Newsletter October 2006

Editorial

Advice, information and representation standards

For some time SERN has been interested in establishing standards for employment rights advice, information and representation. We have studied accreditation systems for both organisations and individuals. It now seems to us that the standards that have been developed for Housing Advice workers and their organisations are, in principle, applicable to employment rights workers and their organisations.

SERN is in the process of applying to the Big Lottery Fund for a three year grant. Using the Housing Advice Standards as a model the first year (2007/2008) would be used to draft the written standards for the field of employment rights. There would be an extensive consultation process that would include our members and any other organisation that regarded itself as a stakeholder. We would like to develop standards that are acceptable to all concerned including the Scottish Legal Aid Board and the Scottish Executive.

The remaining two years of funding would be used to encourage our members and others to use the standards for accreditation of- both agency and workers/ volunteers.

The Legal Profession and Legal Aid Bill

Earlier in the year we wrote to our members asking them to write to MSPs calling for an amendment to the Bill. The amendment would allow for the Scottish Legal Aid Board (SLAB) to make strategic grants for the employment of solicitors and paralegals.

We wish to thank all those members who wrote to MSPs and for copying to us their replies.

SERN has now been informed that the Legal Aid provisions of the Bill will be considered by a Parliamentary Committee which will meet on 31st October 2006. All the stages of the Bill will be completed this year and it will become law in 2007.

It seems that there is widespread support for the amendment that we wrote to you about. An appropriate amendment will be tabled at the October meeting and should be incorporated into the Bill. However, there is still a month for further lobbying.

There is still some debate on how the amendment will be implemented if adopted. In other words what resources will be available to SLAB to use as strategic funding.

Des Loughney, Secretary.

Amending Claim Forms to add newly accrued claims

The EAT has held that it is permissible to amend a Claim Form, so as to include a claim which did not exist at the time the Claim Form was originally presented.

To put it more technically, an Employment Tribunal has jurisdiction to exercise its discretion to allow a claim that is presented prematurely to be amended so as to permit a claim to be included that could not have been included when the claim form was originally presented, because the claim had accrued at a later date. A claim may be presented pursuant to section 111(2) of the Employment Rights Act 1996 by way of amendment to an existing claim form as well as by the presentation of a claim form. The discretion to allow such an amendment must be exercised by the ET in accordance with the well-known principle set out in *Selkent Bus Company v Moore*.

This is an important procedural decision - previously it was standard practice for an employee to have to issue a second Claim Form and apply for the two cases to be heard together.

The EAT's reasoning is at paragraphs 61-63, and is very much a (sensible) policy argument.

The case is also authority for what might seem the uncontroversial proposition that a successful appeal against dismissal, taking place after a fixed term contract would otherwise have expired, does not have the effect

of extending the employee's employment beyond the agreed date of expiry of the fixed term contract.

The reference for the case is UKEAT/0140/06.

Deposits in the Employment Tribunal

As most employment advisers will know, one of the powers of the Employment Tribunal (ET) at a Pre-hearing Review is to require a party (usually the claimant) to pay a deposit of up to £500 in order to be able to proceed with their claim or defence. The issue that could arise is whether this is a breach of **Article 6 of the European Convention of Human Rights** on the basis that it could deny someone access to justice if they cannot afford to pay this deposit.

There does not appear to be any decision in the employment field on this point but it has been considered in the Sheriff Court. In the case of **Wm. Dow Potatoes v William Dow** [2001] SLT (Sh. Ct.) 37, the sheriff was considering an application by the pursuer to order the defender to pay an amount of money into the court in order to be able to proceed with his defence and counterclaim. The basis for the order was that they had a poor case and, as they seem unlikely to be able to pay the other party's costs should they lose their claim, the court should require them to pay this money up front before proceeding with case, incurring more costs for the other party. It is, therefore, very similar to the deposit in ET proceedings.

The defender argued that his **Article 6** rights would be breached by such an order but the sheriff held that a requirement to pay such a sum, in itself, did not necessarily breach a party's human rights in this regard. Such an order does act as a restriction of the right of access to justice and the court must be sure that such a restriction does not impair the essence of that right. There may be a legitimate aim in imposing such an order and it could be a reasonable and proportionate means of achieving that aim.

In effect, the court needs to consider whether there is a good reason for making an order of this nature (for example, because the pursuer has poor prospects of success and may be unable to pay the costs of the other side in the event that they lose) and then whether it is reasonable and appropriate to use such an

order in these circumstances (which would include taking account of the amount to order, ability to pay etc).

