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ADVISE

Services to Business

Employment Conference

Tuesday 17 May 2011

prepared for David Ludlow
Barlow Robbins

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strong reputation in
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injunctions.”***

Legal 500 2010

Programme

Buffet Lunch 12:30pm

Keynote Speech by David Ludlow, 1:15pm
Head of Employment
*Employment Law in 2011: Where are
we now and where are we going?*

Panel Q&A: *David Ludlow & Joanna* 2:00pm
Lada-Walicki

Breakout Session A: *Discrimination* 2:45pm
*Update: Andrew Peters
& Michelle Tudor*

Breakout Session B: *Protecting your* 3:55pm
Business from Unfair Competition:
David Ludlow

Closing Discussion 4:55pm

“David Ludlow has a ‘gentlemanly approach,’ say clients; ‘he is a good communicator with traditional values’”

Chambers Legal Directory 2011

Keynote Speech

Employment Law in 2011:
Where are we now and where are we going?

David Ludlow

Introduction

When we first planned the theme and topics of discussion to consider at this conference, we agreed that, before looking at specific aspects of employment law, it would be appropriate to try and assess the significant changes that have taken place not just in the last 12 months, with the enactment of high profile and somewhat controversial legislation such as the Equality Act 2010 and the forthcoming Agency Workers Regulations, but also put such recent and imminent changes into an overall context of changes that have taken place in the last decade or so. We should also look forward to what is likely to happen, not just in the year but beyond.

Employment law and HR journals record us employment lawyers and HR professionals as working in “an age of uncertainty” or in even more alarming terms such as entering “a period of industrial conflict and strife”.

Employers, unions and workforces alike cannot fail to have been impressed by the sheer volume and scale of change whether because of the cost and ‘braking effect’ that new employment laws have on business or, conversely, because they promote fairness and thereby result in greater productivity in the workplace. But the pace of change of employment law is still, to my mind, as somebody who has worked in the area for 22 years, quite breathtaking.

Those of you who are established clients of the Firm will hopefully have appreciated this from the monthly Employment Law Updates that we send out, the May edition of which you should have received in the last day or so.

A measure of the pace of change is to be found in the fact that only last Tuesday I was chased by our Marketing Team to provide the drafts of the handouts that you have received today and, insisted that we could not deliver our materials until after Thursday when I was due to attend the Annual Conference of the Employment Lawyers Association. I protested that I was bound to obtain fresh material and even more up-to-date information if we delayed going to print until after the Annual Conference. The Employment Lawyers Association met in Manchester on Thursday and inevitably there was a well planned agenda with a keynote speech focusing on the Equality Act, but you will recall that last Wednesday and Thursday the Government announced further steps in its ongoing review of employment law and you will have seen the reports in the national newspapers such as “Osborne takes on the unions” and “Osborne urges business to take on the unions” and “Battleground: workers’ rights”. Most of the press reports focused on comments made by the Chancellor in general terms indicating the attention to cap discrimination awards, reform TUPE and reduce redundancy consultation periods. By lunchtime, as you might expect, the 800 or so employment lawyers in attendance had looked at the small print of the Government’s announcement and concluded that, whether one likes it or not, the fact of the matter is that any UK Government whether it is a Conservative Lib-Dem Coalition Government or a Labour Government, cannot now simply slash away at areas of employment law such as TUPE, discrimination compensation levels and redundancy consultation periods without falling foul of European law and ending up in the European Court of Justice except perhaps where there really has been “gold plating” of rights in the UK.

I do not say that as a self-interested employment lawyer but as a professional and along with my partners, an employer, who is trying to accurately assess the state of UK employment law in May 2011 and what the shape and

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character of workplace disputes is likely to be in the foreseeable future.

Indeed an important part of the Government's raft of employment law reforms is a more cost-effective and efficient means of resolution of workplace disputes. The Government has two objectives: to promote growth by removing barriers to recruitment and increasing flexibility; and to ensure that where the employment relationship has broken down, proceedings are brought to a close expeditiously and cost-effectively.

Remarkably when the Government made its last announcement about Employment Tribunal reforms many of us present today were meeting here in this room for our January Employment Law Seminar.

Discrimination in the workplace - The Equality Act 2010

More about the Government reforms at the end of my talk, but I now want to look at what many commentators believed would be and some still do regard as a "firecracker" – the Equality Act 2010. The media and HR industry press have, it would be fair to say, been pre-occupied in the last year or so with the Equality Act 2010. However, opinions are divided amongst HR professionals as to whether it was a firecracker or a damp squib.

