DechertOnPoint

Spring 2006 / Issue 3

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Work Matters

Employment News

In this issue

HEADNOTE

It Never Rains...

by **Charles Wynn-Evans**, Head of Employment

The chances are that some of you will have picked up this Spring issue of Work Matters at our 6 April seminar held at our new offices on Queen Victoria Street near Blackfriars. If so, and it's your first visit since we moved in last November, we hope you like our new home! If not, we run regular seminars and look forward to seeing you next time.

As ever, much of the content of *Work Matters* has been included in response to current concerns expressed and challenges faced by our clients. New developments in case law as well as new statutory regulations mean that 2006 already promises plenty of food for thought for employers (with no shortage of required action to boot).

Issues covered include data protection as it applies to references, reasonable adjustments required by the Disability Discrimination Act, and the implications for employers' contingency planning in response to the threatened outbreak of avian flu. I hope you find it both interesting and informative.

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On a Wing and a Prayer – Are You Ready for Bird Flu?

By **Keely Rushmore**, Associate

The spread of avian flu will not have escaped the attention of many, with France recently having confirmed its first case. In the event that bird flu gains a foothold here and spreads to and becomes transmittable within the human population the potential implications for UK businesses are wide-ranging.

The World Health Organisation (WHO) has warned that there is a serious threat of a global avian flu pandemic and experts predict that, worldwide, there could be anything between 2 million and 50 million deaths. Experts say that the UK is at "extreme risk" from the spread of a flu pandemic and WHO predicts that one in four of the UK population could be infected, resulting in a possible 50,000 deaths.

Were this to happen, the implications for businesses would be serious. Transport and supply systems, utilities and workforces could be disrupted, possibly severely. Some sectors (such as travel and entertainment) would experience a downturn in trade, while others (such as the pharmaceutical industry) may experience unprecedented demand for their services and products. Employers should consider what steps they could take to minimise the impact that a pandemic could have on their business and protect their workforce.

Staff Absence

There are estimates that suggest that flu-related absenteeism could be as high as 15 per cent at any one time and employers have been advised to base their contingency plans on up to 25 per cent of their employees taking five to eight days off over a period of three to four months due to sickness and to care for with their dependants. These are average figures and some employers could experience much higher levels of absence.

Obviously, infected employees should not attend work, and employers should ensure that employees do not return until they have fully recovered (perhaps even instigating a quarantine period) in order to reduce the risk of other employees becoming infected. By statute employees have the right to take reasonable unpaid time off work to "make arrangements for the care of" (rather than undertake the care themselves) a dependant. For these purposes a dependant is broadly defined as a member of the employee's immediate family, a family member living in the same household as the employee and anyone who reasonably relies on the employee for assistance.

More problematic would be a situation where an employee stays away from work because they are afraid of catching the virus or refuse to work with certain colleagues who, for example, have previously been infected. Although employers can instigate disciplinary proceedings as a way of dealing with absence in these circumstances, this may be difficult in practice. Demands on HR and management at this time are likely to be high and, given that the workforce is likely to be depleted, a 'carrot' rather than a 'stick' approach may be more effective. If employees' concerns can be addressed in another way (by enabling them, for example, to work from home) this is likely to maintain good staff relations and also ensure the continuity of business operations.

An Employer's Duty of Care: Health and Safety

Employers owe a duty of care to take reasonable steps to provide a safe system of work and to protect employees from unnecessary risk of injury while at

work. This could include infection with avian flu by a work colleague. What amounts to reasonable steps will vary according to the workplace in question and the circumstances.

In the event that a pandemic takes hold, employers should review their HR policies and procedures, particularly with regard to travel, and ensure that they are working from the most up-to-date and accurate advice. They should monitor the situation regularly and consider whether or not it is safe to send employees on business trips to affected areas. Where appropriate, employers may wish to minimise the need for business travel by making use of technology such as video conferencing. Those employers with operations in areas that experience very serious outbreaks may consider evacuating some or all of their staff – a significant exercise which would require detailed planning. Employers should also consider whether it is necessary to introduce procedures for employees returning from affected areas or returning from absence due to illness. This could include quarantine and home-working.

In the event of a pandemic some employers could run their offices with a skeleton staff, with other employees being permitted and enabled to work from home where possible. With this in mind, employers may wish to assess their business needs and home-working capabilities and to identify key employees at an early stage.

Contingency Plans

Employers any wish to draw up contingency plans for dealing with a flu pandemic. This could include practical steps for stopping the virus spreading among its workforce in the first place – such as reviewing the use of air-conditioning, ensuring that there are facilities so that, where possible, employees can work from home – and having a plan designed to maintain business continuity.

Although not a legal requirement, employers should consider consulting with appropriate employee representatives about their contingency plans. This is likely to reassure employees that the employer is taking the issue seriously, which in turn may have a favourable impact on the levels of absenteeism from the workplace.

Conclusion

Employers are advised to:

- audit their business to assess its needs and how it can deal with the impact that may be caused by avian flu;
- review their policies and procedures (particularly those relating to business travel);
- communicate their plans and procedures to the workforce; and
- keep up to date with developments.

The websites of the Department of Health (www.dh.gov.uk), the DTI (www.dti.gov.uk) and WHO (www.who.int) all contain useful updates and guidance on how to deal with a flu pandemic (which is likely to be regularly updated as the extent of any pandemic becomes clear).

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Point of Reference - References and the Data Protection Act 1998

By **Will Winch**, Associate

If you thought that a reference given in confidence would never be read by the employee to whom it related, think again. The Information Commissioner (IC) has published a good practice note which seeks to clarify how the Data Protection Act 1998 applies to employment references.

The note encourages employers to be as open as possible when responding to requests by employees for access to references relating to them. It makes it clear that the fact that the reference was given in confidence may not, in itself, be sufficient grounds to withhold the information.

The Act applies differently to references given *to* employers and those given *by* employers.

References You Have Written

While the Act expressly exempts you from having to provide to your employees copies of references which you have written about them, the IC suggests that it would be reasonable to provide a copy of the reference to an employee if it is wholly or largely factual in nature, or if the individual would not be surprised by the contents of the reference.

References You Have Received

Provided an individual has properly made a formal data subject access request, that individual is entitled to have communicated to them in an intelligible form any personal data (held electronically or in a relevant filing system) of which he or she is the subject. As the definition of "personal data" includes any expression of opinion about an individual, a reference which you have received about that individual will normally fall to be disclosed as part of a response to a data subject access request if it is stored electronically or in a relevant filing system.

