All in all a tighter, more rigorous, procedural code is now in place. Plenty of argument as to detailed implementation of the new rules can be expected from those who, for one reason or another, come a cropper.

◆ Daniel Lawson

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# New disability discrimination provisions

- ❖ The Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI No. 1673) ("the Regulations") add to the onslaught of new legislative measures which took effect from 1 October 2004. By way of pre-emptive strike, the Regulations implement the disability provisions of the EC Equal Treatment Framework Directive (No. 2000/78) which required compliance by 2nd December 2006.
- ❖ Military metaphors are not quite apt, as the armed forces are one of the few bodies exempted from the scope of the amended Act. The small employers' exemption has been removed in its entirety. The impact of this provision alone is significant as the DTI estimates that around 25% of all businesses have fewer than 10 employees. In addition, the police force, fire fighters, barristers, partners in law firms, office holders and qualifications bodies must now comply with the employment provisions of the Act. Qualification bodies responsible for schools and further and higher education institutions are covered by the education provisions of the Act.
- ❖ The Disability Rights Commission ("DRC") has issued two new codes of practice to assist with the application and interpretation of the new legislation - the Code of Practice Employment and Occupation and the Code of Practice Trade Organisations and Qualifications Bodies. As usual, the Codes are not legally binding but courts and tribunals must take them into account.
- ❖ The definition of discrimination is expanded and the range of defences diminished. There were previously three kinds of discrimination covered by the Act: disability-related discrimination; failure to make reasonable adjustments; and victimisation. The Regulations introduce "direct discrimination" which differs from disability-related discrimination in that it

occurs when the reason for the less favourable treatment in question is the disabled person's disability rather than related to the disability. As the new discrimination covers discrimination on the ground of a person's disability, "if the less favourable treatment occurs because of the employer's generalised, or stereotypical, assumptions about the disability or its effects, it is likely to be direct discrimination." The disability does not have to be the only reason for the treatment as long as it is an effective cause, determined objectively from consideration of all the circumstances of the case. The definition will be familiar as it closely mirrors Section 1 of the Sex Discrimination Act 1975 and, similarly, cannot be justified. Disability-related discrimination may still be justified so that, for example, if an employer discriminates against a disabled person because of the amount of sick-leave taken, the defence will be open to the employer.

- ❖ On the other hand, the defence of justification has been removed from the duty to make reasonable adjustments. The focus will now be on whether or not the adjustment was "reasonable". The nature of the duty to make such adjustments has changed. Previously, Section 6(1)(a) of the DDA referred to "any arrangements made by or on behalf of an employer" which placed the disabled person at a considerable disadvantage. The new provisions are extended to cover any "provision, criterion or practice". According to the DRC's revised Employment Code, this broadens the application of the measures to cover selection and interview procedures as well as to job offers, contractual arrangements and working procedures. Indeed, all stages of the employment process will now be covered including dismissal and post-dismissal.
- ❖ Finally, in relation to definitions of discrimination, an explicit definition of harassment is introduced which avoids the need for a comparator. Where a person, for a reason which relates to the disabled person's disability, engages in unwanted conduct which has the purpose or effect of violating the disabled person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her, this will constitute harassment.
- ❖ Complainants not only have a wider range of options in which to frame an allegation of discrimination, the burden of proof has been changed so that, once the complainant has made out a prima facie case of discrimination or harassment, the tribunal "shall" find for the complainant unless the employer can prove that it did not commit the act complained of.

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- ❖ The Regulations make clear that constructive dismissal will constitute dismissal for the purposes of the Act. The Act will now apply even after employment has come to an end. An employer must not discriminate, subject to a detriment or harass a disabled employee where the discrimination or harassment arises out of the employment and is closely connected to it. There is no time limit in relation to this last provision although the requirement of "close connection", in practice, is likely to act as a bar.
- ❖ Advisors beware. The Regulations are only one arm of operation in disability rights. October 1st 2004 also saw the implementation of:
  - ❑ Disability Discrimination Act 1995 (Pensions) Regulations 2003 (SI.2003/2770) which prohibit discrimination against and harassment of disabled people by trustees and managers of occupational pension schemes;
  - ❑ the Disability Discrimination (Questions and Replies) Order 2004 (SI 2004/1168) which updates the prescribed questionnaire which may be used when bringing discrimination cases and changes the time limits for such use;

- ❑ the Disability Discrimination (Employment Field) (Leasehold Premises) Regulations 2004 (SI 2004/153) which relate to consent to reasonable adjustments required from lessors.
- ❖ A draft Disability Discrimination Bill was presented in the summer of 2004 for pre-legislative scrutiny. One of the major changes accepted by the Government was that people with a mental impairment should not have to show that they have a clinically well-recognised illness. The obvious implication will be for stress claims which currently face a nearly insuperable bar.
- ❖ The above changes represent significant advances for campaigners in the field of disability. However, the Government has yet to concede long called for rights for people associated with disabled people, such as carers or for people wrongly perceived as disabled.

