Employment Update
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Equality of arms?

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Featured in this edition

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Is there a pressing employment law issue that you would ike us to cover in the autumn newsletter? Please get in touch with the editor, Catherine Urquhart, curquhart@elyplace.com or contact us on twitter: @Ely_Place

Chris Burrows

How far should an employment tribunal go to help a litigant in person put their case? And what duty do legal professionals representing the other side have to an opponent litigant in person? For example, must the tribunal or the opposing lawyer point out to the litigant in person that they have failed to pursue one of the issues in their case?

This issue is increasingly pertinent given the large number of litigants in person who appear in the employment tribunal. In *Kouchalieva v LB Tower Hamlets* UKEAT/0188/18/JOJ, a case in which the Claimant was a litigant in person, the Employment Appeal Tribunal ruled that the Employment Tribunal had no duty to bring the Claimant's attention to her failure to bring evidence in respect of matters which had been raised in the agreed list of issues.

His Honour David Richardson based this decision on rules 2 and 41 of the Employment Tribunal Rules of Procedure 2013, stating that the overriding objective and the tribunal's discretion to regulate its own procedure conferred a wide discretion in the extent to which the ET could intervene to assist an unrepresented litigant. It is significant that the matters that the Claimant did not address in her evidence were, without an extension on the 'just and equitable' ground, outside the time limit for bringing a claim. Otherwise, it is possible that the ET and the EAT may have approached the exercise of discretion under rules 2 and 41 differently.

In a different set of circumstances in *Anderson v Turning Point Eespro* [2019] EWCA Civ 815, the Court of Appeal has held that the statutory requirement to make reasonable adjustments for a disabled litigant-in-person do not extend to having to hold a 'ground rules' hearing in every case. On the facts in Anderson, it was sufficient that the ET identified potential organisations which could assist the Claimant and adjourned the remedies hearing to allow her to find help. There was tacit reference again to rule 41 where Underhill LJ stated that, in a case in which accommodations as a result of disability had not been adequately addressed at a preliminary hearing, "any problem can usually still be resolved at the substantive hearing itself". Had the Claimant not been represented at the subsequent hearings, again the ET and EAT and Court of Appeal might have approached the task differently.

All of this is further proof that, in reality, the ET is no different from any other civil jurisdiction where the decided authorities continue to show that there are no special rules for litigants in person.

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Waving goodbye to the Swedish derogation

Amy Stroud

Next spring heralds further changes to workers' rights, provoked by the Taylor Review of Modern Working Practices. As of 6 April 2020, the Employment Rights (Miscellaneous Amendments) Regulations 2019 (SI 2019/731) and the Employment Rights (Employment Particulars and Paid Leave) (Amendment) Regulations 2018 (SI 2018/1378) will come into effect, entitling workers the right to join the ranks of employees and receive a statement of employment particulars under section 1, ERA 1996.

Importantly for workers and employees alike, the s.1 statement will also have to be given at the very beginning of employment rather than, as s.1(2) currently provides, within two months of the start of employment. Furthermore, the core particulars will need to be contained in a single document and not in instalments, as the legislation currently permits.

Necessary information will include: details of any other paid leave to which the worker/employee might be entitled e.g. parental leave, all remuneration – not just pay – such as bonuses or commission, particulars of the days of the week to be worked, whether they are variable and, if so, how that variation is to be determined, as well as any training provided and/or required by the employer, including training which the employer will not bear the cost of providing.

Although these changes only affect workers and employees commencing employment on or after 6 April 2020, any worker recruited prior to that date can request a 'principle statement' with the requisite information.

Another change in the offing is the repeal of the Swedish Derogation Model (SDM), effective by the deletion of Regulations 10 and 11 from the Agency Workers Regulations 2010 (see the Agency Workers (Amendment) Regulations 2019 (SI 2019/724)). The SDM came about when the Swedish government lobbied for its inclusion in the Temporary Agency Workers Directive as an exception to the right to equal treatment set out in Regulation 5 of the AWR. The exception applies when an agency worker has a permanent employment contract with a temporary worker agency which satisfies certain requirements and pays the worker a minimum sum between assignments. In such cases there is no obligation to ensure the worker has parity of pay with its hiring company's permanent employees, although other rights under the AWR still apply.

