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Albion Chambers EMPLOYMENT & PROFESSIONAL DISCIPLINARY

The gender pay gap is an Employment Law issue

CMI research in 2014 found that female managers aged over 40 take home on average 35 per cent less than their male counterparts. The same research found that male directors earn an average of £21,084 per annum more than their female colleagues. Why? Outdated gender-based 'expectations' and stereotypes around men and women's roles and their respective economic value in the workplace still exist. Jobs traditionally done by women, such as catering, caring or cleaning, are typically paid at a lower rate than jobs traditionally done by men, such as construction, transportation and electrical engineering.

The predominance of women in low paid sectors is a significant contributor to women making up the majority of those on low pay. Overall, 62 per cent of workers paid below the Living Wage (set at £7.65) are women. (All figures are taken from the Fawcett Society January 2015).

The gender pay imbalance has remained in place despite the 1970 Equal Pay Act being in force for several decades before the Equality Act and in a recent BBC interview experts gave differing opinions below on whether equal gender pay should be enforced by law and if not, how else the gap should be addressed.

Charlotte Bowyer, Research Associate at the Adam Smith Institute, argued that "Legal enforcement of equal pay risks harming women". Ms Bowyer is an expert where I am not, but I feel that misses the point, not least as she goes on to argue that "because the gender pay gap persists for complex reasons ... the legal enforcement of equal pay risks harming women".

Now I struggle with the word 'persists' here. It *exists* for complex reasons; it *persists* because 'we' are not doing enough to understand and address them.

Ms Bowyer continues; "Sexism does exist in the workplace: some employers undervalue less traditionally 'masculine' attributes and skills, leading them to compare women unfavourably against conventionally 'male' skills".

The enforcement of equal pay through legislation cannot address these problems – the causes or consequences – on its own, but the discrimination laws can and do. Addressing the gender pay gap is a social issue but that does not mean that it is not also a legal one. The law necessarily reinforces and reflects what society has identified as important restraints on freedom of choice or expression. In my experience the coupling of the equal pay legislation and discrimination legislation does go some way to addressing the problem and delivers remedies.

Those who counsel against the role of the law in addressing the gender pay gap trot out the spectre of the Equality Act provisions having the effect of discouraging employers from hiring women, as taking women on simply becomes more expensive. Having spent years representing Claimants and Respondents, I do not believe that an employer's justifiable desire to operate efficiently always means

Team Announcements

A bigger, better team

For the past few years Albion's Employment and Professional Disciplinary Teams have worked side-by-side, with a number of barristers practising in both teams.

We are beginning to see the merging of various regulatory regimes and we come across an increasing number of cases where dismissal or disciplinary decisions are reserved pending the decisions of regulatory bodies as to misconduct by employees. In this changing market place, we, at Albion Chambers, have decided to merge the two teams, to offer a single point of contact for clients involved with professional disciplinary and employment matters.

A new team leader

As part of this merger of the teams we are delighted to announce that Richard Shepherd has accepted an invitation to lead the new Employment and Professional Disciplinary Team drawing on his expertise and experience in both Regulatory and Employment Law. Richard's appointment will be effective from May 2015.

Our new team offers to clients 24 barristers, including three QCs, covering the full range of issues in employment and professional disciplinary law. We believe that Albion has one of the largest Employment and Professional Disciplinary Teams outside of London.

A fond farewell

We must say a fond farewell to Elizabeth Cunningham who has decided to cease practice at the Bar and focus on her existing, stellar academic career; teaching the lawyers of tomorrow in Employment Law and Civil advocacy. Liz will remain an Associate Member of Chambers and with her, we will continue to forge our links with UWE.

that they assume that employing a women is 'more expensive' as a result of the anti-discrimination or equal pay legislation. I don't believe that the Equality Act makes it 'more expensive' to employ women and we do see – in the tribunals and courts, day in and day out, that the law is actively engaged in paving the way for the cultural change that has to follow, that will – perhaps too slowly – close the gender pay gap.

I do recognise that enforcing equal pay does little to tackle the reason behind pay inequality, but the bill that Birmingham City Council faced following *Birmingham City Council v Abdullah & Others* [2012] UKSC 47 has many employers thinking: 'I don't want that to happen to me' and so they are scrutinising how they reward employees in different roles, conscious of what 'work of equal value' actually means. Comparing jobs and salaries across an organisation is time consuming and complex, but when something has been this wrong for this long it will take time and effort to fix, and in my view the real spectre for employers is the Court or the Tribunal and the teeth and claws of the Equality Act.