◆ Laura Elfield

## Les jeux sont faits - Johnson v Unisys, the House of Lords & legal roulette

- ❖ In March 2001 the House of Lords started the ball rolling with their decision in *Johnson v Unisys*. An employee cannot recover damages (including personal injury damages for psychiatric harm) resulting from the fact or manner of dismissal in a common law action brought in the Courts. That was not unjust, said Lord Hoffman in an ad libbed aside, because such compensation could be recovered in an unfair dismissal claim in the Employment Tribunals.
- ❖ Two different strands of argument thus spun out of *Johnson*. Was Lord Hoffman right and to what extent did a breach of contract claim coming into existence before the dismissal survive the termination? The answers to both questions were entirely unclear and this led to no small degree of confusion and conflicting decisions at first instance hearings in Courts and Tribunals. This game of roulette was bound to return to their Lordships to explain what they had meant. It was a little tough on the punters in the meantime but, after all, the House always wins.
- ❖ Lord Hoffman's ad lib was considered by the House of Lords in *Dunnachie v Kingston upon Hull CC* [2004] 3 WLR 310. Three of the committee had also participated in *Johnson* (Lords Steyn, Hoffman and Nicholls). This time, Lord Hoffman was curiously subdued, limiting himself to just a couple of sentences in which he agreed with Lord Steyn, who gave the leading opinion. Lord Steyn, who had dissented in *Johnson*, accepted that neither he nor Lord Nicholls had seen anything wrong at the time with Lord Hoffman's observation. However, it had been made without the benefit of detailed consideration of the decision in *Norton Tool v Tewson* [1973] 1 WLR 45 which for many years had been accepted as an authoritative statement that compensation for non-pecuniary loss was not recoverable in an unfair dismissal claim. Having analysed the wording of s.123 ERA, Lord Steyn concluded that loss did not include non-pecuniary loss. Equally, the fact that compensation had to be assessed on a just and equitable basis, did not mean that sums were recoverable for humiliation, injury to feelings or distress.
- ❖ The degree of overlap between unfair dismissal claims and common law psychiatric injury claims was dealt with by the

House in the conjoined appeals of *Eastwood v Magnox* and *McCabe v Cornwall CC* [2004] 3 WLR 322. In each case the claimant, having succeeded in an unfair dismissal claim, attempted to bring a personal injury claim for the psychiatric harm arising out of events leading up to the dismissal. In the County Court each claim had been struck out on the grounds that the events relied on were part and parcel of the dismissal and therefore fell within the *Johnson* exclusion zone. On appeal, differently constituted Courts of Appeal came to opposite decisions - *Eastwood* stayed struck out, *McCabe* was reinstated.

- ❖ The House of Lords allowed both claims to continue. Lord Nicholls noted that the decision in *Johnson* had given rise to "demarcation" problems, which he considered to have been inevitable where there existed an implied obligation to act fairly applying to events leading up to dismissal, but not to the dismissal itself. If the employee had acquired a cause of action at law prior to his dismissal (actual or constructive), that cause of action exists independently of the dismissal and survives it. Thus, where an employee has a right to sue for common law damages for psychiatric harm arising from breaches of contract committed before dismissal, both that claim and a claim for unfair dismissal can be brought, provided that there is no double recovery of damages. Lord Nicholls was alive to the practical difficulties of drawing the demarcation line between the two causes of action and described their interaction as unsatisfactory. Legislative intervention was called for.
- ❖ Lord Steyn also called for Parliament to act. However, he additionally took the opportunity to point out that the majority in *Johnson* had got it wrong, with stultifying consequences for the development of the common law.
- ❖ The existence of the demarcation line and the *Johnson* exclusion zone are understandable in theory but may turn out to be difficult to apply. In particular, there will be attempts to differentiate between psychiatric harm arising from events prior to dismissal and from the dismissal itself, with all sorts of arguments as to whether the dismissal represented a psychiatric "tipping point". There are plenty of spins of the wheel yet to come.