Applying this to a requirement to pay a deposit in the ET, we can see that such a requirement will not breach **Article 6** so long as the ET has a good reason for imposing it, have considered whether requiring a deposit is a reasonable and appropriate means of satisfying this reason and take account of a party's ability to pay (which they are specifically instructed to do under the ET rules). Also, given that the maximum amount is limited to £500 in the ET while the sheriff in the **Dow** case was happy to order the defender (who was bankrupt) to pay the sum of £5000, I doubt whether the ET rule would fall foul of the human rights legislation.

Statutory Grievance Procedures & claims against other employees

The equality legislation allows claimants to not only bring claims in the Employment Tribunal (ET) against their employer but also, in certain circumstances, against other employees who have aided their employer in discriminating against them. For example, it is very common in harassment cases for a claimant to name both their employer and the harasser as respondents in a claim to the ET.

The method by which the legislation allows such claim works as follows. An employer is liable for the discriminatory acts of their employees carried out in the course of their employment, whether or not the employer knew or approved of them. The employer can only escape from this liability if they can show that they took all steps as were reasonably practicable to prevent their employees from carrying out such acts. The legislation goes on to state that any employee whose acts the employer is liable for (or would have been liable for had they not established the reasonable steps defence) is deemed to have aided the employer in this discrimination and is also liable for it.

There is often good legal reasons for bringing a claim against an employer and a fellow employee for unlawful discrimination; an award can be made against the employee even where the employer escapes such liability by means of the reasonable steps defence. A claimant could well find that they win a pyrrhic victory where they have proved they have been harassed by another employee but no-one is held liable for this because the employer proves the reasonable steps defence and the harasser has not been named in the claim.

The question then arises of how do the statutory grievance procedures (SGP) apply to such claims and, most importantly, does the automatic extension of the time limit apply?

The Scottish Employment Appeal Tribunal (EAT) has looked at this in the case of ***Martins v Castlehill Housing Association & ors*** (EATS/0022-23/06). Although this claim involved race and disability discrimination, the provisions in the race and disability legislation are in identical terms to the all the other equality acts.

There appears to have been no issue that the SGP applied to the claim brought against the employer and so, once the claimant lodged a grievance about the alleged discrimination with her employer, the time limit for bringing this claim to the ET was automatically extended.

However, the EAT decided that the SGP did not apply to the claim against the employee. They held that the claim against the employer and the claim against the employee have to be regarded as separate claims and it is then a question of whether the SGP applies to the claim against the employee as distinct

from the application of the procedures to the claim against the employer.

The EAT went on to decide that the SGP did not apply to the claim against the employee; they pointed out that the relevant legislation clearly refers to "employer" having to take steps as part of the SGP and that it was inconceivable that employees were expected to take similar steps (eg convene grievance hearings or hold an appeal). Further, they pointed out that the SGP applied as a matter of contract and that there was no contract between employees.

In these circumstances, the SGP did not apply, there was no automatic extension of time limits and the claim against the employee was out of time. It was remitted to the ET to consider whether it was just and equitable to hear the claim out of time.

The implications of this decision for claimants and their advisers are potentially horrendous where the SGP has not been completed by the time the normal time limit expires. It leaves them with some very difficult decisions in how to proceed with a discrimination claim that they wish to pursue against their employer and another employee. There appears to be only three options for such a claimant who wishes to proceed with a claim of this nature, all of which have potentially adverse consequences.

First, they can lodge the claim against the employee on the expiry of the normal three month time limit and then lodge against the employer once the SGP is completed at some later date. The difficulty with this is that you, on the face of the legislation, it appears that you cannot bring a claim against an employee on the basis of aiding discrimination without bringing the claim against the employer as well. If you did try to bring this as a stand-alone claim then the ET may well not accept it or the respondent may ask for it to be struck out on the basis that it is not competent. There may well need to be a PHR and the claimant could end up having to lodge their claim again at a later date and then face time limit arguments and other procedural difficulties.

The second option is to lodge both claims within the three month time limit. This is always assuming that the claimant can do so, having lodged a written grievance by this point and waited 28 days. A claimant who has not done so will find that they cannot lodge their claims within the normal time limit and, again, may face time limit difficulties in relation to the claim against the employee. Even assuming that the claimant can lodge their claim, an employee who lodges their claim before the completion of the SGP faces having any compensation reduced by at least 10% and as much as 50%. Further, this would appear to defeat the purpose of the SGP as the parties are being denied the opportunity to resolve the complaint without going to ET by the application of the very rules which are supposed to compel such resolution.

The final option is to wait until the SGP is completed and then lodge all claims at that time. In these circumstances, the claim against the employee would be out of time and the claimant would be left to argue that it is just and equitable to hear this claim out of time. While it would be very harsh decision for the ET to find that it was not just and equitable to hear such a claim out of time where there are so many complicated legal and procedural issues, the fact remains that there is no guarantee of this and most advisers would not want to expose their clients to this situation.

