



## EMPLOYMENT LAW UPDATE – JULY 2009

### **FAILURE TO PAY TRIBUNAL AWARD CAN BE VICTIMISATION**

In the recent case of **Rank Nemo (DSM) Limited v Coulinho** the Court of Appeal held that an ex employee ( The Claimant ) can bring a victimisation claim under the Race Relations Act against a former employer after the termination of the employment relationship where there was a failure to pay an award of £72,500. The Claimant worked for Vision Information Systems Limited until March 2004 when he was made redundant. In July 2004 the undertaking in which he had been employed was transferred to Rank Nemo Limited. The Claimant issued claims for automatically unfair dismissal and race discrimination in the Employment Tribunal and was successful.

Liability for the award of £72,000 passed to Rank Nemo following the TUPE transfer. The award was not honoured even after the Claimant obtained an order in the County Court in December 2006.

The issue that the Court of Appeal had to deal with was whether the Claimant was merely enforcing a judgment debt or whether the failure to pay the award was an act of victimisation. The interesting part of this case is that the employment's relationship had terminated five years previously and the question arose as to what connection the claim had with his past employment relationship.

The Court held that Rank Nemo's unexplained conduct in not complying with the Judgment to pay the award was unlawful because it was discriminatory in an employment context. It was found that the Claimant's claim was not based solely on Rank Nemo Limited's failure to pay the Judgment debt this was only one ingredient of the right of action invoked by him. The Claimant pointed to other creditors who had not brought race discrimination claims having been paid when he had not.

Employers need to be careful that they do not inherit liability for discrimination claims/awards following a TUPE transfer. When a business is transferred the employer should ensure that indemnities are contained within sale and purchase agreements with regard to employment claims that are current at the time of transfer or that may arise out of pre transfer employment.

	<p><b><u>REINSTATEMENT</u></b></p>
	<p>It remains open to an employee who is suing his/her employer to ask for reinstatement as a remedy. Put simply they can ask for their job back. In the case of <b><u>Central and Northwest London NHS Trust v Abimbola</u></b> the Employment Appeal Tribunal held that the existence of mutual trust and confidence between the employer and ex employee was a relevant factor when addressing the question of whether reinstatement could be ordered.</p> <p><b>Section 116 of the Employment Rights Act 1996</b> requires the Tribunal to have regard to:-</p> <ol style="list-style-type: none"> <li>1. Whether the Claimant wishes to be reinstated.</li> <li>2. Whether it is practical for the employer to comply with an order for reinstatement.</li> <li>3. Whether the Claimant caused or contributed towards their dismissal</li> <li>4. Whether it would be just to order reinstatement.</li> </ol> <p>The employer argued that the Employment Tribunal had failed to take into account the relevant factors as above. Also the finding that the Claimant was evasive and on one occasion dishonest in giving evidence at the remedies hearing, and the existence of an earlier unproven allegation of misconduct prior to dismissal.</p> <p>The EAT took these into account and held that the employer could not be expected to trust the Claimant and the reinstatement order was set aside.</p>
	<p><b><u>SETTLEMENT NEGOTIATIONS</u></b></p>
	<p>In the EAT case of <b><u>Eagles v Rugged Systems Limited</u></b> it was held that the time limit for issuing an Employment Tribunal claim could be extended as the claimant reasonably believed that there was some process dealing with their dismissal that was ongoing.</p> <p>In this particular case there were ongoing negotiations and legal advice was being sought in relation to a compromise agreement. It was important that the complainant believed that there was some ongoing process and that there were reasonable grounds for such a belief. It should be noted that the automatic extension of time for presenting a claim was extended in this case under regulations 15 (2) of the Employment Act 2002 Dispute Resolution Regulations 2004 and that this has now been repealed.</p>
	<p><b><u>HOLIDAY PAY</u></b></p>
	<p>In the House of Lords case of <b><u>Stringer v HMRC</u></b> it was held that a claim for unpaid holiday pay under regulations 13 and 16 of the Working Time Regulations or a payment on the termination of employment under Regulation 14 can be pursued as an unauthorised deduction</p>

