

Employment Briefing



October 2011



Signing up to Praesidium couldn't be easier.

Visit:

www.praesidiumemployment.co.uk

Or

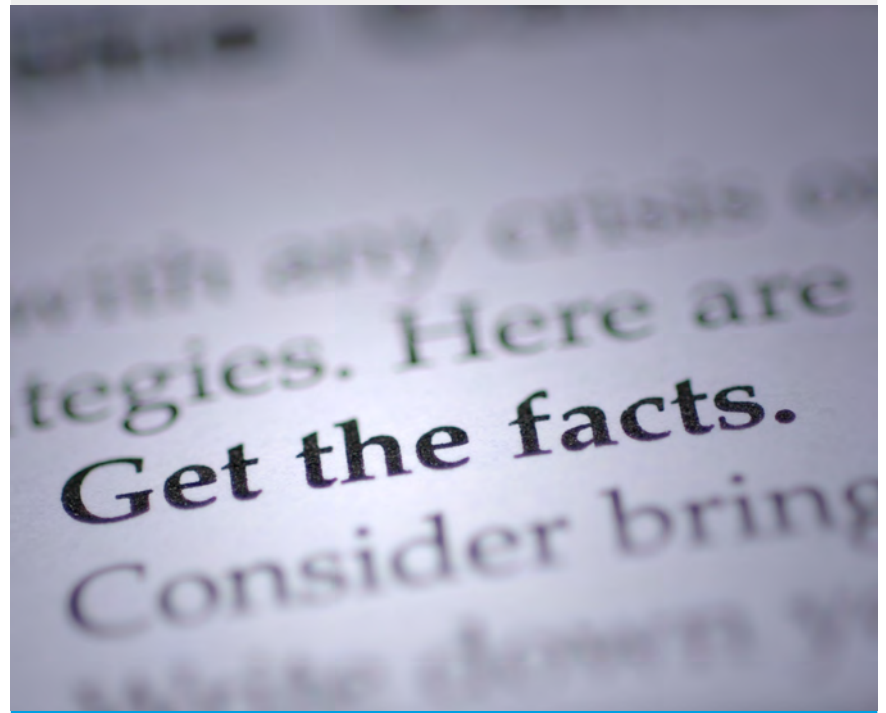


References must be true, accurate and fair

In May's Employment Briefing we reported on the case of McKie v Swindon College, which highlighted the dangers for employers in giving a careless reference. The English Court of Appeal returned to the subject of references this month in the case of Jackson v Liverpool City Council.

The decision will give some comfort to employers, but serves as a warning to departing employees.

Mr Jackson had been a social worker with Liverpool City Council for 12 years. He left to take up another post with Sefton Borough Council with a favourable reference. A year later he applied for a new job with Sefton, and supplied three references. Two of the references were satisfactory, but the third, from Liverpool City Council, raised concerns over his record keeping. The new reference from Liverpool City Council was provided by a different manager than previously and made it clear that the record-keeping issues had not been investigated before Mr Jackson left. The fact that the issues had not been investigated was



made clear in a phone call from an employee at Sefton to the new manager who had provided the reference. The issues had emerged after Mr Jackson left Liverpool.

Mr Jackson failed to get the job and was unemployed for a year. He sued Liverpool City Council for damages on the grounds that the reference was a negligent misstatement. Unusually for an employment law matter the case was brought in the courts and not an Employment Tribunal.

Employers are required to take reasonable care to provide references that are true, accurate, and fair. The County Court held that the City Council's reference was true and accurate, but not fair in that it carried an unspecified allegation about Mr Jackson.

The Court of Appeal overturned this decision. It held that the reference was fair. The facts provided were true and accurate and the City Council had made it clear that the allegations had not been investigated.

This case makes it clear that employers should always take care to provide an accurate reference. For employees, it serves as a warning that they should always look to agree the terms of a reference before leaving their employment. Agreeing the terms of a reference should also give protection to employers against an employee bringing a claim later on the basis that a reference was unfair.