It would appear that there is no right answer for the claimant; no matter what option they choose there are adverse consequences for them and they will be forced into arguing

procedural and jurisdictional
points. Arguably the lesser of these evils is the second option as the claimant only then faces a reduction in compensation rather than the ET not hearing their claim against the employee because it is out of time (which could, as described above, mean that no-one is held liable for any discrimination). This is, of course, assuming that the claimant is in a position to lodge their claim on the expiry of the three month time limit.

It appears that this decision may be appealed further and hopefully the problems caused by this case can be resolved.

It is arguable that the EAT's decision is flawed, specifically in relation to regarding the claim against the employee as separate to the claim against the employer. As outlined, a claim against an employee under the equality legislation is not a stand-alone claim and must be brought along with a claim against the employer. It is difficult see how the claims against the employer and employee can be regarded as separate in these circumstances, when one is contingent on the other; the employee is only liable for aiding discrimination if there is an act of discrimination for which the employer is liable (or would have liable if they had not established the reasonable steps defence).

The EAT reached their decision on the basis that you can have a situation where only the claim against the employee succeeds because the employer has the reasonable steps defence. With all due respect to the EAT, this is putting the cart before the horse. You cannot get to that situation without there first being a potential liability against the employer; there is no stand-alone claim against the employee and both claims have to be regarded as part of a whole with the SGP applying to both claims, in particular that the time limits for bringing these claims to the ET are extended on the submission of a written grievance to the employer.

If the EAT is right about the claims being separate then the rest of their decision is probably correct; the SGP legislation does only apparently apply to the employer/ employee relationship and is not drafted in such a way as to apply to any employee/ employee relationship. There are some flaws in the EAT's reasoning on this point, for example, the EAT relies on the provision in the **Employment Act 2002** that makes the SGP part of the contract of employment in arguing that the SGP is a contractual matter between employer and employee (as opposed to between employees) but this provision has not been brought into force as yet. However, despite such possible errors of law, it is likely that the EAT's conclusion is correct.

The statutory dispute resolution procedures are due to be reviewed by the DTI in December 2006 and SERN will raise issues such as this as part of the review. If members have any other issues in relation to these procedures then please feed these in to us and we will raise them on members' behalf.

Employment Tribunal Service Annual Report

The Employment Tribunal Service annual report for 2005-06 is now available and the statistics make for some interesting reading.

The period 2005-06 is the first full year that the statutory dispute resolution procedures have applied to ET claims. It is therefore ironic that, given that these procedures are intended to resolve disputes within the workplace and reduce the number of ET claims, the number of claims in the whole of the UK have increased by almost 50% on the previous years. For example, the number of equal pay claims has doubled (and I think we

would expect that to increase further) and nearly every other type of claim has increased. The most spectacular increase has been in Working Time Directive claims which have increased by a factor of 10 from just over 3000 to over 35,000 (although this increase is probably explained by mass action claims brought in relation to the Gate Gourmet dispute). Only a very few claims have seen a decrease in numbers.

Of more concern is the fact that over 12,000 applications were initially rejected by the Tribunal and over 7000 of there were either not re-submitted or were re-submitted and again rejected. This is a particularly worrying statistic as many SERN members have reported cases where claims have been wrongly rejected by the Tribunal and there have been cases reported at the EAT where decisions not to accept claims were overturned, for example, in one case the ET had rejected a claim because they could not scan the claim form into their computer. We have no way of knowing how many of those 7000 claimants may well have been denied access to justice simply because they had not completed a claim form properly or due to an error by the ET.

A copy of the report can be downloaded from the Employment Tribunal Service website www.employmenttribunals.gov.uk .

Peter O'Donnell
Convenor, SERN

RRA Monthly Case Update:

5th September 2006

Proving Race Discrimination

Aziz v Crown Prosecution Service [2006] EWCA Civ 1136

Facts

Ms Aziz, a solicitor, employed by the Crown Prosecution Service ("CPS"), was suspended and had disciplinary proceedings commenced against her, after a complaint was received about remarks she was alleged to have made, to staff at Bradford County Court, 2 weeks after the World Trade Centre attacks in September 2001.

Ms Aziz made complaints of race and sex discrimination against the CPS. The employment tribunal which heard her case, decided that the CPS had failed to carry out adequate investigations following the complaint and that this was because assumptions had been made which would not have been made about a white solicitor employed by the CPS. The CPS denied that there had been any different treatment on the grounds of race and failed to offer an adequate explanation for what had happened. An employment tribunal upheld the complaint of race discrimination after having found that the CPS had been influenced by racial considerations in breaching its own disciplinary procedure. Although the judgment was successfully appealed to the EAT the Court of Appeal restored the employment tribunal's findings.