Birmingham City Council was a landmark case that showcased the teeth and claws of the law. It also means we can use the law to illustrate, educate and prevent. It will take more equal pay cases, though perhaps not on that scale, to deliver cultural change and re-cast the equal pay legislation, not as a lame tool for administering a retrospective slap on the wrist or a ineffective statutory dinosaur, but as a meaningful tool with which to bring about change.

The internet and pro-bono services, for instance, mean that the law is accessible and 'real' for all employees, whereas just two or three generations ago it was a distant, impenetrable mire. So, I think that what is crucial is not to sit back and suggest 'well, it's all a bit tricky, employers won't like it', but to activate the law; we need the legal tools to be sharpened, strengthened and simplified for them be effective. It goes without saying that Employment Tribunal Fees do the exact opposite, but that is a different article...

No, the Equality Act alone will not result in permanent cultural change, and despite 40 years of legislation and case law the difference between men's and women's average earnings is still 19.1% (based on the Fawcett Society's January 2015 figures). There should be more investment in business-led initiatives to drive a change in attitudes and pay practices. Any business can put in place merit-based pay that can withstand objective scrutiny.... and, if they choose not to do so, employees should have access to justice in the tribunal and know that through the law they have an effective and real way of being paid the same as a man doing work of equal value.

Elizabeth Cunningham

Plebs in the ET

In my article for the April 2014 edition of this Newsletter, I suggested that Employment Tribunals were bound to move closer to the brave new world inhabited by civil lawyers ever since a case management decision in Andrew Mitchell's libel action against The Sun revolutionised civil claims.

Readers will remember that in that case a fairly innocuous failure resulted in an automatic draconian sanction: Mr Mitchell failed to file his costs budget on time, for which the automatic sanction was that he would be unable to recover his costs (£500,000) had he won (he lost). He applied for relief from that sanction, but lost that too, including in the Court of Appeal. Thus a purely technical omission had potentially devastating consequences.

Subsequent cases have signalled something of a retreat (see for example *Durrant v Chief Constable of Avon & Somerset Constabulary* [2014] 1 Costs LR 130). Concern remained, however, that the cold winds of change were blowing in the direction of employment lawyers too, and that any failure to comply with a Tribunal order might lead to the case being struck out.

These concerns have been somewhat put to bed by the EAT in *Harris v Academies Enterprise Trust & Others* [2014] UKEAT which was heard at the end of October 2014.

The Claimant in the case was a teacher and suffered from serious depression. Acting as a litigant in person, he brought four separate claims against both the school at which he worked, its head-teacher and two named colleagues. He alleged victimisation, harassment and disability discrimination. The case was listed for a trial, which was due to start on Monday, 3 March 2014.

At an earlier hearing, an order had been made requiring witness statements to be filed by 19 February 2014. The order was not complied with and on the day the statements were due the Respondents' solicitor applied to the Tribunal seeking an extension of time to 26 February 2014, five days before the trial.

The application was refused, partly because of the extra stress the delay would cause to an already vulnerable Claimant, but also because the statements were extensive (13 in number) and their late arrival would jeopardise the trial.

Despite the refusal, by 26 February 2014 the statements had still not been provided. The Claimant applied for an unless order, requiring the statements to be served immediately, on pain of being struck out. The Employment Judge refused to make the order, instead requiring the statements to be provided on the first day of the trial, but did indicate he was minded to strike out the ET3 and would hear submissions on the day.

On the first day of the trial the statements were finally provided. The Claimant (by now represented pro bono by Counsel) applied for an order pursuant to Rule 37 striking out the ET3. The Employment Judge agreed that the threshold in Rule 37 had been crossed, in that the Respondent's conduct had been unreasonable, the defence had not been actively pursued and orders had been breached. Once the threshold had been crossed, however, the decision whether or not to strike out the ET3 was still discretionary.

As to this, the Employment Judge applied the well-known authority of *Blockbuster Entertainment Ltd v James* [2006] IRLR 630 CA where Sedley LJ said of the power to strike out:

"…The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to

consider whether, even so, striking out is a proportionate response."

In applying this test, although the Employment Judge reasoned that the delay had been intentional and blameworthy, he refused to strike it out on the basis that to do so was not proportionate. In so finding he took into account that the failure was a personal failure of the Respondent's solicitor and there could still be a fair trial. He applied a balance of prejudice test, and found that a strike out would on balance cause the individual Respondents greater prejudice, as they would be at risk of unjustified stigma, than would the Claimant if a strike-out was refused.

The Claimant appealed, arguing essentially that the Employment Tribunal should have applied the new Mitchell test, and that in any event the decision was perverse.