The Equality Act was essentially a harmonising act replacing all the previous anti-discrimination law in Great Britain and codifying it into one common set of rules. There are nevertheless a number of areas where the law has changed in significant ways. Although the Equality Act was Labour Government legislation, the majority of the provisions survived the transition to the Coalition Government but the Coalition Government has been able to sideline and, at least, delay some of the more radical changes that they could have implemented.

So what is the bottom line on the Equality Act? What is the state of discrimination law in May 2011?

"Associative" and "Perception" Discrimination

The wording of the Act makes it absolutely clear that claims of associative discrimination (which is technically a form of direct discrimination) can now be brought but the UK Courts and Tribunals had already concluded in cases such as *Coleman -v- Attridge Law*, which is a case where the woman was treated less favourably by her employer because she had to look after her disabled son, that associative discrimination claims could be brought. An example of perception discrimination is where the discriminator wrongly believes the victim to be gay or Catholic when they are not. The law goes further now as the case of *English -v- Thomas Sanderson Blinds* illustrates where colleagues subjected the claimant to homophobic harassment even though they knew he was not gay. Such a victim is protected. So in this area the Equality Act has simply enacted, i.e. codified what the Courts and Tribunals had already established.

"Positive action"

One of the more controversial aspects of the Equality Act was the introduction of provisions allowing for "positive discrimination" so as to allow employers to promote, i.e. recruit or indeed literally promote people from under-represented groups in its workforce. A cynic might say that under the old discrimination law one could achieve that

anyway by pinpointing a material factor that was not related to the disadvantaged person's sex, race or whatever personal characteristic.

However, the new legislation which the Coalition Government surprisingly introduced in April does certainly now expressly enable employers to go further than was previously allowed (by permitting training for under-represented groups) to positively engineer equality through recruitment or internal promotions. In the employment field, if an employer has a man and woman applying for a job who have equal service but the woman has spent say 5 years on maternity leave or parental leave, the employer could now for that reason safely promote the woman to remedy the disadvantage of her career break.

Similarly if an employer had a predominantly female workforce and was keen to recruit male applicants to redress the balance then, presented with a man and woman of equal skills and qualifications, the employer could positively discriminate against the woman or in favour of the man for that reason.

Justifications for promotion or selection will no longer have to be linked directly to formal qualifications. Take, for example, a company that has a high proportion of a particular ethnic minority staff which is under represented at the managerial level and, say, two candidates apply for a position as manager. One of the candidates comes from the same ethnic minority group, i.e. the same background as the high proportion of staff, whilst the other candidate does not. Say that the candidate from the same ethnic background as the staff merely has a relevant language qualification or some practical experience in dealing with that group whilst, on the face of it, the other candidate is better qualified because he or she has a Master's Degree in Business Management. In those circumstances, under the new law, the would be entitled to positively discriminate in favour of the apparently less qualified, or rather differently qualified, candidate - for that reason.

Disability – Indirect Discrimination

Another area of employment law where there has been a significant change is with the introduction for the first time of a rule prohibiting indirect discrimination against disabled employees, which arises where an employer has a policy, criterion or practice which, although applied equally to all or a group of its employees, impacts adversely disproportionately on disabled people.

Indirect discrimination has applied to other “protected characteristics” such as sex and race for a quarter of a century at least. In practice, because there has since 1995 been a positive duty on employers to make reasonable adjustments to ensure disabled employees operate on a level playing field, indirect discrimination has not until now featured in disability discrimination law or been regarded as a priority. Nevertheless there is now a further type of protection, and therefore potential claim, for disabled people to bring.

'Discrimination arising from disability'

Perhaps more significantly in the field of disability discrimination is the new definition of what used to be called 'disability-related discrimination' which means that for a disabled employee to establish discrimination (that requires objective justification by the employer), it is not now necessary for a Claimant to establish any motive or indeed knowledge on the part of the employer. It is just a question of causation.

Disability-related discrimination can be defended and justified by the employer if the employer can show that the discriminatory treatment that gives rise to the less favourable treatment is a “proportionate means of achieving a legitimate aim”. That formula of “a proportionate means of achieving a legitimate aim” is now the same formula of all

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types of discrimination. This is what lawyers and commentators mean by the Equality Act harmonising and codifying discrimination law.