◆ Philip Jones



# Grappling with the Burden of Proof

The law has changed, allegedly, to make it easier for tribunals to infer discriminatory conduct as a result of the shift in the burden of proof. The cases of [Bahl v Law Society](#) [2004] IRLR 799 and [Sinclair Roche v Heard](#) [2004] IRLR 763 highlight the pitfalls which can beset industrial juries.

The facts of the former are too well known to bear repetition. Dr. Bahl was accused of being a bully during her stint as Vice President of the Law Society and proceedings instigated against her. The employment tribunal rejected a number of her allegations of race and sex discrimination but found antagonism and unreasonable behaviour by some of the protagonists which they concluded amounted to race and sex discrimination. In the Sinclair Roche case, two junior female partners said that they were made ineligible for equity partnership because of the low billings they achieved because male colleagues did not refer enough work to them. They relied on two male comparators whose billings were dramatically higher than theirs.

Tribunals were reminded that just because an employer is unreasonable this does not mean they have discriminated. In Sinclair Roche, Mr. Justice Burton points out that it may be there is no explanation; there may be an explanation which only confirms the existence of discrimination; there may be a non-discriminatory explanation which redounds to its discredit or there may be a non-discriminatory explanation which is wholly admirable. How does this analysis sit with the shift in the burden of proof where a tribunal is required to infer discrimination where there is no adequate explanation? If there is no adequate explanation the tribunal 'shall'

drawn an inference of discrimination. At a time when tribunals are becoming more adept in analyzing and inferring discrimination this sort of approach may seem unduly restrictive given the wording of the regulations.

On the facts of Bahl, it could be questioned whether there was enough evidence to raise a prima facie case. The comparator used was not a true comparator and the facts identified as unreasonable were equivocal. The situation in Sinclair Roche, on the other hand, has been remitted to the same tribunal for further consideration.

The Sinclair Roche cases also touches on two procedural issues of some importance: when ordering written submissions counsel should be allowed proper time to prepare such submissions, review the other side's submissions and to supplement their own with oral argument- forcing counsel to spend the entire Easter bank holiday weekend preparing submissions at the end of a 12 day case was deemed unreasonable!

On the vexed question of when a matter should be remitted to the same tribunal the EAT highlighted certain relevant factors: proportionality; passage of time - there will be a real risk that the original tribunal will have forgotten about the case; bias or partiality; where the decision was so totally flawed that it would be unwise to remit it to the same tribunal; 'second bite at the cherry' - it may be difficult for the tribunal to look at the evidence afresh and finally, in the absence of evidence to the contrary, the professionalism of the tribunal to deal with the matter should be assumed.

◆ Susan L. Belgrave

## Case Law Digest

### **Waltham Forest London Borough v Folu Omilaju 11 November 2004 CA**

The Court of Appeal have held that in a claim for constructive dismissal, the 'final straw' did not have to be unreasonable conduct in order to be action sufficient to justify resignation. The test of whether there had been a breach of implied term of trust and confidence is an objective one. The court pointed out that it would be an unusual case where the conduct was reasonable and justifiable but still fell foul of the final straw test. On the facts of this case, the appellant had not been constructively dismissed.

### **Salinas v (1) Bear Stearns International (2) Camblain EAT 0596/04**

The EAT reiterated the principles on which an award of costs would be made in the employment tribunal. The parties should be aware that such awards are only made in exceptional cases. Having heard all the evidence and reached clear findings of fact the tribunal was entitled to award costs where the claimant's case had been misconceived and her conduct during the course of proceedings unreasonable within the meaning of regulation 14.

### **Office of National Statistics v Ali [2004] EWCA (Civ) 1363**

The Court of Appeal analysed the authorities on the question of what was the appropriate test to apply when dealing with an application to amend an originating application in the Employment Tribunal. The Court concluded that the test adumbrated in [Selkent v Moore](#) of considering the need to balance the injustice and hardship between the parties is broadly similar to the test under section 68(6) of the Race Relations Act whether it was just and equitable to allow an amendment. The court noted that [Quarcoopome v Sock Shop Holdings Ltd](#) should not be followed.

### **Khan v Trident Safeguards [2004] IRLR 961**

The Court of Appeal overturned a decision of the EAT that a person declared a bankrupt would not be entitled to pursue a claim for race discrimination before the employment tribunal. It considered that such a claim, provided it was limited to compensation for claim for injury to feelings, amounted to a personal claim which would not form part of the estate in the way that a claim for pecuniary loss would.