In this issue we cover recent EAT decisions relating to indirect discrimination following a flexible working request (Hacking & Paterson & anor v Wilson) and religion and belief discrimination (Power v Greater Manchester Police Authority); as well as Court of Appeal decisions on the jurisdiction of employment tribunals over foreign employers (Pervez v Macquarie Bank Limited (London Branch) & anor) and the treatment of compensatory awards following a technical unfair dismissal finding (Arhin v Enfield Primary Care Trust). Further topics are considered in the In Brief section.

In Hacking & Paterson & anor v Wilson the EAT provided useful guidance with regard to flexible working requests that should be considered by all employers.

Mrs Wilson was one of seven women and nine men employed full-time as a property manager. Whilst on maternity leave, she requested flexible working on her return to accommodate her childcare arrangements. The company refused her request on the basis of a policy that its property managers were not permitted flexible work schedules.

Mrs Wilson brought a claim for indirect discrimination. She argued that the appropriate “pool” of persons for comparison with her was all company property managers. The rule refusing all flexible working requests for property managers indirectly discriminated against women in this pool, because more women than men in this pool had asked to work flexibly. The company argued that the appropriate pool should be limited to those property managers who wished to work flexibly. Applying the rule to this pool, there was no indirect discrimination because 100% of men and 100% of women in this pool were refused flexible work requests.

The EAT found that the company had selected the correct pool. However, applying the rule to this pool did not necessarily mean that there was no indirect discrimination. The personal circumstances of those individuals in the pool must also be considered. If, for example, the women in the pool who were denied flexible work schedules were required to resign and the men who were denied flexible schedules were not, the women may have been “particularly disadvantaged” by application of the rule. Mrs. Wilson’s claim was therefore submitted to the Tribunal for final determination.

This case demonstrates that an employer will not defeat a claim for indirect discrimination merely because its policy or rule applies equally to all employees. The EAT’s opinion emphasises the importance of a closer analysis by employers of the impact of their policies on men and women, especially with regard to the application of potentially contentious rules like flexible working schemes.

In Power v Greater Manchester Police Authority, the EAT expanded employee protection against religious belief discrimination to include beliefs in spiritualism. It also clarified the distinction between religious discrimination and religious proselytizing in the workplace.
Mr Power successfully applied for a post with the police authority as a special constabulary trainer. Unbeknown to the police authority at the time of his interview, he had previously volunteered his services at a police training establishment where he had handed out various literature concerning spiritualism and psychics. This was said to have been disruptive and unhelpful and came to the attention of his present employer.

Mr Power was dismissed only a short period into his employment with the police for handing out literature concerning spiritualism and psychics at a police training establishment. It was deemed inappropriate to bring in literature to police premises which did not relate to police business.

The EAT found that spiritualism is a category of religious belief protected by law. However, it drew a distinction between adverse treatment of an employee because of his religion (which is unlawful), and adverse treatment of an employee for “improperly foisting” his religion on others in the workplace (which is not illegal). Because Mr Power was dismissed for unacceptable conduct in distributing the material at work, and not for his beliefs as a psychic and spiritualist, the EAT found no unlawful discrimination.

This case demonstrates the important distinction between treatment based on inappropriate conduct and treatment based on the belief itself. Employers should take particular care in this area to identify the specific inappropriate conduct of the employee, and to apply rules of conduct consistently and uniformly.

In Pervez v Macquarie Bank Limited (London Branch & anor) the EAT handed down an important judgment on the jurisdiction of UK employment tribunals to determine issues of liability for foreign companies seconding staff to the UK.

Mr Pervez was a bond trader working for a company incorporated in Hong Kong. He was seconded to the UK branch of an associated bank. His secondment was for approximately one year and he reported to the directors of the associated bank in the UK. He was remunerated by the UK bank for the duration of his secondment, although his contract of employment remained with the Hong Kong bank.

