

## BULLETIN

9 GOUGH SQUARE



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## Employment Tribunal Rules of Procedure - *Minutiae creates problems instead of intended simplicity*



Louise Jones

### EMPLOYMENT TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) REGULATIONS 2004

→ *Khan v Heywood and Middleton Primary Care Trust [2006]*

→ *Moroak (t/a Blake Envelopes) v Cromie [2005]*

→ *Sutton v The Ranch [2006]*

Two years on from the introduction of the new Employment Tribunal Rules of Procedure, Louise Jones considers some recent cases which have brought the interpretation of the Rules into question.

When, on 1 October 2004, the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861) ("the Rules"), came into force, commentators heralded the recasting of the Rules into plain English. Out went "notice of appearance" and in came "response form", for example. Simplicity and ease of understanding were hoped for in the inception of the new Rules. Even back in 2004, however, a close examination of the legislation revealed an underlying complexity. Their content has since been the subject of many appeals to the EAT and Court of Appeal. Here, three recent cases that have demonstrated problems with interpretation are considered, each demonstrating that the Rules have been far-reaching in their practical import, creating more problems than the draftsmen may have realised.

### WITHDRAWAL OF CLAIMS

Most recently, in *Khan v Heywood and Middleton Primary Care Trust [2006]* EWCA 1087, the Court of Appeal considered whether an employment tribunal

had the power to set aside a notice of withdrawal of a claim, further to Rule 25(2). In this case, the claimant, on receipt of legal advice from his first solicitors, had sent a notice to the employment tribunal indicating that he wished to withdraw his claim. He then received alternative legal assistance, following which he sought, in effect, to withdraw his withdrawal – he asked the tribunal to set aside the withdrawal notice and list the matter for a pre-hearing review. The difficulty with which the tribunal was faced in deciding whether the original withdrawal notice could be set aside was that in Rule 25, there is an inherent contradiction between Rule 25(3) and 25(4). On the one hand, Rule 25(3) provides that, upon withdrawal, proceedings are brought to an end. On the face of it, this is simple enough. There is no express provision stating that a withdrawal may be set aside. But Rule 25(4) states that where a claim has been withdrawn, a respondent may make an application to have the proceedings against him dismissed. If that application is then granted and the proceedings are dismissed, those proceedings cannot be continued by the claimant. The question that arose was what happens under Rule 25(4) if the respondent's application for dismissal of the proceedings fails – does the claim stand withdrawn?

The interpretation adopted by the employment tribunal, and followed in both the EAT and the Court of Appeal (Wall LJ delivering the leading judgment) was that Rule 25(4) was intended to convey that the consequence of the dismissal of a previously withdrawn claim will be to prevent a claimant from starting a further claim based on the same cause of action; the mere withdrawal of a claim under 25(3) will not. As such, the employment tribunal has no jurisdiction to allow the setting aside of a withdrawal,

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### EMPLOYMENT LAW BULLETIN

Editor: Laura Elfield

Enquiries: John Kerr  
Chief Executive

9 Gough Square  
London EC4A 3DG  
Tel: 020 7832 0500  
Fax: 020 7353 1344  
DX LDE 439  
Video 020 7832 0592

Email: [clerks@9goughsquare.co.uk](mailto:clerks@9goughsquare.co.uk)  
Web: [www.9goughsquare.co.uk](http://www.9goughsquare.co.uk)

# Big brother is listening

*Whether secret recordings of disciplinary panel private deliberations can be adduced in evidence*

It is an increasingly frequent occurrence in the employment tribunal that an employee provides a secret tape recording of telephone conversations or disciplinary meetings. In a recent case that may raise alarm bells in the HR corridors across the land, the ex-employee, Mrs. Dogherty, went one better: she managed to tape the private deliberations of the disciplinary panel. The EAT had to determine, via an appeal by Governors of Amwell School, whether the employment tribunal had properly exercised its case management powers in allowing Mrs. Dogherty to adduce in evidence transcripts of the 'open sessions' as well as of the private deliberations.

Mrs. Dogherty, who had been a teaching assistant and midday meals supervisor, had been dismissed for gross misconduct which involved the unreasonable use of force in relation to one child and inappropriate use of language on another occasion. The disciplinary hearing and appeal were conducted by a panel of governors. Since the issues in the hearing related to children at the school, the hearing was not open to the public. Mrs. Dogherty was dismissed and lodged a complaint for unfair dismissal. During the course of the hearing it became apparent that Mrs. Dogherty had taken a tape recorder into the room and had a full record of what had been said. The recorder had been left running even when the parties had been asked to leave the room so that the panel could privately consider various matters. Permission had not been given by the panel for a recording to be made.

It was discovered, quite late in the day, that such transcripts were available. As the tribunal did not consider that full disclosure had been given, a



Susan Belgrave

interestingly perhaps, that the panel of governors was acting in a judicial capacity but no material as to the legal framework within which it operated was available for the EAT's consideration. In a last desperate throw of the dice, it was submitted that there was an infringement of the governors' right to private and

family life.