However, you (or, indeed, the person who has received the reference which you have written) do not need to comply with the access request if an individual, such as the person writing the reference, can be identified as the source of the information, *unless* that individual's consent has been obtained or it is reasonable in the circumstances to disclose without their consent.

When determining what is "reasonable in the circumstances", you must consider:

- whether you owe a duty of confidentiality to the person who provided the reference;
- what steps you should take and have taken to obtain the referee's consent;
- whether the referee is capable of giving their consent; and
- whether the referee has expressly refused their consent.

The IC suggests that you should not assume that merely because the reference is marked "in confidence", you owe a duty of confidentiality to the referee. If the individual already knows about the information contained in the reference (such as the dates of their employment and their absence records), such information should be disclosed as it cannot be said to be confidential. If the information *could* be known to the individual (for instance, if they may have had appraisals during the course of their employment which would have made them aware of the referee's opinion of their performance), you should contact the referee and ask if the employee is indeed aware of the information. If the referee replies that, although the employee is aware of the information, they would be uncomfortable were you to disclose that information to the employee, you should ask the referee to explain why they object.

Even if the referee at this stage continues to object to the disclosure of the reference and gives reasons for objecting, the IC says that you must weigh up the referee's interest in maintaining confidentiality against the employee's interest in seeing what has been said about them. When carrying out this balancing act, you should consider:

- the potential or actual effect of the reference on the individual;
- that if the employee were denied access to the reference, he or she would be denied the right to challenge its accuracy and truthfulness;
- that good employment practice suggests that the employee should have been advised of any weaknesses in the course of his or her previous employment;
- whether you gave an express assurance of confidentiality to the referee prior to receiving the reference;
- the reasons given by the referee as to why they want the reference to remain confidential; and

- whether the referee would be at risk if you were to disclose the reference. By 'at risk', it would appear that the IC means 'at risk of violence or intimidation', rather than 'at risk of litigation'.

The note concludes by saying that even if you decide that you are unable to provide a copy of the reference to the employee because it would not be reasonable in the circumstances to disclose the identity of the referee, you should consider summarising the reference in such a way as to give the employee an overview of the content of the reference.

Effect on References

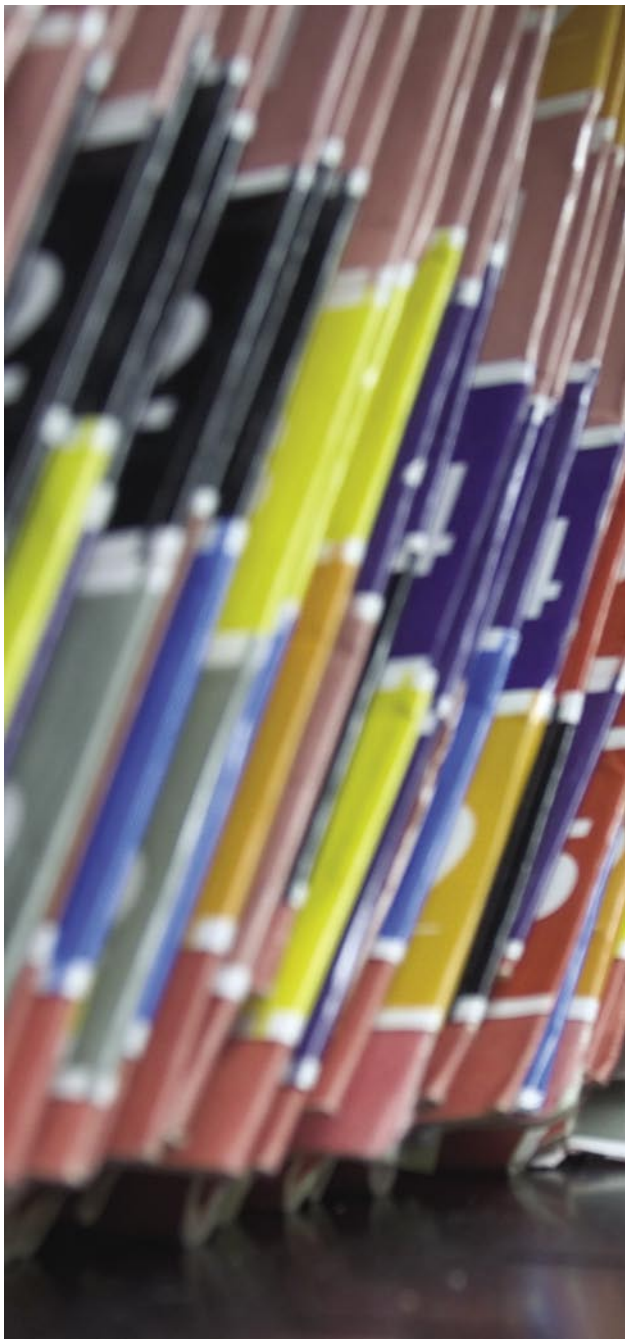
This good practice note may come as something of a surprise to employers. Guidance that employers must proactively seek to disclose, in whatever form possible, a reference given about an employee may sound the death knell of the subjective employment reference. Already there is a trend for employers to give skeletal, objective references which only state the employee's job title and dates of employment. This may accelerate that trend.

Application of the Act

Employers should remember that the Act only applies to personal data held electronically (emails, Word documents, etc.) and personal data held in a relevant filing system. The Court of Appeal in a case called *Durant* has defined a relevant filing system as being a system:

> *"1) in which the files forming part of it are structured or referenced in such a way as clearly to indicate at the outset of the search whether specific information capable of amounting to personal data of an individual requesting it under [a data subject access request] is held within the system and, if so, in which file or files it is held; and*
>
> *2) which has, as part of its own structure or referencing mechanism, a sufficiently sophisticated and detailed means of readily indicating whether and where in an individual file or files specific criteria or information about the applicant can be readily located...*
>
> *An ability of staff readily to identify and locate whole files, even those organised chronologically and/or by reference to his and others' names, is not enough."*

Following this case the IC published guidance in which he commented: "following the Durant judgment it is likely that very few manual files will be covered by the provisions of the DPA".



Those employers still willing to express an opinion about their employees might consider more traditional methods of communication (such as giving an oral reference by telephone or posting a handwritten reference to the person requesting it) in order to avoid their reference being passed to the employee to whom it relates. If they give the reference on the condition that the person requesting the reference stores the reference either in their desk drawer, or in a file marked "Confidential References" and the recipient complies with the condition, the Act will not apply.

