

Employment Briefing

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Dismissal for refusing pay cut

The Employment Appeals Tribunal (EAT) has decided in *Garside & Laycock v Booth*, that the question whether a dismissal is fair for "some other substantial reason", where the dismissal is for failure to accept wage-cutting proposals, is whether it was reasonable for the employer to dismiss, rather than asking whether it was reasonable for the employee to accept the lesser terms offered to him.

The employer decided that, in order to avoid redundancies, it needed to cut its workforce's salary by 5%. Mr Booth refused to agree to a variation of his contractual terms relating to pay, and was dismissed for that refusal from a job he had held for the previous seven years. Out of 77 employees he was the only one, by the time of dismissal, who held out against the change. He brought a claim of unfair dismissal, which was upheld by an employment tribunal on the basis that it was reasonable for him to seek to maintain his terms and conditions. The employer appealed the decision.

The EAT held that the tribunal had erred in two important respects. Firstly, it had wrongly considered the reasonableness of the employee's decision to reject



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the pay cut, rather than whether the employer was reasonable to have dismissed B for not accepting the reduction. Secondly, the tribunal had completely misunderstood the EAT's earlier decision in *Catamaran Cruisers Ltd v Williams and ors*. That case had rejected, not supported, the argument that whether a dismissal for refusing a pay cut is fair will depend on whether the employer was in a situation so desperate that the only way of saving the business was to propose stringent reductions in pay and conditions.

Having held that the case would be remitted to a fresh tribunal, the EAT gave guidance on the correct approach for tribunals to take when dealing with such dismissals. In assessing reasonableness, a

tribunal must look at whether, in the circumstances (including the size and resources of the employer's undertaking), it was reasonable to treat the refusal to agree to a contractual variation as sufficient to dismiss the employee.

This is an important decision in these difficult financial time and demonstrates that a reduction in wages can be imposed in the appropriate circumstance but that great care must be taken. Please contact the Employment Team for further guidance.

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Summary Dismissal beats date of Termination

The Employment Appeal Tribunal has handed down a decision in *M-Choice UK Ltd (M-Choice) v Aalders* confirming that where an employee is summarily dismissed during his or her notice period, the date of that summary dismissal will be the effective date of termination (EDT) for unfair dismissal purposes and not the date on which employment would have terminated had notice continued to run.

Miss Aalders started work with M-Choice on 1st February 2010. Her employment contract said that she was entitled to six month's notice. On 26th July 2010 M-Choice put her on garden leave. She was told that her employment would end on 1st February 2011. Miss Aalders brought a claim for unfair dismissal on 11th January 2011 on the basis that her employment was due to end on the 1st February 2011 and as such, she would have been employed for 12 months at the EDT.

On the 21st January 2011, M-Choice dismissed her with immediate effect. The tribunal had to decide whether Miss Aalders was still able to bring her claim

based on the fact that her employment was due to end on 1st February 2011 (giving her 12 month's service) or whether M-Choice's immediate dismissal on 21st January 2011 meant that the EDT was before the 12 month's had elapsed. M-Choice won. The EAT decided that M-Choice's immediate dismissal on 21st January meant that the EDT occurred before Miss Aalders accrued 12 month's employment. However, the case is not over, because Miss Aalders claimed that



the reason why M-Choice dismissed her 'early' was because she had brought the unfair dismissal claim against them. There is a sting in the tail however. If an employee is dismissed for 'asserting a statutory right' (which would include the right to bring an unfair dismissal claim) the employee does not need to have been employed for 12 months (ironically). Therefore, this case is set to continue.

Employee off on sick leave for a year is entitled to holiday pay

Following on from last month and the discussion about the European Court of Justice Opinion in the *KHS AG v Schulte* case, the Employment Appeal Tribunal has held that a sick worker who had not taken any holiday was entitled to statutory holiday pay even though she had not submitted a request for annual leave in the relevant year.

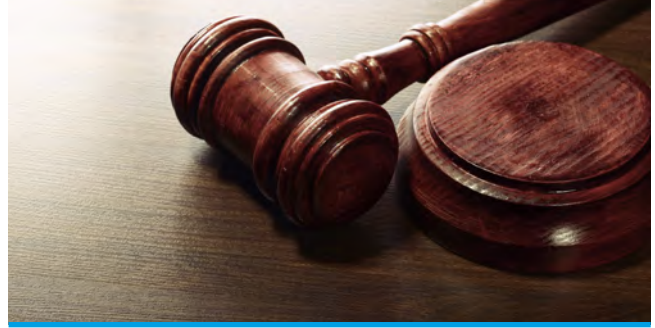
The Claimant in the case of *NHS Leeds v Larner* had been off sick for the entire holiday year before she was dismissed on capability grounds. During that time she had not requested any holiday and on termination of her employment the Respondent refused to pay her accrued holiday pay.

The Respondent argued that the Claimant had no right to carry forward her leave entitlement into the new holiday year because she had not made a formal request to do this, as required by law. Nonetheless, the Tribunal held that she was entitled to be paid because she had been too sick to be able to exercise her right to a "period of relaxation and leisure". The Claimant's entitlement was allowed to "roll over", even though she had not requested it.

This decision makes clear that employers cannot avoid paying holiday pay to an employee on long-term sick leave on the grounds that the employee did not book any holiday during their sick leave.

Compulsary Retirement – the ECJ passes judgement

In a recent German case of *Fuchs v Land Hessen*, the European Court of Justice ruled that the employer's need to keep costs down could count as an objective justification for having a compulsory retirement age. Gerhard Fuchs was a state prosecutor who was made to retire at 65 by his employer, the German state of Hessen, as part of a policy that was linked to cost-saving measures.



The ruling also appears to hold that a retirement age can potentially be justified to encourage the promotion of a younger workforce. But more controversially, it suggests it is legitimate to retire older workers to prevent possible disputes concerning employees' fitness to work beyond a certain age.

Employers should take great care when dealing with a retirement situation as each case will be decided on its merits. The UK courts and tribunals have held a much tougher stance on this point. A question, which was referred to the ECJ, was whether cost alone can justify discrimination (in the UK, we currently have the controversial 'costs plus' justification, namely cost cannot be the only factor in justifying the discrimination). Unfortunately, the ECJ did not deal with this point.



Guidance for Employers during the Olympics

It may still be months away, however ACAS has issued guidance for employers who are worried about how to deal with staff wanting time off during the event. It sets out three things that should be considered:

- 1. Manage Attendance:** it's time to start talking to your employees about their plans. You may keep your policy simple - maybe have a 'first come, first served' policy for booking leave - but it may help to draw up some guidelines;
- 2. Work Flexibly:** whether or not you currently have flexible working in your business, it may be something to consider, even as a short-term measure;
- 3. Deal with Performance issues:** there may be problems around staff watching lengthy coverage via their computers. Why not plan for popular sporting events in advance - perhaps giving staff access to a TV during agreed times?

No doubt more will follow but it is worth Employers planning ahead to deal with big sporting events.



Manton Associates
Praesidium Scheme Managers
43 Temple Row
Birmingham
B2 5LS