Furthermore, whereas the test of whether a person was disabled was determined by the question of whether they fell into 8 categories set out in the old Disability Discrimination Act such as manual dexterity, mobility, ability to concentrate, etc.

The only test now that is applied in determining whether an employee is disabled is whether the disability in fact has a “substantial and long-term adverse effect on their ability to carry out normal day-to-day activities”.

“Harassment” by third parties

A universal (and extended) definition of harassment has been applied to all areas of discrimination, i.e. all “protected characteristics”. Furthermore, the Equality Act has enacted rules protecting staff from harassment by third parties such as clients or customers in relation to all protected characteristics (and not just sex as was previously the case) and imposing positive duties on employers to protect staff, although in its recent budget the Government announced a consultation on its proposal to abolish this aspect of the Act, so it has not yet done so.

Equal Pay

Opinions are seriously divided as to whether the Equality Act makes any serious attempt to address what is repeatedly cited as being the biggest failure of UK discrimination law since the Equal Pay Act which first introduced in 1975. There is a still universal pay differential between men and women of 18%. Like previous Governments, the Coalition Government prefers a persuasive or voluntary approach to achieving equal pay, although the Equality Act does outlaw secrecy clauses in contracts of employment so that employees can now discuss with each other their terms and conditions of pay and, if an employee complains about a disparity in pay they cannot be “victimised”, i.e. subjected to any detriment for that reason.

Remarkably, the Equality Act also abolishes any requirement for an actual comparator where a woman complains that her level of pay is not equal to a comparable male worker. Now, as in every other area of discrimination, a hypothetical comparator is allowed.

But the Government has decided not to provide for compulsory audits of pay nor make any awards of aggravated or exemplary damages for equal pay which is probably the best way to force employers to take the matter seriously.

Overall, therefore, the Equal Pay Commission or the Equalities and Human Rights Commission would probably be of the view that the Equality Act merely tinkers with this problem.

Caste Discrimination

This is one of the areas where there is provision in the Act for the definition of “race” to be extended. This is an area or an aspect of British society which most people are wholly ignorant of. Anyone with any understanding of the Asian sub-continent caste system and the way in which it has been introduced into certain sectors of British society would understand that, at least potentially, it is a serious issue. A recent report by the NIESR indicates that there are significant levels of discrimination and harassment at school, work and in the provision of goods and services but also in workplaces with Asian British workforces.

The Coalition Government will in its current frame of mind probably say that it does not want to add to the burden on employers and this provision in the Act will probably not get enforced in the immediate future.

Socio-economic discrimination

Section 1 of the Equality Act boldly addresses the whole question of social economic discrimination by imposing a duty on public authorities to eliminate socio-economic inequalities. This provision has not been implemented and again it is unlikely that the Coalition Government will implement it in the near future but it is on the agenda of the more liberal minded thinking Government Politicians.

Marital Status

Since 1975 it has been unlawful to treat people less favourably by reason of their status as married people. This has not changed and the Equality Act has not extended protection to “single” status or “divorce” status employees.

Gender Reassignment etc

The definition of gender reassignment has been extended and is not now limited to those who have gender dysphoria but includes those in a pre-operative state. It also extends to transvestism or cross dressing which stems from the gender identity process and recognises such conditions for children (in relation to the provision of goods and services at schools etc).

Volunteers and interns

Significantly, particularly for charities, volunteers, i.e. unpaid workers, are not protected from discrimination in the workplace, as has been made clear in the recent case of X -v- Mid Sussex CAB. Nor generally are they protected from unfair dismissal or entitled to the minimum wage. Further good news is that employers cannot be vicariously liable for the volunteer’s discriminatory conduct (unless the volunteer was acting as an agent of the “employer”).

It is likely however that following the Coalition Government’s “Social Mobility Strategy: Opening Doors, Breaking Barriers” and the announcement of a voluntary code there will be greater pressure for employers to pay interns, common in the media, arts and fashion industries at least the National Minimum Wage.

Tribunal Recommendations

Perhaps the most significant and far reaching reform in the Equality Act is the power that is conferred on Tribunals to make “recommendations”, not just in relation to individual claimant employees but to the workforce as a whole with power to award compensation for failure to do so.

Firecracker or damp squib?

On balance, when one scrapes beneath the surface of the codification and harmonisation and looks at the combined effect of the measures set out above and the powers contained within the legislation which are yet to be implemented, one can see that it is a significant piece of legislation which will at least add momentum to the whole philosophy of “equal opportunities” and, despite the Coalition Government’s efforts to put a brake on that process it at least take employers further down the road towards “equality”, whatever one’s view of that may be.