After just under a year he was told that his secondment was to be terminated, and as there was no work in Hong Kong he would be let go. Mr Pervez brought proceedings against his Hong Kong employer in a UK employment tribunal for unfair dismissal and race discrimination.

On the issue of jurisdiction the Tribunal had to determine whether the Hong Kong bank "carried on business in the UK". It was accepted that the Hong Kong employer neither maintained a place of business nor performed transactions in the UK. The associated bank to which Mr Pervez was seconded did not act as an overseas branch or office of the Hong Kong employer. Nevertheless, the EAT found that the employer did carry on business in the UK for the purpose of jurisdiction and that accordingly the UK Tribunal could hear the claim.

This decision should be carefully considered by all foreign companies looking to second employees to associated companies in the UK. If the secondee is based in the UK for the duration of his secondment and the actions he complains of occur during the course of his work in the UK, then the UK Tribunal is likely to have jurisdiction to hear a claim against the foreign employer itself.

Arhin v Enfield Primary Care Trust is a helpful Court of Appeal decision for employers seeking to rely on a Polkey argument to avoid compensatory awards for technical violations.

Dr Arhin was joint assistant director of the Primary Care Trust together with a Mr Stewart. In an effort to reduce staff costs, the Trust dismissed Dr Arhin by reason of redundancy and retained Mr Stewart. The Tribunal found that Dr Arhin had been unfairly dismissed on the basis that the Trust had failed to put Dr Arhin and Mr Stewart into a comparative pool before selecting one of them for dismissal. However it awarded no damages, on the ground that the same result would have been obtained if the appropriate procedures had been followed.

The Court of Appeal agreed, finding it certain that if a competitive selection exercise had been undertaken, Mr Stewart would have been selected for retention over Dr Arhin. Given that no alternative post existed for Mr Arhin a 100%
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deduction in the compensatory award was appropriate.

Cases of this sort will always be fact sensitive as to whether the Polkey argument succeeds. In handing down judgment in this case the court emphasised that this does not obviate the employer’s duty to carry out redundancy exercises fairly. However, when employers are looking at a likely technical unfair dismissal finding, this case provides helpful assistance in seeking to reduce or eliminate the consequential compensatory award.

In Brief

In Roberts v Acumed Ltd, the EAT considered whether an employee was unfairly dismissed by reason of his employer’s failure to comply with the statutory dismissal procedures. This case demonstrates that whilst these procedures are now less prescriptive than they were, following the implementation of the Employment Act 2008, it is still important that employers consider them when managing a dismissal procedure.

Mr Roberts was one of five sales managers. He was paid commission based on total sales whereas other sales managers were paid commission based on annual increase in sales. This led to Mr Roberts earning substantially more than the other managers. Mr Roberts did not agree to the company’s proposal to vary his contract so that he was paid on the same basis as his colleagues. After raising a grievance which was not upheld, the employer wrote to Mr Roberts with proposed new contract terms and a deadline date for acceptance, by which time the existing contract of employment was to terminate.

The EAT found that in order to comply with the statutory dismissal procedure a dismissal meeting had to take place before action to dismiss was taken. The employer had not complied with this requirement because the decision to dismiss was taken immediately after the grievance was dismissed without a prior dismissal meeting.

In Bleiman v Ezekiel, the EAT gave guidance on the practice of reading witness statements aloud in tribunals. The judge found that it was not a requirement of fairness that the statement of every witness be read aloud, in full, or indeed at all. Rather, and in summary he stated that:

- Very often, reading witness statements aloud "achieves nothing of value" and "wastes the time of the Tribunal and the parties";
- Sometimes, it might be helpful to read a particular statement – or section of a statement – aloud if it requires further elucidation. Examples are technical passages in statements, or statements drafted by unrepresented litigants which require clarifying;
- If both parties are represented, the lawyers should normally be able to agree whether to take statements as read – albeit it ultimately remains a decision for the tribunal.

If this EAT guidance is adopted in practice, there are likely to be savings for parties both in terms of the length of hearings, and consequently in the costs involved as well.