Comment

This judgment will be worth bearing in mind when considering the burden of proof in cases involving internal policies and procedures. It highlights how a breach of disciplinary procedures (or by extension other workplace policies and procedures) could be evidence of race discrimination. In dealing with such claims it will be important to focus on three issues:

Has there been a breach of the relevant policy and procedure?
What explanation does the employer have for breaching the relevant policy and procedure? Is this adequate and credible? Is it

tainted in any way by considerations related to race?
If so is there a real or hypothetical comparator to show that there would not have been such a breach in relation to a person of a different race?

Laing v Manchester City Council (EAT unreported) 28/07/06

Facts

The claimant made a claim to the employment tribunal alleging that he had been bullied and this was race discrimination and that he had been victimised by his employers when they dismissed him shortly after he had raised his complaint of race discrimination, with them.

The employment tribunal dismissed both claims and the claimant appealed. One of the grounds of appeal focused on the material the employment tribunal is entitled to consider when considering whether a prima facie case of race discrimination has been made out, as at Stage 1 of the 2 stage process set out in *Igen v Wong*, requiring the employment tribunal to consider stage 2 of that test, namely whether an adequate explanation has been put forward by the respondents.

The argument advanced at the appeal was that in this case the employment tribunal had wrongly taken into account at stage 1 that the employee who had managed the claimant treated all employees in an abrupt manner. Taking this into account was the key factor in the employment tribunal finding that there was no prima facie case of race discrimination, or to put it another way, the alleged bullying was not on racial grounds. The EAT rejected this argument and stated that all evidence should be taken into account by the employment tribunal when considering stage 1/whether there is a prima facie case of race discrimination. The appeal was rejected

Comment

This is another useful case to remember when considering the burden of proof. It contains clear and helpful guidance on how the burden of proof should be applied. There is a simple explanation of stage 1 being about whether it could be said on the face of the evidence there was less favourable treatment on racial grounds and stage 2 being about whether there is an adequate (non-discriminatory) explanation for the treatment. There is also guidance on when it will be acceptable for employment tribunals not to go through the two stage test set out in *Igen v Wong*. The EAT stated that in some cases it will be appropriate to focus on stage 2 and consider the whether there is an adequate (non-discriminatory) explanation for what has occurred. Those acting for claimants however will require to continue to prepare cases on the basis that they will want to be able to go through the two stage process in *Igen v Wong.*

A full copy of the judgment can be viewed on the EAT web site at:
http://www.employmentappeals.gov.uk/.

Hundal v Initial Security Ltd & Another (EAT unreported) 04/08/06

Facts

The claimant made a claim of unlawful race discrimination to an employment tribunal after he was removed from an evening shift because of alleged difficulties he had in communicating in English. The appeal focused on the manner in which the employment tribunal had dealt with the alleged failure of the employers to warn the claimant about the alleged communication difficulties and give him the opportunity to improve.

The argument advanced at the appeal was that the employment tribunal had failed to consider whether the employers had shown an adequate (non-discriminatory) reason for the failure to give warnings and an opportunity to improve.

The appeal was dismissed and guidance was given to employment tribunals that it might assist them to engage in the exercise of identifying in a particular case, the specific qualifying facts for stage 1, either by agreement or submission at the outset or at some other stage by some other means, depending on the circumstances of the particular case.

Comment

Another useful judgment to be aware of, particularly as it may form the basis of a request to prepare submissions or agree what are the relevant primary facts that would be required to satisfy stage 1 of the *Igen v Wong* test. This means that these issues require to be considered at the earliest possible stage as the case progresses.

A full copy of the judgment can be viewed on the EAT web site at:
http://www.employmentappeals.gov.uk/.

Statutory Grievance Procedures

Bisset v Martins & Castlehill (EAT unreported) 18/08/06

Facts

The claimant in this case had made discrimination claim to an employment tribunal claiming she had been unlawfully discriminated against by her employer and by a fellow employee. The employment tribunal claim was made more than 3 months but less than 6 months after the date of the alleged discrimination. The EAT judgment confirmed that the claim against the fellow employee was, on the face of it, time barred.

Comment

This unreported judgment, decided by the EAT sitting in Scotland last month, highlights the fact that the statutory grievance procedures and the extension in time limits to 6 months less one day only apply to claims made against the employer.

So if, as in this case, there is a discrimination claim to be made against a fellow employee, the claim against the other employee must be made by making an employment tribunal claim, within 3 months less one day of the date of the incident complained of. If it is not made within that timescale, it will be time-barred, unless it is possible to persuade the tribunal to allow the claim to proceed late (under the just and equitable rules).

A full copy of the judgment can be viewed on the EAT web site at:
http://www.employmentappeals.gov.uk/.

Commission for Racial Equality.