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Disability Discrimination - Reasonable Adjustments

By **Charles Wynn-Evans**, Partner

The Disability Discrimination Act (DDA) imposes on employers a duty to make reasonable adjustments where either a physical feature of premises or a "provision, criterion or practice" causes a substantial disadvantage to a disabled person. Two recent cases illustrate the practical impact of this duty.

Introduction

DDA, s4A states that "where a provision, criterion or practice applied by or on behalf of an employer, or any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect". This note summarises two recent decisions on the extent of an employer's obligation to make reasonable adjustments in the context of employment practices and policies.

Consultation Before Dismissal

In *Rothwell v. Pelican Hardcopy Scotland Limited*, the employer sought a medical opinion from an occupational health physician and a consultant neurologist about the individual's health after a long period of absence. The occupational health physician was of the opinion that the employee would not be fit to return to work in the foreseeable future. In light of that opinion it was apparent that the decision to dismiss had already been taken before the employer met the employee to discuss his position.

The tribunal found that an employer had not discriminated against an employee on grounds of disability when it did not consult him about his fitness for continued employment before deciding to dismiss on grounds of ill health. The tribunal held that the employee had been treated less favourably by reason of his disability but that this treatment was justified. There were no reasonable adjustments which the employer should have made and the employee was not unfairly dismissed.

The EAT upheld an appeal. Following the guidance provided by the House of Lords in *Archibald v. Fife Council*, it held that a tribunal cannot find that less favourable treatment of a disabled person is justified unless it is satisfied that any reasonable adjustments that an employer had a duty to make were carried out. In this case, a reasonable adjustment to take account of the individual's disability would have entailed the employer consulting with the claimant about his medical condition *prior* to taking the decision to dismiss. The tribunal was wrong to find that there had been consultation in the face of the fact that no one from the employer had discussed the occupational health physician's report with the employee prior to the decision to dismiss. There was no reason why the employer could not have deferred the decision about termination of employment to allow for consultation.

The finding that the employee was not unfairly dismissed was also overturned. The tribunal had overlooked the lack of consultation prior to the decision to dismiss and this was not one of the rare cases where an employer could show that dismissal without consultation was fair.

Comparators and Adjustments

In *Smith v. Churchills Stairlifts Plc*, Mr Smith suffered from lumbar spondylosis which meant that he had difficulties in walking and could not lift or carry heavy objects. He was offered a place on a training course on the basis that he would be offered a job as a salesman if he completed the course satisfactorily. Between the interview and the start of the training course, it was decided that salesmen would need to take with them particular equipment (a full-size radiator cabinet). The employer believed that, because of his disability, the claimant would not be able to carry the equipment and withdrew the training course offer. The claimant suggested a trial period on a commission-only basis for him to be allowed to follow an alternative sales method which would have avoided him having to carry around the relevant equipment, but this was rejected.

The tribunal held that there had been no unlawful disability discrimination. It considered that the claimant was not placed at a substantial disadvantage to persons who are not disabled on the basis that the majority of the non-disabled population would also not be able to carry the cabinets. The duty to make reasonable adjustments therefore did not arise. The tribunal did, however, hold that, if the duty to make reasonable adjustments had applied, to allow a different arrangement on a trial basis would have been a reasonable adjustment. The tribunal concluded that the claimant was treated less favourably for a reason related to his disability by virtue of the training course offer being withdrawn. However, that action was justified because the claimant was not able to carry the relevant cabinet. The employer had a genuine commercial reason for wanting its salespeople to use full-size cabinets in demonstrations and this

was material to the circumstances of the case and substantial (thereby establishing justification).

The Court of Appeal made a number of points in allowing an appeal against this decision. First, it was confirmed that the test of whether an employer has failed to make an adjustment is objective. The statutory requirement is that, in determining whether or not it is reasonable for an employer to take a particular step, regard is to be had, among other things, to the financial and other costs which could be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities. The test is not of the employer's *belief* as to the disruption which an adjustment would make to its business but of the *actual effects* of the adjustment. By contrast, the assessment of whether less favourable treatment on grounds of disability is justified is of whether the employer's reason for its actions is material and substantial, which is a partly subjective test.

Had the tribunal considered the situation properly, it would inevitably have found that the claimant was at a substantial disadvantage in comparison to persons who were not disabled. Accordingly, to allow a trial period in which the claimant would be allowed not to carry the cabinet was a reasonable adjustment.

Some useful guidance was given as to the comparison to be made to establish disability discrimination. The tribunal compared the claimant with the population at large who are not disabled to establish if the requirement to carry the cabinet put him at a substantial disadvantage. This was wrong – the proper comparator should be identified by reference to the disadvantage caused by the relevant arrangement. The proper comparators would have been the successful candidates for the training course who were subject to the requirement (that they carry the cabinet) but who were not disadvantaged by it because they were not rejected on the basis of their inability to comply.

Conclusions

These two cases are useful reminders of the importance of the duty to make reasonable adjustments. It is clear from *Rothwell* that an employer's ability to argue that dismissal of a disabled person is justified can be undermined by a failure to follow what would, in the unfair-dismissal context, be a fair procedure in terms of consultation with the employee about the medical condition, prognosis, etc. *Smith* makes clear that it cannot be assumed without good reason that an employer can insist on a particular way of working without considering whether and how the job can be changed to accommodate a disability and that trial periods may be appropriate and sensible.

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Mitigation of Loss - or How Not to Pay When You Lose

By **Nick Jackson**, Associate

The duty imposed on a claimant seeking compensation for unfair or wrongful dismissal or unlawful discrimination to use reasonable efforts to mitigate his or her loss is of perennial importance. If an employer is liable but the employee mitigates, this amounts to a 'get out of jail free card' for the employer. On the other hand, in a case where an employee spends a lengthy period out of work following a dismissal, an employer may have to fight hard to show that it ought not to compensate the employee for the whole of the period on the grounds that, had the employee acted reasonably, he or she would have found work (and an income) much earlier.

Introduction

This article summarises the main points to note from a recent (and relatively rare) spate of cases arising in relation to an area whose basic tenets can be easily stated but whose practical application can be difficult to predict.

The Basic Principle

The financial loss recoverable in employment claims such as wrongful and unfair dismissal is only that caused by the employer's actions. An employee is required to do all that he or she reasonably can in order to minimise that loss. The essence of the duty to mitigate was captured by Sir John Donaldson in *Archibald Freightage v. Wilson*;"[I]t is the duty of an employee who has been dismissed to act reasonably and to act as a reasonable man would do if he had no hope of seeking compensation from his previous employer."