The Employment Appeal Tribunal refused the appeal, holding that there was no perversity in the decision, that the Employment Judge had applied the correct test and was not bound to follow the stricter guidance of Mitchell.

Mr Justice Langstaff (President) pointed out the enduring differences between the wording of the overriding objectives in the CPR and the ET Rules, notably the omission from the ET version of the allotting of resources between cases and ensuring compliance with rules. This difference was a conscious decision, reflective of *"the different function and purpose that Tribunals may serve".* He went on to say:

"it would be a mistake to suggest that the CPR applied in the Tribunals in the same way as they apply in the civil courts. Regard must be had, I have no doubt, to the insight given by cases such as Mitchell into that which constitutes justice.... All of this falls short of a requirement that the Tribunals apply a test that is identical to or so closely akin to Mitchell.... though I am satisfied that it would be entirely appropriate for an Employment Judge in a suitable case to take account of the wider view of justice as I have expressed it, a Judge is not required as a matter of law in the Employment Tribunal to deal with a claim as if the CPR applied when they do not.

The President, however, finished with a warning:

"I do not wish what I have said to let it be thought that Judges should be unduly forgiving of procedural default by parties. Rules are there to be observed, orders are there to be observed, and breaches are not mere trivial matters; they should result in careful consideration whenever they occur. It is a matter of frequent complaint to this Tribunal, in particular by litigants in person, that orders have not been observed to the letter by the other party to the litigation. Tribunal Judges are entitled to take a stricter line than they may have taken previously, but it remains a matter to be assessed from within the existing Rules and the principles in existing cases".

Those of us horrified by the effect *Mitchell* has had on civil claims, should all rejoice that in the employment field wiser heads prevail. It remains good practice to make every effort to comply with orders and to apply for an extension if it becomes clear that a deadline might be missed. If a deadline is missed and the effect is innocuous, in all likelihood there will be no sanction. Even if the effect is serious the Employment Tribunal will apply a balance of fairness test before imposing a serious sanction such as a strike out. That seems to me to be as it should.

Nick Sproull

Shared parental leave

It pays to plan

It's the hot topic this month, and if it works it will be fantastic for everyone. However the likelihood is that the Shared Parental Leave (SPL) will provide flexibility for employees, and a headache for employers. Brought in on 1 December 2014 and effective for births or placements since 5 April this year, SPL allows parents to share leave during their child's first year. Once the mother has given notice to curtail her maternity leave, the remainder of her 52 week entitlement converts into SPL and can be split between either parent in whatever way they choose.

Admin for HR

The administrative headache comes from the continuous or discontinuous 'blocks' of leave that parents are entitled to take:

- a parent is entitled to three blocks of leave, which can be taken as a solid block, such as eight weeks in a row, or a broken block, such as one week on/one week off for 16 weeks.
- an employee must put together their proposal for how they wish to take their leave, and give their employer at least eight weeks' notice.
- if the request for a discontinuous block is refused, the employer must allow the employee to take the same leave as a continuous block.

The difficulty is that employees will now have a lot more freedom over when they choose to take leave. Whereas under additional paternity leave, the 'window of opportunity' was 32 weeks, under SPL a partner can take leave any time from the child's birth until their first birthday. In addition, that leave may be taken in a maximum of three separate blocks, rather than all at once.

What about pay?

A further difficulty for employers is caused by enhanced maternity pay. Whereas statutory maternity pay is a like-for-like swap for SPL, employers must decide what the status of enhanced maternity pay will be where mothers wish to cut short their maternity leave to share it with their partners. If enhanced maternity pay doesn't convert to enhanced SPL pay, employers will effectively be penalising those mothers who wish to make family planning decisions and, ironically, incentivising them to take time off rather than their partners.

If, however, employers do allow enhanced maternity leave pay to convert to enhanced SPL pay, they potentially leave themselves open to sex discrimination claims, on the basis that SPL is one way for female employees, and another for males.

What can be done?

The key to SPL is planning, much of which will already have been done. Employers need to make sure they:

- create a culture which encourages early discussion;
- give employees the necessary information well in advance of the child's expected due date;
- where possible, plan an employee's working year in advance – when are they irreplaceable?

Ultimately, productive early discussion can ensure that leave is taken in a manner which works for the parents' pattern of care, whilst accommodating the needs of the employer.

In addition, employers will need to consider whether to offer enhanced SPL

pay. One way of avoiding doing so may be to incorporate enhanced maternity/SPL pay for mothers (but not fathers/partners) into a formal strategy for increasing female representation within the workforce, as the employer did in *Shuter v Ford Motor Company* [2014] EqLR 717. Although the claim related to additional paternity leave rather than SPL, similar principles may well apply.