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Fathers v Employers: The New War at Work

Quite apart from the changes in the Equality Act, another significant development is taking place in the workplace, namely a change in the status of working fathers. We all understand, or at least are used to dealing with maternity leave and maternity pay problems. We also understand and are used to dealing with limited paternity leave and paternity pay problems, because fathers have enjoyed the right to 2 weeks' paternity leave paid at the statutory minimum level since 2002.

Since last month, fathers and same sex partners (or the other partner to an adoption) have been allowed up to 26 weeks' additional paternity leave so with the mother's agreement and provided she has the right, they can use up the remainder of the mother's entitlement to maternity/adoption leave. They are also entitled to use up any remaining statutory maternity pay.

For whatever reason, the take-up of these rights is expected to be limited. The Equality Act has made it clear that men are protected from less favourable treatment because of their sex, but what about on the grounds of men bottle feeding, or other activities connected to childrearing. What happens in a situation where two employees, one female on maternity leave and the other male on additional paternity leave are not treated in the same manner? These are questions that employment lawyers and HR professionals will now have to grapple with.

In a recent remarkable Spanish case decided by the European Court of Justice in Strasbourg (Roca Alvarez –v- Sesa Start Espana), the ECJ held that a Spanish law that permitted a mother to take time off provided she was an employee was discriminatory as a father could only take time off if both he and the mother were employees. The Spanish law permitted employees to take time off to feed a baby (to promote breast feeding) but it was extended to bottle feeding. The European Court of Justice held that the different treatment of men and women could no longer be justified as a means of protecting new mothers or of reducing any inequality suffered by women in the workplace and was actually liable to perpetuate traditional gender roles by keeping the father's caring role subsidiary to that of the mothers.

In another European case, this time a European Court of Human Rights decision (Konstantin Markin –v- Russia), the Russian Government was found to have acted unlawfully because the Russian Military would only allow women to take parental leave. Whilst only a mother can take maternity leave (to enable her to recover from the fatigue of childbirth and to breastfeed), parental leave is intended for the purpose of caring for the child in respect of which the mother and father are similarly placed.

The issues that now need to be considered by employers include whether enhanced maternity benefits should be extended to men on paternity leave; if employers provide a bonus for mothers returning to work early or returning to work at all following their additional maternity leave, they should consider whether they must apply the same benefit to men exercising additional paternity leave rights. Alternatively employers can consider removing the benefit from women altogether to avoid discrimination claims. Employers must ensure that they act proportionately in their treatment of women who are on leave as compared to men in the same position.

This extends to the consideration of redundancy situations in circumstances in which fathers are on additional paternity leave. Women who are on maternity leave whose posts are made redundant are afforded special protection and must be offered any "suitable available vacancy". Where the employer fails to do so there is a breach of Regulation 10, an automatic unfair dismissal and potential direct sex discrimination too. It seems likely that this special protection now extends to fathers (or other partner of an adopted parent) whose posts become redundant during additional paternity leave.

Age Discrimination

You are probably all wondering how I have managed so far not to mention age discrimination once.

In the last year or so, employment lawyers and HR advisers have been pre-occupied by the question of the abolition of the default retirement age. The transition rules were first of all drafted incorrectly and even now that they are finalised are overly complicated. The net effect of the compulsory retirement rules is that if you have not already given notice to compulsorily retire an employee at or over the age of 65, you are too late, but if you had the presence of mind to give notice on the 5 April 2011 those employees can be compulsorily retired on the 4 April 2012 unless they applied for a 6 month extension in which case they can be compulsorily retired on the 5 October 2012.

Age discrimination is a massive issue because of the ageing population. There are 960,000 workers over the age of 65 and by remarkable coincidence perhaps 700,000 young people unemployed. That is at least an interesting correlation.

Of course, going forward, employers can retire people because they reach a retirement age but if the lawfulness of such a compulsory retirement is challenged the employer has to justify it, i.e. demonstrate it is a proportionate means of achieving a legitimate aim. ACAS has issued guidance to help reach the decision safely but take it from me it is very poor guidance. I am not going to give advice now even in general terms about how to avoid age discrimination claims when effecting compulsory retirements. We have dealt with it many times at our seminars over the last year and will undoubtedly do so going forward. Indeed, it will be touched on this afternoon by Joanna and Ben in their workshop. Suffice it to say now that the default retirement age has gone dismissals will have to be justified in terms of incapability, some other substantial reason or redundancy. Retirement cases are likely to take the form of unfair dismissal and discrimination claims in the future and the focus will be very much on the individual employee's circumstances.