The application of the duty to mitigate is highly fact-sensitive and the extent to which an employee bringing an employment claim can be expected to obtain alternative remuneration from a new position will depend on a variety of factors such as the skills, qualifications and age of the employee in question and the state of the market for jobs in the sector or area for which he or she is qualified. The burden of proof falls on the employer where a failure properly to mitigate is alleged.

It is clear that an employee may be entitled to set up his or her own business or start a training course without breaching the duty to mitigate his or her loss. In *Gardiner-Hill v. Roland Berger Technics*, the tribunal held that the compensation to be awarded to a senior employee who had spent 80 per cent of his time after his dismissal trying to set up his own company should be reduced on the basis that he had not been looking for an employed position. The EAT allowed an appeal against that decision – the employee's attempt to set up his own business was considered reasonable in the circumstances in the light of his age and experience.

While to commence a training course designed to assist a dismissed employee's job search may be seen as a reasonable step and therefore to be consistent with the duty to mitigate, it may put a stop to the employee's losses. In *Simrad v. Scott*, an employee retrained for a new career as a nurse and could not recover losses arising after the start of the relevant course because those losses were too remote to be attributable to the employer.

The Proper Test

In *Ultra Electronics Limited v Krishnakumar*, in determining the unfair-dismissal compensation to be awarded to him, the employment tribunal reduced the loss that could be recovered by 15 per cent to reflect its finding that the employee in question had failed properly to comply with the duty to mitigate and therefore should not recover his full loss. This 15 per cent reduction was, however, restored due to the employer in question having given what the tribunal considered to be a damaging reference about the employee which it found had obstructed his ability to obtain new employment.

The employer's appeal against this decision succeeded because the EAT considered that the tribunal had failed to follow the correct approach as to the proper assessment of an employee's compliance with the duty to mitigate loss, particularly in terms of applying a percentage reduction. The employer has the burden of proof to show a failure to mitigate. It is therefore for the employer to show how, on the balance of probabilities, a particular step taken at a particular time would have led to the employee obtaining alternative employment. The tribunal must identify what steps should have been taken and the date on which those steps would have produced alternative income and thereafter reduce the employee's recoverable loss. A detailed argument must be put forward as to compliance or otherwise with the duty to mitigate loss and a broad-brush percentage reduction is not a sufficiently precise approach.

With regard to the supposedly damaging reference, again the employer's appeal succeeded. The reference was in a standard form designed to minimise the risk of a negligence claim. The EAT held that the fairly standard disclaimer in the reference, its brevity and its terse drafting did not of themselves render it (viewed objectively) damaging.

Losses Referable to the Notice Period

One of the major issues litigated in a number of recent cases is whether the duty to mitigate applies to compensation sought in respect of what would have been the employee's contractual or statutory notice period, had he or she not been wrongfully or unfairly dismissed.

In *Hardy v Polk (Leeds) Limited*, an employment tribunal awarded unfair-dismissal compensation for only four of the seven weeks of the notice period to which the employee would have been entitled had she not been unfairly and summarily dismissed. The EAT upheld that decision, holding that the compensatory award for unfair dismissal is not penal in nature and was not designed to punish the employer for its conduct. Accordingly, the common law duty to mitigate applied to the assessment of unfair-dismissal compensation even in respect of the notice period, reflecting the fact that ERA 1996, s123(4) expressly refers to the duty to mitigate ("In ascertaining...loss...the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages claims...").

In reaching this decision, the EAT declined to follow *Norton Tool Company Limited v. Tewson*. In that case it was held by the tribunal (and upheld by the National Industrial Relations Court) that the relevant dismissal was unfair and that, had the employer acted in accordance with fair industrial practice, it would have paid the employee in full for the notice period. Accordingly, there was no reduction for the employee's actual earnings during what would have been the notice period. The Court of Appeal followed this decision in *Babcock FATA Limited v. Addison*, while making comments which could be construed as indicating that Norton Tool did not reflect an absolute rule that the duty to mitigate could never apply in respect of the notice period.

The EAT in *Hardy* found it straightforward not to follow *Norton Tool* and *Babcock* primarily by reference to the express wording of ERA 1996, s123(4) but also on the basis (subsequently shown to be erroneous) that these cases did not refer to the duty to mitigate. The EAT also relied on *Cerberus Software v. Rowley*, a decision in which the Court of Appeal made it clear that the remedy for dismissal without notice or payment in lieu is a damages claim (and therefore susceptible to mitigation) rather than a debt claim.

Earnings During Period Covered by Payment in Lieu of Notice

In *Voith Turbo v. Stowe*, the EAT considered a related point. An employee was paid in lieu of notice when made redundant. He obtained employment during what would have been the notice period. The employment tribunal held that he had to give credit for earnings from that employment in relation to the compensation due to him in his successful race-discrimination claim because the remedy in such a claim is tortious in nature (i.e. it puts the complainant in the position in which he or she would have been but for the act of discrimination). However, no credit was due in respect of the unfair-dismissal compensatory award. Following *Norton Tool*, the EAT considered that good industrial practice was to make payment in lieu of notice and criticised *Hardy* heavily. The EAT identified in *Norton Tool* and *Babcock* precisely the references to the duty to mitigate whose absence was part of the EAT's reasoning in *Hardy*. The EAT also noted that the predecessors of ERA 1996, s123(4) at the time of *Norton Tool* and *Babcock* respectively were essentially the same in substance as the current legislation.

The promotion of good industrial practice was considered still to be a valid consideration for tribunals to consider and therefore *Norton Tool's* view that compensation for the notice period was not subject to mitigation was considered to be correct.

Invalidity Benefit Reduces Loss

This debate continued in *Morgans v. Alpha Plus Security Limited*, where it was held that, since the compensatory award for unfair dismissal is intended to compensate for economic loss, credit had to be given for invalidity benefit received by an employee following his unfair dismissal. Otherwise, the employee would recover more than his loss.