The EAT began by noting that the litmus test remains whether the evidence is relevant to the issues between the parties and, manifestly, such evidence was relevant to the question of the fairness of the dismissal. It was noted that even illegally obtained material can be admissible if it is relevant and so this test was easily satisfied by Mrs Dogherty in relation to the transcript of the 'open' sessions. Despite the distasteful manner in which the evidence had been obtained it was really an extension of the claimant taking verbatim notes of the proceedings which she would have been able to do.

## **“CONTRARY AND SUPERIOR” PUBLIC POLICY**

However, in relation to the private proceedings, the EAT concluded that there was a 'contrary and superior' public policy dimension which arose. When the panel invited everyone, including their clerk, to withdraw from the room they expected that those deliberations would be confidential to



wasted cost order was made against the Claimant, and the employers were given time to consider the accuracy of the transcripts which were admitted into evidence in their entirety. The Governors appealed this decision to the EAT (Mr. Recorder Luba Q.C. presiding) which decided, by a majority, that the transcripts of the open sessions were admissible but that the record of the private deliberations should not be admitted.

*Was the material unlawfully obtained, was the panel of governors acting in a judicial capacity or was there as infringement of the governors' right to private and family life?*

## **EVIDENTIAL POSITION**

There is some frustration apparent in the decision at the way the matter was argued on behalf of the appellant school. They sought to argue that the material had been unlawfully obtained but made no submissions which justified this line of argument. They also sought to argue, more

enable a full and frank discussion to take place. The failure to maintain privacy would inhibit an open discussion between those involved in adjudicating and give rise to satellite litigation based on leaked information coming from members of the panel or unauthorised recordings. The majority noted that they were not creating a new category of common law public interest. They also noted that the answer might be different if an allegation of unlawful discrimination had been made and a recording or an account of the discussions by one of the panel members produced the only incontrovertible evidence of such discrimination.

The question of covertly obtained material can damage the claimant in the eyes of the tribunal and thus can be counter-productive. Tribunals are more receptive to material/transcripts of conversations or discussions to which the claimant was a party. So far this decision protects the integrity of confidential discussions but it must only be a matter of time before the scenario suggested by the EAT becomes reality. The question of privilege may also be more fully argued. Flak jackets, anyone?

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although unless a claim has also been dismissed pursuant to an application by the respondent, the claimant may still be able to bring a further claim. The drafting of Rule 25 was described, among other things, as "lamentable" and the Court of Appeal observed that the Rule is in need of amendment.

### ACCEPTANCE OF A RESPONSE OUT OF TIME

The EAT held, in the case of *Moroak (t/a Blake Envelopes) v Cromie* [2005] IRLR 535, that notwithstanding any lacunae created by the new Rules, the old principles established in *Kwik Save Stores v Swain* [1997] ICR 49 still apply in respect of the employment tribunal's discretion to accept a response that is out of time: the tribunal must do what is just and equitable.

Rule 4(1) represented a change in the time limits for responding to claims, providing that a respondent must present a response within 28 days of the date on which he was sent a copy of the claim. Rule 4(4) then provides that if a respondent seeks an extension of this period of time, such an application must be made before the deadline by which the response should be filed. Again a new creation of the Rules, default judgment could be entered if no response was received.

Use of the word "must" in rule 4(4) led a number of employment tribunals to hold, in the aftermath of the inception of the Rules, that where no extension of time had been sought before the deadline, the response should not be accepted. In *Moroak*, the EAT made clear that the old principles of the tribunal exercising discretion in respect of late responses should apply, regardless of the actual text of Rule 4(4). If no response had been filed, judgment in default may be entered. But if it had not been so entered, the respondent would be left in a vacuum if the tribunal had no discretion to accept late entry of a response.

### COSTS

In the case of *Sutton v The Ranch* [2006] ICR 1170, the EAT considered the meaning of Rule 38(4), whereby "a costs order may be made against or in favour of a respondent who has not had a response accepted in the proceedings in relation to the conduct of any part which he has taken in the proceedings." In this case, Ms Sutton had brought a claim against her former employers; they failed to file a response at any point in the proceedings and, subject to the caveats in Rule 9, could take no further part in the proceedings. Ms Sutton was successful and initially, the tribunal made an award for costs against the employers in her favour on the basis of Rule 38(4), but then, at a review hearing, the chairman of the tribunal sitting alone decided that Ms Sutton was not entitled to her costs. The decision not to award costs was made on the basis that Rule 38(4) allowed costs where a response had not been accepted, rather than where the respondent had simply failed to file a response altogether.

The EAT upheld this reasoning, stating that a costs order cannot be made under Rule 38(4) where there has been a total failure to file a response. HHJ Burke QC, sitting alone in the EAT, did note that the existence of Rule 38(4) may in fact be strictly unnecessary, given the co-existence and content of Rule 40, which gives the tribunal the power to order costs against a party who has acted vexatiously, abusively, disruptively or otherwise unreasonably, or if the bringing or conducting of the proceedings by the paying party has been misconceived.