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Agency workers

Perhaps the most topical example of the long reach of European employment law, imposing what is regarded as a brake on British productivity, is the agency workers directive which comes into force in the UK in the form of the Agency Workers Regulations in October.

The rules had in fact been agreed between the unions and the CBI prior to the election of the Coalition Government. However, the general perception of employers and certainly the Coalition Government politicians is that they introduce a new level of red tape. Even though these regulations have been foreseeable since 2008, and in that sense employers have had plenty of time to prepare, the impression is that many employers are being taken by surprise. The regulations introduce a level of complexity that will be time-consuming for employers particularly in relation to the calculation of the 12 week qualifying period. The regulations will create different classes of agency workers with different levels of status making the calculation of pay and payroll complex. Paradoxically, the Regulations which are designed to protect workers and achieve equal treatment, might actually cause employers in the UK (who use agency workers more extensively more than in other European countries) to reduce their reliance on agency workers and introduce shift patterns compatible with more part-time working and flexible working.

Collective Bargaining/Workforce Agreements

In the last 12 months or so the Courts have assisted employers in defeating strike action including wildcat and balloted strike action in cases such as the cabin crew dispute (British Airways -v- Unite) and the recent NURMTW-v-Serco and ASLEF -v- London Midland Railway cases where the employers sought injunctions to derail strike plans on the basis of minor irregularities in the balloting and notification procedures. However the net effect of cases such as Serco and London Midland Railway (which were successfully appealed) is that employers will no longer be able to rely on minor irregularities to derail strike plans.

The standard has been lowered and it will be harder for employers to trip the unions up. It will, going forward, be significantly easier for trade unions to arrange a valid ballot. Although the right to strike is enshrined in Article 11 of the European Convention of Human Rights, there is still no right to strike in the UK per se but unions will remain immune from suite.

Although most employers in this forum today do not deal with recognised unions, the best way to prevent collective bargaining disputes and workplace disharmony will be to pre-empt union organisation and workforce disaffection by employers working with their employees through works councils (which have very much gone off the radar in recent years- how many of us remember that since April 2008 if asked to do so any employer with more than 50 employees can under the Information and Consultation of Employees Regulations 2004 be required to create works councils). Employers with large workforces will I expect increasingly put in place effective information and consultation

procedures to establish as much non-unionised consensus and agreement over business management as can be achieved.

Social Media and monitoring in the workplace

Dismissals and disciplinary issues

Another right enshrined in the European Convention of Human Rights (and the Human Rights Act 1998) is the right to privacy. Nowhere is the tension between work life and private life more obviously seen than in the area of employees' use of social media such as Facebook. That tension has always existed even in the days of traditional media before the advent of the internet, as you will recall was highlighted in the World Cup Football hooligan case (now 13 years ago) of Post Office -v- Liddiard and the UEFA Cup cases Doherty -v- Consignia PLC. In those cases the employees were found to have been dismissed unfairly because there was insufficient connection between their private activities and the employers' businesses.

Recent cases involving misconduct on various internet social media, for example, Gosden -v- Lifeline (offensive email from home computer to home computer which enters the employer's computer system); Pay -v- United Kingdom (photographs of sado masochistic activity involving a probation officer posted on the internet); Preece -v- JD Wetherspoon (pub manager posting rude and derogatory remarks about equally rude customers) all involved damage to the employer's reputation. In all these cases the employee's claims of unfair and unlawful dismissal were rejected.

Cases like these will become more common as the internet becomes even more entrenched in our lives and both employees and employers are likely to adopt ever more sophisticated arguments in pursuing and defending them.

Confidentiality and unfair competition issues

Another area in which social media increasingly impacts on the employment relationship is the question of the ownership of customer and client details. Employees increasingly, often with the encouragement of their employers, store their lists of contacts on sites such as LinkedIn. Arguably this amounts to the employer's confidential information being posted on line. If the contacts are made and the entries are created in the course of employment then the information belongs to the employer. Any use of it by the employee after the employment has ended (or unfaithful use of it during the employment) could be a breach of restrictive covenants. We will look at the management of these issues in one of our workshops this afternoon.