In reaching this decision the EAT approved the approach adopted in *Hardy*, while acknowledging that in *Hardy* it had been erroneously suggested that the duty to mitigate was not mentioned in *Norton Tool* or

Babcock. Nonetheless the EAT held that the duty to mitigate and receipt of benefits are relevant to the assessment of compensation in respect of the notice period. The fundamental point was that, since the compensatory award is based on economic loss, a reduction to that loss based on an actual receipt (such as invalidity benefit) or a failure to comply with duty to mitigate loss should be reflected in the award made. To do otherwise, and leave the matter to the discretion of each tribunal, would (it was said) be a "*recipe for uncertainty [and would] legitimise...palm tree justice...*"

Setting Up Own Business

In *Aon Training Limited v. Dore*, an employee who succeeded in unfair-dismissal and disability discrimination claims set up a new business because he did not wish to risk being subjected to further discriminatory treatment. His losses were assessed by the tribunal by reference not to his earnings but by reference to the interest which the employee incurred in relation to his borrowings for his new business. The Court of Appeal held that this was not the correct approach – where setting up a new business was accepted as a reasonable step to take in seeking to mitigate loss, it could not be assumed that the proper compensation payable was the interest incurred on the relevant borrowings. The tribunal had ignored the loss of remuneration which the employee had suffered by virtue of losing his job as well as his earnings from the new business. The correct approach is to consider the employee's loss of remuneration, to add any reasonably incurred costs in mitigating that loss (such as interest on borrowings) and then to deduct any earnings from the new business.

Conclusion

Mitigation remains an essential aspect of much employment litigation as evidenced by increased reliance by parties on expert evidence. The conflict in the EAT decisions in relation to the applicability of the duty to mitigate to the assessment of compensation in respect of the notice period is unfortunate. While this writer's view is that the clear reference to the duty to mitigate, ERA 1996, s123(4), means that the duty is relevant to the notice period early resolution of the issue at the requisite appellate level would clearly be desirable.

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Source: This Dechert-authored article appeared in the February 2006 issue of the Employment Law Journal and is reproduced with permission.

Can a 'Withdrawn' Claim be Reinstated?

By **Carl Vincent**, Associate

From time to time claimants in employment tribunal cases write to the tribunal to withdraw their claims. But what happens if the employee then changes his mind and tries to rescind the withdrawal? Is it too late or will the tribunal allow a second bite of the cherry?

Under rule 25 of the tribunal rules, a claimant can withdraw his case at any time. If the respondent chooses, it can at that point apply to have the withdrawn proceedings formally dismissed.

In *Khan v. Heywood Primary Care NHS Trust*, Dr Khan withdrew his race-discrimination claim on legal advice. After a change of adviser he had a change of heart and decided to apply to set aside the withdrawal so as to enable him to resume his claim. When he did so the respondent had not applied to have the proceedings dismissed.

Dr Khan's attempt failed. The Employment Appeal Tribunal (Rimer J.) held that a tribunal has no power to set aside a notice of withdrawal once this has been received. The effect of withdrawing a claim is that the claimant's only option is to issue a *fresh* claim based on the same facts (but subject to any limitation issues).

However, if in the meantime the respondent has proactively applied to have the claim dismissed on withdrawal, the claimant's escape route is closed and he is also debarred from issuing a fresh claim based on the same facts.

The EAT also upheld a costs order which the tribunal had made against Dr Khan, on the basis it was unreasonable for him to withdraw his claim and then renege on his withdrawal and seek to have the claim reinstated.

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They Think It's All Over - What Happens to the Employer that Fails to Get its Defence in on Time

By **Carl Vincent**, Associate

Under the tribunal rules a respondent has 28 days from the date it was sent a copy of the claim to submit its defence. This period can be extended if the respondent applies before the 28 days are up. If the respondent fails to lodge its defence in time the consequences are dire. It will not be accepted by the tribunal and (subject to any review or appeal) the respondent will be debarred from taking any further part in the proceedings. In effect the claimant's claim will proceed and he will be shooting into an open goal. This happened in the case of Turner v. The Pestle & Mortar.

Mrs Turner (the claimant) was employed by the respondent as a barperson from 3 December 2004 until 1 January 2005. On 4 March 2005 she lodged her claim with the tribunal, complaining of automatically unfair dismissal on the grounds of pregnancy and unlawful sex discrimination. The respondent then made an application for an extension of time to submit the defence and an extension was granted until 26 April 2005. On 21 April the respondent instructed solicitors and on 25 April, a Monday, the defence was posted first class to the employment tribunal. It did not arrive until 28 April, two days late. Had it been faxed to the tribunal on 25 or 26 April, it would have been lodged in time.

In fact, the defence form had also been faxed, but instead of being faxed to the tribunal, it was faxed to ACAS in error. The defence was not accepted by the secretary as being not presented within time and a chairman entered a default judgment.

The respondent's solicitors applied for a review of the default judgment. This was heard by a chairman sitting alone. He found that there was no good reason for the delay and concluded that it would not be just to turn a 'Nelsonian eye' to the respondent's failures. The default judgment stood.

The respondent appealed. The EAT ruled that, in exercising discretion, a chairman should take account of all relevant factors. These included the explanation or lack of explanation for the delay and the merits of the defence, weighing and balancing them against each other and reaching a conclusion that was objectively justified on the grounds of reason and justice and, in doing so, balancing the possible prejudice to each party.

The EAT went on to find that the chairman was entitled to find that no good reason had been put forward for the delay in submitting the defence but that he had failed to consider the prejudice to the parties when balancing the merits of the defence with the absence of good reason for the delay. It concluded that the decision should be reversed because the chairman failed to take into account the balance of prejudice and in particular the prejudice suffered by the respondent if the default judgment was allowed to stand.

The reasoning of the EAT was that the defence had a reasonable prospect of success and, although there was no good reason for the delay, the respondent was only late by two days and had made an attempt to fax the defence in time, albeit (due to an administrative error) it was faxed to the wrong person. On the balance of prejudice issue, although the claimant would suffer prejudice by losing a default judgment, set against that, preventing the respondent from taking any effective part in the proceedings and having the opportunity to defend both as to liability and remedy was a draconian effect and outweighed the prejudice to the claimant.

Therefore, in this case the employer, by the skin of its teeth, was allowed to stay in the game. But the moral of the story for employers when served with a claim form is, to diarise the deadline for submitting the defence, do not leave it to the last minute to prepare the document or instruct lawyers and don't rely on the Royal Mail to deliver a first-class letter on the day after posting.

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Compromise Agreements - Stitch-up or Slip-up

by **Carl Vincent**, Associate

Compromise agreements are frequently used by employers to obtain a binding release of claims from their employees in a variety of circumstances when employees exit the business. When used effectively they can avert litigation and provide certainty and finality. But when mistakes are made an employer can find that the binding compromise they thought they had is illusory.

Unfair dismissal (and other statutory employment claims) cannot be compromised unless the requirements of s203 of the Employment Rights Act 1996(ERA) (and the equivalent sections in other Acts and Regulations) are satisfied. These are:

- there must be a written agreement;
- it must relate to "particular proceedings";
- the employer must be independently advised by a qualified person;
- the agreement must identify the advisor; and
- the agreement must state that the s203 conditions are satisfied.