There has been criticism of the SDM in a number of respects, including, for example, complaints of the exploitation of agency workers by the agencies and the use of the SDM for circumventing national minimum wage legislation. Its repeal should, critics say, increase clarity and fairness in the industry, clear up confusion over employment status, as well as drive up standards.

There has also been criticism of the impact of the heavier obligations that permanent employment contracts impose on the agencies themselves, raising fees and warranties to offset the risks presented by having permanent employees on the books.

However it is viewed, the SDM's impending abolition is likely to lead, if it has not already, to a significant overhaul of recruitment business models as agencies adapt to the new landscape and is likely to prove expensive to some businesses who have invested heavily in the SDM, for example with large numbers of blue collar workers.

Temporary worker agencies will have to provide those staff on its books to whom the SDM applies, with a written statement by 30 April 2020 to the effect that, from 6 April 2020, the SDM provisions no longer apply. Failure to do so will entitle the agency worker to bring a claim in the employment tribunal. ■

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Police action too positive

Gillian Crew

A straight white man who failed to be accepted as a trainee police constable despite meeting the relevant standard has won his claim for direct discrimination, in the first decision on 'positive action' under the Equality Act 2010.

There is still much to be done in terms of diversity in the workplace: by way of example, the Equality and Human Rights Commission's 2018 race report statistics show that in Britain, significantly lower percentages of ethnic minorities (8.8 per cent) worked as managers, directors and senior officials, compared with white people (10.7 per cent), and according to a recent BBC report, women still significantly lag behind men in the workplace with the median gender pay gap in 2019 being 9.6%.

Whilst acknowledging that much needs to be done, many feel deeply uneasy about any form of positive discrimination. Section 159 of the Equality Act 2010 provides for positive action (as opposed to positive discrimination) in recruitment and promotion where (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic; or (b) participation in an activity by a person who shares a protected characteristic is disproportionately low.

In such circumstances, the 2010 Act does not prohibit the treating of a particular candidate more favourably in connection with recruitment or promotion because they have a particular protected characteristic where that treatment is done with the aim of enabling or encouraging person who share the protected characteristic to overcome or minimise the disadvantage, or participate in the activity – but only if the candidate is "as qualified" as others.

There has been no case law on this provision until now. In the first instance decision of Furlong v The Chief Constable of Cheshire Police (ET Case No: 2405577/18), the Claimant was a white heterosexual male without a disability who applied to be a police constable. He successfully completed the assessment centre and interview process. The Respondent concluded that all applicants who passed the interview process were deemed to be of "equal merit" and applied positive action following the interview stage. The Claimant performed relatively strongly in interview, but was told by the Respondent that he was unsuccessful. The Respondent relied upon the positive action measures in section 159 of the 2010 Act.

The Tribunal accepted that the Respondent reasonably thought that participation in the police service was low in relation to people who shared a protected characteristic of gender, BME and sexual orientation.

However, the Respondent failed to convince the Tribunal that all of the candidates who passed the interview were as qualified, with some candidates performing better in interview. Whilst the Tribunal applauded the Respondent for attempting to improve diversity, it concluded that applying positive action as it had was not reasonable, necessary or a proportionate means of achieving a legitimate aim, as other diversity measure were bearing fruit. The Claimant's claims of direct discrimination on the grounds of sexual orientation, race and sex succeeded.

This decision shows what a potential minefield positive action can be. What is interesting about the decision is that the Tribunal decided whether the candidates were "as qualified", instead of the employer.

Further, the Tribunal's criticism of the Respondent, that it should have waited to see if other measures bore fruit, undermines the very raison d'etre of positive action. It will be interesting to see whether this decision will go further, or if other employers will be brave enough to attempt more nuanced positive action. ■

Five minutes with... Michael Salter

Why do you enjoy employment law?