In fact as we speak two of our team are in the High Court acting for a PLC whose former employee provided a competitor with customer names and details.

Recruitment

The temptation for employers to effectively screen and vet applicants using on-line information is perhaps overwhelming. It would seem to be a sensible course to take. However there is considerable scope for discrimination claims by rejected applicants if the decision is based on the discovery of a personal characteristic e.g. a candidate's religious or philosophical belief which can now extend to such beliefs as the higher purpose of public sector broadcasting (Maistry -v- BBC) and opposition to fox hunting (Hashman -v- Milton Park).

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The Government's Intentions: Resolving Workplace Disputes

The Government's basic approach is that employment laws are a barrier to growth. It has concluded its consultation (on April 20th). Its proposals include increasing the qualifying period for unfair dismissal to 2 years; fining employers a sum of up to £5,000 on top of compensation awarded; early compulsory conciliation of disputes through ACAS; greater scope for use of strike out powers and deposits; an increase in the amount of costs that tribunals can award and an employers' charter. The likelihood is that many of these proposals will be implemented but it remains to be seen to what extent the Government will take up suggestions like allowing the use of 'offers to settle' with costs sanctions attached which would reduce the number of claims that are brought.

So far as the 'Bonfire of Employment Regulations' or Red Tape Challenge is concerned, in my view there will be very little deregulation and repeal of employment laws but as I mentioned earlier some areas such as socio economic and caste discrimination where the Government will not introduce new laws. It is possible particularly in view of a recent ECJ decision in the case of *Clece SA -v- Maria Socorro* which establishes that a mere change of service provider is not a transfer of an undertaking the Government might seek to remove that gold plating, which might make it easier for transferors and transferees to resist TUPE claims and proceed on the basis that TUPE does not apply to contracting out and contracting in exercises.

Conclusions

In 2011 we have reached a state in which employment laws have expanded and developed to an extent which must have been unimaginable in 1971 when the concept of unfair dismissal was first enacted. As one Judge recently commented even that simple concept, which is based on reasonableness and rationality "has become encrusted with case law". The sophistication and range of rights, duties, liabilities and obligations is incredible. Employers could perhaps tolerate new laws in times of growth but it is obvious that organisations like the CBI and IoD are lobbying hard for de-regulation and the Coalition Government is responding sympathetically if only in vague and aspirational terms. It will be extremely difficult for any UK government to destruct and dismantle the layers of EU law without some wider European political settlement. Employers must continue to build their businesses through effective HR management which must be based on good understanding of best law and practice.

David Ludlow

Partner and Head of Employment

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David Ludlow
Partner & Head
Employment



Joanna Lada Walicki
Partner
Employment

Panel Q&A

with David Ludlow
& Joanna Lada-Walicki



Andrew Peters
Solicitor
Employment

Breakout Session A

Discrimination Update
with Andrew Peters
& Michelle Tudor

Case Study: Long Term Sickness Absence

Mary works as a PA for Steven Richmond, the Managing Director of Richmond Office Supplies Limited. She has been employed for 20 years. She works 37 hours per week and her role involves, amongst other things, dealing with telephone enquiries, typing letters and documents, sending emails and filing.

18 months ago she started to suffer from fatigue and, after consulting her doctor, she was diagnosed with ME (Chronic Fatigue Syndrome). Her symptoms include persistent fatigue, muscle pain, joint pain and headaches.

Mary's symptoms have slowly worsened over time. At home, Mary can no longer clean her house and has had to contract a cleaner to help her out once a week. She cannot stand up for long periods of time and finds cooking, washing up and ironing difficult. She relies on friends and taxis to drive her around because she can no longer walk up the hill to the bus stop.

At work, Mary gets uncomfortable when she sits at her desk for long periods of time and cannot type long documents as quickly as she used to. She suffers from severe headaches when she has to spend a lot of time at her computer. She gets tired easily and Steven has noticed that her productivity significantly decreases during the last two hours of the day.

Mary has recently been off work for four months. She received full pay under the company's sick pay policy for the first three months and is now receiving statutory sick pay only. Steven has not contacted Mary during her sick leave as he does not want to bother her.

A few days ago Steven received a fit note from Mary's GP saying that Mary "may be fit to work taking note of the following advice:

- a phased return to work
- altered hours
- an adjustment to her duties"

Yesterday, Steven called Mary and asked her to attend a meeting to discuss the fit note. Mary told Steven that she would like to come back to work part time, working 50% of her hours. Steven does not like the idea of Mary working part time. He would prefer that she did not return to work at all so that he could employ some new into the full time role.