For these purposes a qualified person will be a solicitor, barrister, a certified trade-union officer, official, employee or member, or a certified advice-centre worker.

Lunt

There are several authorities on the meaning and operation of these provisions which contain guidance on what is required in order to comply. In *Lunt v. Merseyside Tech*, the EAT decided that, while a single agreement could be used to compromise several claims, 'blanket' settlement agreements compromising claims that have never been indicated by the employee are not permitted. For claims to be settled under the auspices of a compromise agreement, they must have been raised beforehand. Unless they were, the agreement cannot be said to relate to "particular proceedings".

Hinton

In *Hinton v. University of East London*, the Court of Appeal held that the claim (or claims) to be settled must be identified specifically. Using a general phrase such as "in full and final settlement of all claims" will not do. The context was that Dr Hinton took early retirement from his post as a principal lecturer at the university and when he did so he signed a compromise agreement (which was intended to satisfy s203) which purported to compromise all claims against the university.

Clause 9 of the agreement stated that: "This agreement is made without any admission of liability on the part of the university on the basis that its terms are in full and final settlement of all claims in all jurisdictions (whether arising under statute, common law or otherwise) which the employee has or may have against the university officers or employees arising out of or in connection with his employment with the university, the termination of his employment or otherwise including in particular the following claims which have been raised by or on behalf of the employee as being claims which he may have..." There

then followed a list of 11 particular kinds of claim at common law, under the ERA and under the discrimination statutes. There was no express reference to a whistle-blowing claim, either in terms or by reference to the relevant section in the ERA (s47B). This was surprising given that an allegation of whistle-blowing had been raised by Dr Hinton in correspondence between the parties prior to the agreement being reached.

Under clause 11 of the agreement, Dr Hinton agreed to refrain from instituting proceedings before an employment tribunal in relation to any claims or complaints compromised under clause 9.

Following the termination of his employment, Dr Hinton made a whistle-blowing claim in the tribunal. The university contended that the terms of the compromise agreement precluded him from pursuing that complaint. The tribunal held that the agreement did not cover a such a claim and therefore Dr Hinton could proceed with his complaint. It noted that Dr Hinton had raised a potential claim under s47B at the time of the agreement but s47B was not mentioned in the particular itemised claims listed in the agreement. It held that this was a "grave omission" from the agreement which was not caught by the general words of clause 9.

The EAT allowed the university's appeal against that decision. The EAT was satisfied that s.47B fell within the general words at the beginning of clause 9 and that the list that followed was intended to be illustrative rather then exclusive.

On appeal to the Court of Appeal, it was submitted for Dr Hinton that s203 requires that all the claims or potential claims to be covered by the agreement should be expressly identified, either by reference to the nature of the claim (e.g. unfair dismissal or sex discrimination) or by reference to the relevant statutory provision and that the catch-all reference in clause 9 to "all claims in all jurisdictions..." did not sufficiently identify the particular proceedings which it was intended to compromise so as to comply with s203.

For the university, it was contended that for an agreement to "relate to the particular proceedings" within the meaning of s203(3)(b), it was not necessary for the agreement to specifically mention the claims that were being compromised, as long as they were within the contractual scope of the agreement.

The Court of Appeal allowed the appeal. It found that the requirement in s203 that, in order to constitute a valid compromise, an agreement must "relate to the particular proceedings" means that the particular proceedings to which the compromise agreement relates must be clearly identified and it is not sufficient to use a rolled-up expression such as "all statutory rights". The agreement in question did not meet this test. It neither referred to s47B, mentioned whistle-blowing or described the claim in another way.

The Court indicated that it is good practice for the particulars of the proceedings and of the particular allegations made in them to be referred to in the compromise agreement in the form of a brief factual

and legal description. In addition, if the compromise is of a claim which is not yet the subject of proceedings, it is good practice for the particulars of the nature of the allegations and of the statute under which they are made or the common-law basis of the claim to be referred to in the agreement in the form of a brief factual and legal description. Compromise agreements (it was suggested) should be tailored to the individual circumstances of the particular case since only in that way can the purpose behind s203 (protecting claimants from the danger of signing away their rights without a proper understanding of what they are doing) be fully satisfied.

Hilton UK Hotels

In *Hilton UK Hotels Ltd v. McNaughton*, the claimant was employed by the respondent (and its predecessor), from April 1974 to 16 May 2003. Between April 1974 and April 1981 she was a part-time, non-salaried member of staff and was excluded from her employers' pension scheme on account of that status throughout that period. When her employment terminated she signed a compromise agreement.

Under the agreement she agreed to accept a payment "in full and final settlement of any and all present and future claims, rights of action, remedies, costs and expenses whatsoever and howsoever arising which you have or may have in any jurisdiction against the Company...arising from or in connection with your employment with the Company ...or any other matter including any common law or statutory claims whatsoever whether under English law, European law, or any other applicable law such as (but not limited to) compensation for breach of contract, wrongful dismissal, and any and all of the Statutory Claims..." Attached to the agreement was a declaration in which the claimant warranted that:

- she had received independent legal advice;
- the conditions regulating compromise agreements in the Sex Discrimination Act were satisfied;
- she had no further claims; and
- "The Statutory Claims referred to in this letter are the claims that you believe you have against the Company ...for breaches of the Employment Rights Act 1996, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Trade Union and Labour Relations (Consolidation) Act 1992, the Working Time Regulations 1998, the National Minimum Wage Act 1998, the Employment Tribunals Act 1996, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Employment Relations Act 1999 and the Equal Pay Act 1970 ...all of which claims you have raised with the Company but which the Company and its officers, employees and agents dispute."

When she signed the agreement the claimant did not believe that she had an equal pay claim. Neither could she recall discussing such a claim with her solicitor either. It was only when she read a newspaper article in August 2003 that she became aware that she might have a claim in respect of having been excluded from the pension scheme while working part time. She brought a claim and the tribunal allowed it to proceed, taking the view that the compromise agreement did not bar the claim. Unsurprisingly the employer appealed.

It argued that the agreement complied with the statutory requirements and excluded an equal pay claim. It referred to *Hinton* and said that it complied with the test laid down by the Court of Appeal because in the case of the Equal Pay Act there was no need to refer to a specific section since there was only one section under which a claim could be made. Finally the respondent submitted that the tribunal erred in concluding that the express terms of the agreement were overridden by the claimant's contrary testimony at the tribunal hearing. It contended that the terms of the agreement were clearly to the effect that it was agreed that the claimant could not, in the future, make any claim under the Equal Pay Act.