Contacting Us

Click here to fill in a form and we'll get back to you with details



Religious discrimination – employers liable for agents and aggravated damages

The Employment Appeal Tribunal (EAT) has handed down an important decision on religious discrimination in *Bungay v All Saints Haque Centre*.

Mr Bungay and Mr Paul were two members of the board of the All Saints Haque Centre. Mr Saini and Mr Chandel had been employees of the Centre. They were subjected to a “campaign” of discriminatory conduct by Mr Bungay and Mr Paul that culminated in their dismissal. The Employment Tribunal (ET) decided that Mr Saini and Mr Chandel had been discriminated against and dismissed because they were Hindu and also that Mr Bungay and Mr Paul were “agents” of the Centre.

This meant that both the Centre and Mr Bungay and Mr Paul were liable, as acts of religious discrimination are treated as being done by both the employer and the employee or agent personally for the purposes of anti-discrimination law, as are other forms of discrimination.

Mr Bungay and Mr Paul appealed the decision.

The EAT upheld the ET’s decision. The test for agency was whether, when carrying out a discriminatory act, the discriminator was acting within their authority, and not whether they had been authorised to discriminate. Mr Bungay and Mr Paul were the “prime movers” in the discrimination, and had carried



out their actions in their work as directors of the Centre. This meant they were liable for their conduct jointly and severally with the Centre.

In addition, Mr Bungay and Mr Paul had made malicious allegations to the police some time after Mr Chandel and Mr Saini had been dismissed that led to their arrest. They had also conducted a disciplinary process with Mr Chandel and Mr Saini in a high-handed way that was purely aimed at securing their dismissal.

The ET held that Mr Chandel and Mr Saini were entitled to aggravated damages for this conduct, even

though it took place after they had been dismissed from the Centre. The EAT also agreed with this finding.

The case is notable for two reasons. It serves as a reminder that in discrimination cases both the person carrying out the conduct and the employer will be liable, jointly and severally and that this includes agents, not just employees. Secondly, it makes clear that damages can be sought for actions carried out by employees even after the victims of the discrimination have left their employment.

Dismissal cannot be withdrawn

Can an employer retract a dismissal?

No, said the English Court of Appeal in *CF Capital v Willoughby*. At least not where the notice of dismissal is clear and unambiguous and intended to terminate the employee's contract.

In *CF Capital*, the employer and employee discussed the employee becoming self-employed. The employer then wrote to the employee saying his employment would terminate and he would be re-engaged on new terms. The employee replied that he did not accept the new arrangements, and that the employer's letter had terminated his employment. On hearing that the employee did not accept the new arrangement the employer tried to retract their notice and put the employee back onto his old terms of employment. The employee rejected this and claimed unfair dismissal.

Normally a clear and unambiguous notice to terminate cannot be withdrawn, unless there are "special circumstances". Normally this exception will only apply in limited circumstances. An example might be when a dismissal is made in the heat of the moment.



The ET held that there were "special circumstances" as the employer had clearly misunderstood the circumstances when it issued the letter terminating the contract of employment and made a mistake.

The EAT disagreed – an employer's mistake in issuing a notice was not "special circumstances" in itself.

The Court of Appeal agreed with the EAT and held that the employer was not entitled to unilaterally withdraw the notice. The "special circumstances" exception was not an exception at all – it only meant that the employee must consider the circumstances and give the employer a chance to reconsider if that was appropriate. For example in a "heat of the moment" dismissal the employee should allow the employer time to "cool-off".

The decision is a reminder to employers to always take care when dismissing an employee and take time to consider if dismissal is appropriate or whether another course of action is appropriate. One way of dealing with this case without a formal compromise agreement would have been to invite the employee to resign in exchange for a suitably worded consultancy agreement.

Fees for tribunal claims will exempt "low-income earners"

Following the announcement of fees for bringing Employment Tribunal claims this month, the Minister for Employment Relations, Ed Davey, has said "low-earners" will be exempt. This suggests that there will be a sliding scale for Tribunal fees.