Questions

- Do you think Mary is disabled under the Equality Act 2010?
- Does Steven have grounds to dismiss Mary at the meeting?
- How would you advise Steven to handle the meeting with Mary?
- What issues should Steven think about when considering the fit note from Mary's GP and her request to work part time?
- What are the risks if the company does not consider a return to work on the basis suggested?
- Should the company seek to obtain any additional information?
- If Mary returns to work, what steps should the company take in order to manage her return?



David Ludlow
Partner & Head
Employment

Breakout Session B

Protecting your Business from Unfair Competition
with David Ludlow

Protecting Your Business
From Unfair Competition

David Ludlow
17 May 2011

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The Contract of Employment

- What is a Service Agreement?
- Duties and Fidelity Clause
 - Conflict of interest: *Ward Evans Financial Services Limited -v- Fox*
- Confidentiality provision
- Intellectual property provision
- Restrictions on activity during employment

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The Contract of Employment (2)

- Termination provisions
 - PILON
 - Liquidated Damages clause?
- Garden leave
- Returning property
- Post Termination Restrictions

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Breakout Session B

Protecting your Business from Unfair Competition

**The Contract of Employment:
Post Termination Restrictions**

- Non compete
- Non solicitation of customers
- Non solicitation of suppliers
- Non dealing with customers and suppliers
- Non poaching of staff

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**The Contract of Employment:
Post Termination Restrictions (2)**

- Non compete
 - Geographic or business activity
 - Reasonable duration
 - To protect confidential information
- Non solicitation of customers/ suppliers
 - personal dealings
 - Reasonable duration
- Non dealing
 - In house?
 - Reasonable duration
- Non poaching of staff
 - Which staff?
 - Reasonable duration

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Remedies

- "Interim" remedies - injunctions
- To enforce contractual restrictions
- To achieve delivery up of property
- To stop use of confidential information
- To stop use of database
- To inspect former employee's computers
- To inspect new employer's computers?

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Remedies (2)

- Speedy trial
- Final injunctions
- Damages
- An account of profits
- Costs

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Enforcement and efficacy of action

- Costs - very effective prevention
- Damages/ Account of profits - very effective prevention
- Contempt of court
- Good example/ precedent
- Counterclaims by former employee?

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Any Questions?

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Protecting your business from unfair competition

Case Study

Our client ABC Limited designs and manufactures equipment for the processing of materials and is a supplier to the optical disc industry.

The Company is wholly owned by its founder and sole shareholder Robert Remote who is the Chairman of the Board. Having established and grown the business some 20 years ago Robert has left the day-to-day running of ABC to the Managing Director Richard Sharp and 2 other senior executive directors, the Sales Director Charlie Wong who works from his home in Hong Kong (so as to operate in the Far Eastern and Pacific Basin markets) and Tom Spark who is the Technical Director.

When Robert founded the business he prepared relatively simple contracts of employment which Sharp, Wong and Spark all signed when they were appointed at various times over the last 10 or 15 years.

From the outset David Constant was appointed and served as ABC's Accounts Manager.

The contracts (which are attached) contain relatively simple provisions governing fidelity, confidentiality and post termination competition at clauses 3.2, 12 and 18.

There are also provisions governing termination, patents/inventions, and delivery up of property at clauses 9, 13, and 16.

A few years ago Richard who as MD has run the business well asked Robert if he could invest in the Company and become a shareholder. Robert politely declined. There was no further discussion.

Unbeknownst to Robert, in June 2010 Richard set up his own company EFG Limited and encouraged and persuaded Wong and Spark to join him. Using their collective knowledge they identified opportunities and products that would sell well in the markets with which they were familiar. Richard prepared a business plan for EFG and used ABC's resources including its database of customers and suppliers and his long serving PA Rebecca and junior sales people to develop the EFG business. In particular they identified so called Crystal Platform products as being the next generation and saw an opportunity.

At a Board meeting of ABC Limited in September 2010 Robert enquired about developments in the market and, in particular, whether there was scope to develop products in the area of "Crystal Platforms" but following discussion Robert was persuaded by his co-directors that it was not an area that ABC should invest in.