### CONCLUSION

It is clear from the above that the minutiae of the Rules have created significant legal problems, rather than the simplicity that was anticipated on their introduction in 2004. Their precise meaning and effect will no doubt continue to be hotly-contested topics in the employment tribunal. The decisions cited here have ironed out some areas of ambiguity; no doubt more will follow.



## LEGISLATION UPDATER!

Dorothea Gartland provides an update of recent employment legislation and case law.



Dorothea Gartland

- Employment Equality (Age) Regulations 2006
- National minimum wage
- Employment Act 2002 (Amendment Order) 2006
- Collective Redundancies (Amendment) Regulations
- *Commission v UK*
- *Junk v Kuhnel* [2005]
- *Majrowski v Guy and St Thomas' NHS Trust* [2006] and Protection from Harassment Act 1997

- *Taylor v OCS Group Ltd* [2006] and Disability Discrimination Act 1995
- *Fraser v Hlmad Ltd* [2006]
- *Mohmed v West Coast Trains Ltd*
- *Igen v Wong* [2005]

The following provisions came into force in October 2006<sup>1</sup>

- The long awaited and much hyped Employment Equality (Age) Regulations 2006 SI 2006/1031 will outlaw unjustified age discrimination in employment and vocational training including pay and pensions. Implementation of the pension provisions in the Regulations will be delayed until the 1st December 2006.
- The national minimum wage for workers aged 22 and over rose from £5.05 to £5.35 per hour. For further information on all wage increases which came into force from 1st October following the recommendations of the Low Pay Commission in February 2006 see: [www.dti.gov.uk/employment/pay/national-minimum-wage/index.html](http://www.dti.gov.uk/employment/pay/national-minimum-wage/index.html).

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7242 6627, Further information can be found on  
Chambers website seminars page.

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## LEGISLATION UPDATER!

→ The **Employment Act 2002 (Amendment Order) 2006** extended the scope of the statutory dispute resolution procedure. The aim is to ensure that employers and employees are subject to the statutory dispute resolution processes before any complaint to an employment tribunal is made.

→ Three new sets of amendment regulations affecting maternity and parental leave, paternity and adoption leave and flexible working increased the rights available to employees in these areas. For employees whose expected week of childbirth is on or after the 1st April 2007, paid leave for statutory maternity and adoption will be extended from six to nine months.

→ The **Collective Redundancies (Amendment) Regulations 2006** amend TUPE to reflect the ECJ's decision in *Junk v Kuhnel* [2005] IRLR

employee. The Court of Appeal added that it would be open to an Employment Tribunal to find that the employer's decision had been affected by a disability-related reason even though the employer had not consciously allowed that reason to affect its thinking.

→ The perils of the jurisdictional divide between employment tribunals and the civil courts were considered by the Court of Appeal in *Fraser v Hilmad Ltd* [2006] EWCA Civ 738. Mr. Fraser successfully brought proceedings in the employment tribunal for unfair dismissal and wrongful dismissal, expressly reserving the right to pursue an action in the High Court for damages for wrongful dismissal in excess of £25,000. When he then sought to bring such action, the High Court, upheld by the Court of Appeal, struck this out for abuse of process, relying on the doctrine of merger. In short, the cause of action had already been adjudicated upon. It was said that, where a claimant expected to recover more than £25,000 for wrongful dismissal, that claim should only be made in High Court proceedings.



#### Our Employment Team

Laura Elfield  
- Co-ordinator



John Foy QC



Grahame Aldous



Susan Belgrave



Philip Jones



Rajeev Shetty



Shahram Sharghy



Robert McAllister



Emily Radcliffe



Louise Jones



Dorothea Gartland

310, namely that the consultation process for collective redundancies must end before any redundancy notices are issued.

#### CASE LAW UPDATER!

→ The ECJ in *Commission v UK* (C484/04) ruled that the UK had failed in its obligations under Articles 3 and 5 of the **Working Time Directive** (No.93/104) by publishing guidance which informed employers that they were not under an obligation to ensure that workers actually took their minimum weekly and daily rest periods.

→ The House of Lords in *Majrowski v Guy and St Thomas' NHS Trust* [2006] UKHL 34 has confirmed that an employer can be vicariously liable in damages under the **Protection from Harassment Act 1997** for a course of harassing conduct by one of its employees. The impact on stress at work claims should not be underestimated.

→ The Court of Appeal in *Taylor v OCS Group Ltd* [2006] EWCA Civ 702 held that there was no discrimination under Section 5(1) of the **Disability Discrimination Act 1995** where the employer did not have a disability-related decision in its mind when dismissing the

→ The first appellate decision concerning religious discrimination was handed down by the EAT in *Mohmed v West Coast Trains Ltd* UK/EAT/0682/05/DA where it was held that the claimant failed to adduce sufficient facts from which a prima facie case of discrimination could be inferred. The EAT considered and applied stage 1 of the test in *Igen v Wong* [2005] ICR 931.

<sup>1</sup>Measures come into force on the 1st October 2006 unless otherwise stated

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