These arguments got the respondent nowhere. The EAT accepted in principle that a party can contractually compromise a future claim of which he or she has no knowledge but to do so effectively, the terms of the agreement must be absolutely plain and unequivocal. It accepted that the reference to the Equal Pay Act in the declaration attached to the agreement was sufficient to identify the type of claim referred to but pointed out that it was only caught within the compromise if, when the agreement was signed, the claimant believed she had such a claim and had raised it with the respondent. In other words, if the claimant did not have such a belief, the claim was not waived.

The EAT said that had the respondent drafted the agreement more carefully the equal pay claim could have been compromised, whether the claimant had been aware of it or not, but that was cold comfort to the respondent.

Royal National Orthopedic Hospital Trust v. Howard

Although not involving a s203 agreement, the case of *Royal National Orthopaedic Hospital Trust v. Howard* is worth mentioning. In that case Mrs Howard was

employed by the hospital for 18 years. She left in 1998 and made allegations of, among other things, sex discrimination. She compromised her claim on the following terms:

> *"1) That the Respondent will pay to the Applicant within 28 days the sum of £12,000 in full and final settlement of these proceedings and of all claims which the Applicant has or may have against the Respondent (save for claims for personal injury and in respect of occupational pension rights) whether arising under her contract of employment or out of the termination thereof on 29 November 1998, or arising under the Employment Rights Act 1996, the Sex Discrimination Act 1975 or under European Community Law. This payment is with no admission of liability.*
>
> *2) That the proceedings be dismissed."*

The settlement was made in the form of an ACAS COT 3 agreement. Some years later she applied for work at the hospital and was refused. She claimed this was victimisation and issued fresh proceedings for sex discrimination. The hospital responded by arguing that she could not do so because the COT 3 agreement compromised future as well as existing claims through the use of the words "has or *may have*".

On appeal the EAT decided that, on a proper interpretation, future claims had not been compromised. But the court did not rule out the possibility of future claims being compromised by more effective wording. It said, "The law does not decline to allow parties to contract that all and any claims, whether known or not, shall be released. The question in each case is whether, objectively looking at the compromise agreement, that was the intention of the parties... If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come in existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for."

What these cases show is that while compromise agreements remain essential tools in the armory of employers when they seek to manage terminations and resolve disputes, great care should be taken to ensure that the statutory requirements are met and as a matter of plain English, the agreement achieves what the employer is trying to accomplish.

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Modern Apprenticeship - Contract of Apprenticeship or Contract of Employment

By **Jason Butwick**, Partner

The Court of Appeal, in the case of Flett v. Matheson, has suggested that a modern apprenticeship arrangement can constitute a common-law contract of apprenticeship. In doing so, the Court overturned an EAT decision that such an arrangement did not give rise to a traditional contract of apprenticeship, only a contract of employment.

The claimant worked under an Individual Learning Plan (ILP), which operated as a tripartite agreement between him, the employer and a government-sponsored training provider. When, following a transfer of the employer's business, he was dismissed without notice, he brought claims for, *inter alia*, breach of

contract. The question arose whether, under the ILP agreement, he was to be regarded as employed under a contract of employment, a contract of apprenticeship or neither. The tribunal's answer to that was "neither". On appeal, the EAT agreed that there was no contract of apprenticeship. It noted that under the modern apprenticeship system responsibility for training on the part of the employer was crucially absent, whereas under traditional contracts of apprenticeship the employer had an obligation to educate and train, to secure the required qualification for the apprentice and then employ him or her in full-time employment. However, the EAT went on to hold that there was a contract of employment, albeit overlaid with and varied by the tripartite agreement.

The Court of Appeal allowed the claimant's appeal against that decision and remitted the case back to the tribunal for further consideration. The Court held that the ILP was a contract of apprenticeship. It noted that the intention of the parties had plainly been to achieve the same purposes as an old-fashioned apprenticeship contract. Furthermore, the fact that a modern apprenticeship allowed for some training to be provided by a third party did not prevent it coming within the common-law formulation of a contract of apprenticeship. Rather, it was simply a recognition that it is unrealistic in a modern environment to expect an employer to be able to provide the full training required in order to obtain nationally recognised qualifications.

The tribunal will now have to reconsider the issue of whether there was a contract of apprenticeship in this particular case. The issue is of importance as the scale of damages available when a traditional apprenticeship is terminated early is potentially far greater than the remedy for breach of an ordinary contract of employment.

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The New Implications of "I Do"

by **Georgina Rowley**, Associate

On 5 December 2005 the Civil Partnership Act 2005 (CPA) came in to force. The CPA gives same-sex couples who register as a civil partnership the same employment rights as their married colleagues. This article explores the impact this will have in the UK workplace.

In the employment arena, the CPA amends and extends legislation governing discrimination on the grounds of sex and sexual orientation as well as family-friendly employment rights.

Discrimination

The CPA amends both the Sex Discrimination Act 1975 (SDA) and the Employment Equality (Sexual Orientation) Regulations 2003.

The scope of the SDA has been extended such that it is now unlawful to discriminate against an employee because they have entered into a civil partnership in the same way as it is unlawful to discriminate on the basis of marital status.

Since the Regulations came into force in April 2004, gay employees have enjoyed the right not to be discriminated against on grounds of their sexuality. While the Regulations required that employment benefits afforded to unmarried gay couples be no less favourable than those afforded to unmarried heterosexual couples, they contained an exemption which permitted employers to offer more favourable benefits to married employees and their spouses.

Prior to the official recognition of gay partnerships introduced by the CPA, gay employees and their partners have not traditionally enjoyed the enhanced employment benefits sometimes offered to married employees and their spouses. Common examples of preferential benefits offered by employers include wedding gifts, health insurance and pension survivor benefits.

The effect of the CPA is to extend the exemption under the Regulations to civil partners. Where an employer fails to extend benefits afforded to married couples to civil partners, a civil partner deprived of such a benefit can bring a claim of discrimination on the grounds of his or her sexual orientation in an employment tribunal.

Family-Friendly Rights

Gay partners with responsibility for bringing up a child already enjoyed the same paternity leave and flexible working rights as same-sex couples, married or not. The CPA merely specifies that those rights also be extended to civil partners.

Under the Adoption and Children Act 2002, which came into force on 30 December 2005, civil partners may now jointly adopt a child. Previously, only one member of a single-sex couple could formally adopt. Civil partners who jointly adopt now enjoy the same benefits as other couples who do so. That is to say that the couple can choose which one of them takes adoption leave and claims adoption pay (equivalent to maternity leave and pay). The other is entitled to paternity leave and pay.