	<p>claim as well as under the Working Time Regulations 1998. The practical effect of this is that the worker can take advantage of the more generous time limits which apply to an unlawful deduction claim. Such claims can be brought within three months of the last in a series of deductions and the claim can go back more than 3 months if the deduction forms part of a series of underpayments.</p>
	<p><b><u>TUPE</u></b></p>
	<p>The correct approach for establishing whether or not a service provision change falls within TUPE 2006 was considered in the EAT case of <b><u>Metropolitan Resources v Martin Cambridge</u></b>. The EAT held that a commonsense and pragmatic approach is required. The fundamental question for the Tribunal is whether the activities carried out by the alleged transferee are fundamentally essentially the same as those carried out by the alleged transferor. There is no need for the Tribunal to consider a formal list of factors before it can make a decision.</p> <p>According to the EAT in this case where one contractor ceases and another commences service provision with differences in time, manner and/or place there still can be a service provision change under TUPE.</p> <p>Here there was a change of location in relation to the service provided and also the length of time that the service was provided for. The EAT held that it did not matter that the length of time that asylum seekers were accommodated had increased and that the location of the activity had changed. It was held that essentially the same service was being provided and that there had been a service provision change under TUPE .</p>
	<p><b><u>EMPLOYMENT STATUS</u></b></p>
	<p>In the case of <b><u>Little v BMI Chilton Hospital</u></b> the EAT held that the fact the employer could and did send home workers half way through a rostered shift without pay when their services were not required indicated that there was no mutuality of obligation even though there had been a succession of individual assignments each amounting to a contract of service. The Employment Tribunal found that this case was distinguishable from previous cases as here there was no more than a contract for freelance services.</p>
	<p><b><u>EQUAL PAY</u></b></p>
	<p>The EAT case of <b><u>South Tyneside v McElroy</u></b> has now set down that the male colleagues of female equal paid Claimants may bring contingent claims. Simply this means claims which are reliant upon their female colleagues succeeding in their claims.</p>

	<p>Here it was held that it was not premature for contingent male claims to be issued prior to the conclusion of their female colleagues claims. Further, the male Claimants are entitled to claim arrears of pay for the full period in respect of which the female comparators have been award arrears. Given that there are approximately 12,000 contingent male claims currently stayed, the Local Authorities involved in this litigation have been granted permission to appeal to the Court of Appeal. Watch these bulletins for further developments.</p>
<b><u>REDUNDANCY PAY LIMIT TO RISE</u></b>	
	<p>The Government has confirmed that on 1<sup>st</sup> October 2009 the weekly gross wage limit used to calculate statutory redundancy pay will rise from £350 to £380. This limit will not rise again until February 2011.</p>
<b><u>CONSTRUCTIVE DISMISSAL</u></b>	
	<p>Where an employee is claiming constructive unfair dismissal but some of their complaints have been the subject of a grievance but others have not, it has been held in the case of <b><u>Parsons v Burworth Estates</u></b> that there was no reason why an Employment Tribunal could not consider the claim on a severed basis. In such a case a Claimant will still need to establish that the breaches upon which he is entitled to rely are those in response to which he resigned. This case will be of help to representatives of employees who previously faced strike out applications following the case of <b><u>Cyprus Airways v Lambro</u></b> where it was held that there was no judicial basis for a severed approach by the Tribunal. It is worth noting that since 6<sup>th</sup> April 2009, with the removal of the requirement that a grievance be raised prior to the issuing of constructive dismissal claim this decision may be of limited value going forward .</p>

If you require further information in relation to any of the above case developments or any employment matter please contact Marlene Hession at [\*\*marlene.hession@fdl-law.co.uk\*\*](mailto:marlene.hession@fdl-law.co.uk)