The current rate of employment is more than 76%, and unemployment has been at 3.8% for the first six months of 2019. These record figures show the scope of coverage and the effect of employment law. Whether you are an employee, worker or self-employed, there is something that will affect you in some way. Indeed, the continuing litigation on employment status shows how the system copes with disruptive change and, in my view, stands up well to the challenges.

What employment law would you change?

It would involve a one-word change in the Employment Rights Act 1996: change the name from "Unfair" dismissal to "Unlawful" dismissal. With this change you would refocus the apparent aim of the claim from one of subjectivity (fairness), to objectivity (lawfulness) and this could well reduce the number of claims brought by claimants who feel aggrieved by what happened to them, but whose frustrations ignore the fact that the correct process has been carried out. I know I might well feel it was unfair if I were chosen for redundancy over another employee, but in legal terms I might not have a successful claim. In those circumstances, if I were to go home and ventilate that frustration by using a search engine, I would find an army of advisors willing to help me make a claim for unfair dismissal. But if it were called unlawful dismissal, this may well make me consider how my dismissal fits in with the law.

What is the best advice you can give to anyone appearing at an employment tribunal?

Prepare and prepare early: preliminary hearings for case management (be they on the telephone or in person) are vital stages in the process. Doing this well sets you up for a much easier time moving forward through disclosure, witness statements and the final hearing, makes you more efficient, and means you

can provide a better standard of client service. Understanding what "doing one well" means involves researching the tribunal to see what structure they adopt in their orders and judgment and replicating this in your document. It also means sending in your Note and Agenda to the Tribunal and the other side early. And I mean days early, not at 9am for a 10am start, to enable the employment judge to consider and (hopefully) to adopt it as their list of issues/directions timetable.

What employment case are you most proud of?

I sit as a fee paid employment judge in the UK and in a similar position in the Jersey Employment and Discrimination Tribunal. There are a number of cases in both of those tribunal where I have come away from the often multi-day hearing and had a feeling that that was the "right result".

What would your clients be surprised to hear about you?

Anyone who follows me on twitter (@michaelelyplace) will know I am a big Chicago Bears fan. I played the game for about 13 years, and the older I get the better I was! ■

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The Law Society publication 'Litigants in person: guidelines for lawyers' bears this out and clearly states that the representative owes duties to their client and to the court, not to the other side. As we are all well aware, the duty to the court overrides the representative's duty to their client, with limited exceptions. In a practical sense, there is an additional onus on the legal representative which falls short of assisting the unrepresented litigant, but instead falls into the ill-defined zone of 'assisting the tribunal'.

Where the litigant is inexperienced, this will naturally exceed the usual professional courtesy extended to a legally qualified opponent, and will probably include some explanation of procedure before any discussion of areas of agreement or narrowing the matters in dispute. Some unrepresented litigants welcome that assistance for its own sake. Other litigants in person are unwilling to accept documents, let alone explanations from the 'other side'. In the latter case, there is not much point in pressing the issue because the benefit of an explanation is probably outweighed by the antagonism it creates.

Once before a tribunal, Kouchalieva still allows for a fair measure of unpredictability given the ET's discretion to regulate its own procedure and conduct a hearing in the manner that it considers fair. The warning against too much intervention should be read in the context of *Global Corporate Ltd v Hale* [2018] EWCA Civ 2618, where the judge's key findings were based on a line of questioning that he conducted and had not been in evidence. That is set against the observation that "there can [...] be dangers in non-intervention if a litigant in person misses an important point which in fairness ought to be drawn to the litigant's attention." A fair reading of that passage is that it is addressed to the tribunal, rather than any representative on the other side.

At most, the question from any representative at the hearing might be 'has the tribunal heard everything that it needs to?' Even that sits dangerously close to the edge of what is permissible, given the representative's duty to their client. ■

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