With 5 April firmly behind us, it pays to plan ahead.

Alexander West

The workplace and social media

#Fired

A recent case in the Employment Tribunal again highlights the growing problems where the workplace and Social Media meet.

In this case: *Game Retail Ltd v Laws*, [UKEAT/0188/14/DA] Mr Laws worked for Game Retail as a risk and loss prevention investigator. As part of his role to look into losses, thefts and frauds he decided to use his personal Twitter account and started to follow various Game and Gamestation stores across the country in order to detect any untoward activity. Each store had its own feed, which was managed by the store's managers.

Perhaps unhelpfully for Mr Laws, one store manager from Preston responded to his follow request by following him back. He also tweeted an encouragement for other stores to do the same (which, even more unhelpfully, Mr Laws re-tweeted). 65 stores were following Mr Law's tweets at the relevant time.

An unidentified store manager reported his tweets to the Company as being offensive, threatening and obscene. Offended groups included the following:

- The Disabled
- The Police
- Dentists
- Caravan Drivers
- Golfers
- His Father
- Newcastle Supporters

An investigation was carried out into the tweets, it acknowledged that the Claimant's account was a personal one and did not carry any specific references to his employment; however, it did recognise that his actions in following stores were motivated by his work responsibilities. As a result of his conduct, he was dismissed.

The Employment Tribunal decision focused on whether dismissal was within the range of reasonable responses available to the employer. The Employment judge found that the Respondent had made two assumptions in its investigation:

First, it had not been established that any member of the public or of the Respondent's staff had access to the Claimant's twitter feed other than the Preston and unidentified managers. Similarly, although customers would see Mr Laws in the list of 'followers' for each store, there was nothing more to tie him to the Company. Second, the judge held that the Respondent's bullying, harassment and disciplinary policies did not expressly contain a clause that would have demonstrated to all members of staff that offensive or inappropriate use of social media in private time would or could be treated as gross misconduct.

The judge held the following:

"The decision to dismiss did not fall within the band of reasonable responses. The offensive material was communicated for private use only and not in work time. There is no evidence that any customer or member of staff did view the material and was offended by it. The claimant did not post anything derogatory of the respondent or anything which would reveal that he was an employee of the respondent. The claimant had restricted his use of the Twitter account with regard to the respondent who monitor [sic] stores only as part of his duties. He thereby created a theoretical risk that a member of the public might view other posts of his which had nothing to do with the respondent's business."

In the EAT, the Respondent argued that the Judge's decision had been perverse. The EAT agreed. First, the Judge's reasoning seemingly failed to realise that Tweets, perhaps unlike Facebook Posts, are not restricted to social acquaintances. Contrary to what the Judge said in the above quoted paragraph the Claimant had not restricted his use of his sole twitter account. (This would appear to be an error in the judgment.) He also seemingly failed to realise that the Claimant's account, by its actions if not by its outward content, had become linked to the Respondent's business through being followed by 65 different stores as well as being endorsed by the Preston store manager as being one that stores should follow. In those circumstances the Claimant's twitter usage could not properly be said to be private, he had not used separate accounts for following his friends and stores, he had not used any of the privacy or restriction settings and his posts were available to be seen by the store managers of the 65 stores he had allowed (and encouraged) to follow him.

The case was remitted to a fresh tribunal.

This was apparently the first case in which the EAT has been asked to adjudicate upon questions of social media usage and the Respondents asked the tribunal to provide some general guidance for future cases, which the tribunal declined to do. However, it is clear that some general indicators can nevertheless be drawn from the reasoning to assist when deciding if a dismissal is unfair:

- The nature and content of the posts and how offensive they are;
- Whether the posts are made on a purely personal account;
- The usage made of privacy restrictions;
- The links between the employer and the employee visible on the account;
- When the posts are made (work time or outside);
- Whose equipment is used (work or personal phones or computers);
- The clarity of the disciplinary policies with respect to social media usage.

ACAS has many examples of social media policies but suggests it might prove impractical to have an "overly formal policy that also includes rigidly covering the use of social media in recruitment".

In my view, another key factor, which needs to be addressed by lawyers and advocates approaching these cases in the Employment Tribunal, is to ensure that the tribunal fully understands the way in which the relevant social media service operates. It is clear from this case that the employment judge had made an error in understanding the basics of how Twitter works. Effort, therefore, should perhaps be made between parties to agree beforehand a set of admissions which set out how the relevant platform works. If this is made clear beforehand it will be much easier for all parties to conduct the case.

Alexander Small

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