In sickness as in health, a civil partner is now deemed to be a dependant for the purposes of the time-off provisions enshrined in the Employment Rights Act 1996. The effect of this is that civil partners are now entitled to take a reasonable amount of time off work when their partner is ill, injured or dies.

Implementing the CPA

Employers who have introduced and actively promote an equal opportunities policy should have little difficulty in embracing the new legislation. But there may be unexpected traps for the unwary and we have set out below examples of issues and areas which Human Resources departments may wish to consider afresh in the light of the CPA.

- Review your internal benefits to ensure that you treat civil partners in the same way as you treat married employees. Typical problem areas might include extra holiday entitlement for honeymooners, wedding gifts, invitations to office parties and health insurance.
- Ensure your internal policies relating to parental leave, flexible working and time off for dependants apply equally to civil partners as they do to other couples.
- Review the provisions of your pension scheme. In contracted-out schemes, a surviving registered civil partner will now be entitled to a survivor's pension in respect of any rights which the deceased employee member may have built up since 6 April 1988. While the CPA has no direct impact on occupational pension schemes which are not contracted out, employers are well advised to review the arrangements offered to married couples because a surviving registered civil partner could bring a discrimination claim if he or she is not entitled to benefits that a surviving spouse would have received in the same circumstances.
- Tailor your employee databases and hard-copy forms to accommodate civil partnerships. Problems areas to focus on may include internal procedures for name changes and forms requiring employees to disclose marital status.
- Try to avoid asking employees to identify themselves as being in a civil partnership. While civil partners will almost certainly want to exercise their employment rights, you should be aware that they may not want their colleagues to be aware of their sexual orientation and/or to know they have entered into a civil partnership. Ask employees to identify themselves as "married or in a civil partnership" or a "spouse or civil partner" rather than one or the other.
- Communicate any changes you make to your procedures and benefits packages to employees to ensure that civil partners are aware of how to exercise new rights available to them.

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Commercial Agency - What is the Agent Entitled to on Termination?

by **Richard Waller**, Associate

Employers appreciate that their terminating an employment relationship often entails cost. Less well known is the exposure which can arise when a business parts company with an individual if that individual is its commercial agent. The decision of the Court of Appeal in Graham Lonsdale and Howard & Hallam Limited has provided important guidance on the valuation of claims for compensation brought by commercial agents under the Commercial Agents (Council Directive) Regulations 1993.

Introduction

The Regulations govern the relations between commercial agents and their principals in relation to activities carried on within England, Wales and

Scotland. Agents having the authority to negotiate, or to negotiate and conclude, a transaction for the sale or purchase of goods for their principal are covered by the Regulations.

Among other things, the Regulations deal with the formation and termination of a relationship of this kind, the rights and obligations of the agent and principal to each other, the agent's remuneration and his right to receive what the Regulations describe as "compensation" or "indemnity" on the termination of the relationship. The former is applicable if no express choice is made. The parties cannot contract out of the provisions relating to the payment of "compensation" or an "indemnity" (as the case may be).

The Regulations provide little guidance on how compensation payments should be calculated. Since their introduction over 10 years ago a number of cases have considered the assessment of compensation, but these have not resulted in a clear and consistent basis on which the parties to an agency contract can confidently calculate any compensation payments that may be due. In particular, as a result of such cases it has not been clear whether as a general rule compensation should be assessed at two years' commission or not. The Court of Appeal in *Graham Lonsdale and Howard & Hallam Limited* sought to clarify the position.

Background to the Case

Mr Lonsdale was a commercial agent for Howard & Hallam Limited, a shoe-manufacturing company, selling its products to shoe shops in the South East. His agency began in 1990 and continued until 30 June 2003 when it was terminated after a period of notice as a result of the closure of Howard & Hallam's business due to rising costs and falling sales. It was accepted by the parties that the Regulations gave Mr Lonsdale a right to compensation but the parties could not agree on the amount to which he was entitled.

Mr Lonsdale claimed £19,670 which was roughly equal to two years' gross commission calculated by reference to the average of the last five years of his agency less the amount that he had already received. He sought to justify this sum on the basis that it was calculated in accordance with the 'two years' commission rule' – an approach that has been adopted by the French courts and has been applied in a number of previous decisions of courts both in England and Scotland.

The defendants argued that there was no such 'two years' commission rule'. It alleged that if commission was to be taken as the basis for assessing compensation, it should be the amount received by the agent after deducting expenses and that the payment already made to Mr Lonsdale (£7,500) was as much as he was entitled to receive.

What the Court Decided

The Court of Appeal held that:

- the correct measure of damages is the loss of the agency business, including whatever goodwill attaches to it. This will often require expert evidence but the Court of Appeal noted that although in many cases it would be beneficial to the Court to have the assistance of an expert witness (ideally a single joint expert) to determine the value of the goodwill, given the low value of many claims under the Regulations it would not be sensible or proportionate to adopt such an approach in all cases;
- as a result, there can be no presumption that the starting point for compensation is two

years' earnings, as that does not involve any reasoned attempt to ascertain the true extent of the agent's loss. All cases suggesting there is a presumption of two years' loss of earnings are wrongly decided; and

- likewise, there is no room for importing a "just and reasonable" test into the assessment of compensation.

Taking these considerations into account, the Court of Appeal agreed with the original judge's assessment that compensation should be set at £5,000.

Conclusion

The Court of Appeal concluded that the damage in respect of which Mr Lonsdale was entitled to receive compensation was normally the loss of the agency business, including whatever goodwill attaches to it.

In terms of valuing goodwill, the Court of Appeal rejected the proposition that there is or should be any guideline along the lines of the 'two years' commission rule'. Further, the Court of Appeal rejected the notion that compensation should be assessed on the basis of what is considered to be *fair and reasonable in all the circumstances* – thus the duration of the agency or the quality of the agent's performance are not necessarily important factors. However, it is appropriate to take into account the value of the principal's business and with it the prospects of the agency as at the date the agency terminates.

Although the Court of Appeal noted that in many cases it would be beneficial to have the assistance of an expert to determine the value of the goodwill, it acknowledged that the courts must be careful not to impose unrealistic evidential requirements on agents seeking to prove their loss and that in many cases it may be appropriate to adopt a broad approach.

This case is also a timely reminder for employers that an individual acting on its behalf whom it does not regard as its employee may be a commercial agent with financial entitlements when the relationship is terminated.

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