Quite quickly between September 2010 and April 2011 EFG Limited developed and started to secure orders. Richard, Charlie and Tom were able to carry on their work for ABC whilst developing EFG. Indeed ABC continued to perform reasonably well. In particular using ABC systems and labour they developed a Crystal Platform for which they secured orders in the UK, Europe and the Far East.

During this period September 2010 to April 2011 David Constant gradually realised what was taking place. He was increasingly asked to handle and process EFG transactions by Richard, Charlie and Tom. He was

approached by Rebecca who expressed her concerns about what she thought was secret activity. David and Rebecca decided to raise the issue with Robert who was surprised, worried and confused but took the view that fundamentally Richard was to blame for leading Charlie and Tom astray. He confronted all 3


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David qualified in 1989, having spent his early career in commercial practices in Holborn, the West End, and then 7 years as a solicitor at New Scotland Yard specialising in employment law. David joined the practice in 1997 and became a partner in 1999. He is a seasoned Employment Lawyer and Litigation specialist having conducted a wide range of disputes in Employment Tribunals, the County Court, the High Court, the Employment Appeal Tribunal and the Court of Appeal. A number of these have been reported, most recently in the areas of sex discrimination, the enforcement of restrictive covenants and shareholder disputes. David is an active member of the Employment Lawyers Association. He has provided training for fellow employment lawyers through the Employment Lawyers Association and the College of Law.


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Andrea qualified as a solicitor in October 1998 having completed her training with a Manchester firm. Andrea joined the practice in 1999 and became a partner in 2006. Andrea specialises in law advising clients in all areas of employment law and has conducted a wide range of Employment Tribunal claims. She is also a regular speaker at seminars and runs training initiatives for the practice's clients.


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Joanna is a very experienced employment law solicitor having qualified in 1986. She joined Barlow Robbins LLP after practising for a number of years with Richards Butler in London and Charles Russell in Guildford and advises in all areas of contentious and non-contentious employment law. She is a frequent speaker at employment seminars, has run training programmes and written articles on employment law.


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Michael-Jon qualified as a Solicitor in 2003 with Reed Smith (now Reed Smith Richards Butler). Since qualification and before joining the firm in February 2008, Michael-Jon worked for a practice in Croydon, advising on a wide variety of employment issues for a well-known Plc. He has had experience at all levels from the Employment Tribunal through to the Court of Appeal. Michael-Jon has been a regular advocate at the Employment Tribunals in Croydon and Central London taking on a range of cases from unfair dismissal to discrimination on grounds of religion. Michael-Jon has considerable experience negotiating high value Compromise Agreements and likes nothing better than to get a great deal for his clients. Michael-Jon is also a member of the Employment Lawyers Association.

Key Contacts

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Andrew joined Barlow Robbins in 2010 after several years working in both the Bristol and later the London office of a national law firm and more recently the Guildford office of a regional law firm. Andrew deals with all aspects of employment law, acting for both employees and employers. Andrew routinely advises on internal grievance and disciplinary hearings and negotiates compromise agreements and severance packages. He also regularly provides day-to-day HR support for businesses of all sizes and advises upon employment issues arising upon business re-organisations, acquisitions and disposals. Andrew has considerable experience of employment litigation, having represented clients in the Employment Tribunal and Employment Appeal Tribunal in all manner of claims.



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Susanna qualified in 2006 following a career in marketing and public relations. She was a prize winner at Guildford College of Law before joining the firm as a trainee in 2004. On qualification she joined the employment team where she is developing her skills in non-contentious work. She advises on the drafting of contracts of employment and service agreements, compromise agreements and directors' duties, and provides support advice to the corporate team.



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Michelle joined Barlow Robbins LLP in October 2007 after completing her training with a south coast firm. She advises on a range of contentious and non-contentious issues for both employers and employees including the drafting and reviewing of contracts of employment and staff handbook policies, directors' service agreements and the negotiating and drafting of compromise agreements. Michelle has been involved with a number of tribunal claims including unfair dismissal, sex discrimination and harassment and age discrimination. She also provides support to the corporate team. She has contributed to employment law seminars and workshops.



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Ben completed his legal training with Barlow Robbins having achieved distinction in his Law Society exams and following a previous successful career in recruitment with a well known international recruitment consultancy. He qualified in 2009 as an employment lawyer and now practises in all areas of contentious and non-contentious employment law. Ben regularly writes articles for publication in various online and local industry publications and enjoys contributing to the firm's employment law seminar and workshop programmes. He is also accustomed to appearing in the Employment Tribunal and is committed to seeking a just result for his clients.