Mr Davey also hinted that there might be a cap introduced on discrimination payouts, saying there might be "room for manoeuvre" on this.

As a large number of people bringing Tribunal claims are unemployed it is unclear what the

effect of the "low-earner" caveat would be.

A consultation on the introduction of fees, and the government's change to the qualifying period for unfair dismissal from one year to two, is expected in November.

Transfer of undertakings - varying terms and conditions

The EAT decision in *Smith v Trustees of Brooklands College* involved an important area of employment law – the Transfer of Undertakings and Protection of Employment Regulations 2006 (or TUPE for short).

TUPE provide protection for employees when a business is transferred from one party to another. The Regulations prevent changes being made to employees' contracts of employment because of the transfer - an employee must have the same terms and conditions of employment after the transfer as they did before. An employer can, however, make a change to terms and conditions for a reason unconnected with the transfer.

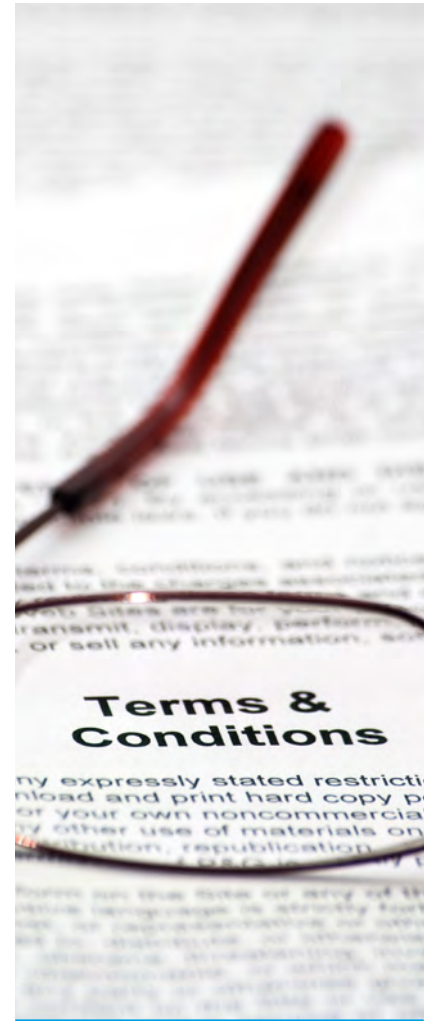
This was the question for the EAT in *Smith* - whether a change in the contracts of employment of four employees was due to a transfer of an undertaking or for another unconnected reason.

The Claimants in *Smith* were Teaching and Learning Assistants at Spelthorne College, a Sixth Form College in London. They had unusual employment conditions – they were paid as if they were full-time employees even though they only worked part-time. Spelthorne merged with another college, Brooklands College. This was a transfer to which TUPE applied. Some time after the merger the Principal of Brooklands realised the Claimants were being paid more than those doing the same job at Brooklands and sought to vary their payment terms. The Claimants reluctantly agreed.

The ET held that the reason for the change in pay conditions was that the Principal of Brooklands believed the Claimants were overpaid, not the transfer.

The EAT agreed – the test was whether the “sole or principal reason” for the change was the merger with Brooklands College. Furthermore, the test was not whether “but for” the transfer the change in conditions would have been made - the question was what was the actual reason for the change. The actual reason had been the Principal's belief that the Claimants were overpaid, and this was not a reason connected with the merger.

The EAT's decision in this case was narrow, and depended closely on the facts. If the decision had been that the reason for the change was to harmonise the pay of the Claimants with their colleagues at Brooklands,



rather than a belief they were overpaid, the decision might well have been different. The practical implication is that employers should always be aware of the possible impact of TUPE when taking on employees under a transfer from another business.



Red-tape challenge consultation open

The Government has launched a three-week consultation period on employment legislation as part of its “Red-Tape Challenge”.

The Consultation is available on-line, and comments can be made on the website under the four headings:

- » -Compliance and Enforcement
- » -Letting People Go
- » -Managing Staff
- » -Taking People On

The web address is below:



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