Employment Law News
December 2010

Here is our latest Employment Law newsletter . We hope you will also visit our web site at http://www.oxford-employment-law.co.uk/ which now includes a comprehensive and regularly updated free employment law section available for you to use whenever and as often as you like to find answers to basic employment law questions. We will, of course, be pleased to assist you with individual advice when that is required.

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1. Pensions - automatic enrolment and NEST

With its cosy sounding clever name, "NEST" (the acronym for the new "National Employment Savings Trust") is in danger of distracting attention away from the more important "Automatic Enrolment" scheme of which it is a part, albeit an important part. The "Automatic Enrolment" scheme is due to start on 1st October 2010 and is designed to ensure that many more workers than at present will have their own private pension to top up their State Retirement Pension.

Official estimates are that some 7 million people are not saving enough for retirement. Under current law all except the smallest employers are obliged to offer access to some form of pension scheme to employees but in general employees have to take active steps to join. For various reasons, inertia amongst them, many do not. Automatic enrolment will ensure that as a general rule employees will automatically become members of a pension scheme. Rather than having to opt in they will have to take active steps to opt out if they do not wish to continue as members.

Automatic enrolment was one of the key recommendations of the Pensions Commission (set up in 2002), which reported in October 2004 and November 2005. It is in operation in the USA where case studies have shown a rise in pension scheme membership following a switch from traditional opt in methods to automatic enrolment, from around 20-40 per cent to around 90 per cent membership amongst new employees three months after they were hired. The largest effect was among people with low incomes, minority ethnic groups and women.

That is all background to the Pensions Act 2008, enacted in November 2008. Under that Act most employees will have to be enrolled into an "automatic enrolment scheme" (technically, *"The employer must make prescribed arrangements by which the jobholder becomes an active member of an automatic enrolment scheme with effect from the automatic enrolment date"* - Pensions Act 2008 s.3(2)). The scheme can be the employer's own scheme provided some quite complicated certification conditions are met or it can be the government approved NEST scheme. Arrangements for using the NEST scheme will be kept simple and it will be relatively inexpensive (the Government has said that it will cost micro firms with up to four employees £46 per person in administration but the Federation of Small Business believes this is a "gross underestimation").

Under the current proposals, the new duty on employers will begin for larger employers on 1st October 2012. Application to all employers will phased in over a four year period based on size. Once in force eligible "jobholders" be automatically enrolled into a qualifying automatic enrolment scheme. Eligible "jobholders" are individuals who meet the following criteria:

- works under a contract of employment or has a contract to perform work or services personally and is not undertaking the work as part of their own business.
- ordinarily works in Great Britain.
- is aged between 22 and State Pension age.
- have qualifying earnings payable by the employer in the relevant pay reference period.
- single person directors where the company has no other employees, members of the Armed forces and members of the Combined Cadet Force, Sea Cadet Corps, Army Cadet Force and Air Training Corps do not count.

Minimum contributions will be calculated on earnings in a band of between £5,715 and £38,185 at today's prices. Upon automatic enrolment, a minimum of eight per cent of earnings within the earnings band would be contributed to the pension, with at least three per cent coming from the employer.

All business, even those with only one or two employees, will have to participate. The Federation of Small Business says *"the average small firm – those with four employees earning an average salary of £25,000 – will pay at least an extra **£2,550** per year in administration and pension costs".* The FSB calculation is based on an employer with 4 employees each earning the UK average annual salary of £25,428 per annum. 3% of the band (ie £25,428 - £5,715=£19,713) is £591.39 per employee paid by the employer per year once the scheme is fully operational, from 2017. Adding to this the £46 per employee Government estimated administration cost for a firm with four employees gives a figure of £637.39 per employee. This equates to just under **£2,550** for four employees.

The Federation of Small Business is calling for micro-businesses to be exempt. This seems unlikely as the October 2010 DWP review "Making automatic enrolment work" has recommended against exemption for micro-businesses for three reasons:

1. to do so would exclude 1.2 million employees from automatic enrolment.
2. there would be substantial practical problems in enforcing boundaries. Identifying those employers with five employees at any one time is almost certainly beyond the capacity of current systems. In addition, incentives to hide or distort the number of employees could be considerable.
3. a significant disincentive to business growth would be created. The pension costs alone of moving from four employees to five could come to more than £1,500. In addition, some competitive distortions might be created between employers either side of the size cut off.

The October 2010 DWP review "Making automatic enrolment work" is a lengthy document but is an excellent source of detailed information about the scheme. The rest of this note consists of a few short interesting verbatim extracts from it:

"current proposals ... involve automatic enrolment on the first day of employment" "we believe there is a strong case for giving employers the opportunity to have a waiting period of up to three months...This would allow employers to automatically enrol their employees at any point in the first three months of their employment (although workers who wish to opt in and receive an employer contribution in this period would be able to do so)".

"we propose a much simplified certification process [editor's note: ie for employers using their own schemes rather than NEST]. Automatic enrolment requires minimum contributions based on a very particular definition of pay, total pay between a floor and a ceiling. Most existing pension schemes involve contributions defined as a percentage of all basic pay (not above some floor). Employers who run good schemes at present want certainty over whether contributions based on these definitions are enough to meet the legislated amounts. If they have to change their scheme rules to achieve this, we believe there is a real risk that the revised rules may be somewhat less generous overall. So we are very keen that a certification process is as simple as possible. A process we think would work would ensure that any scheme which met one of the following criteria could be certified as meeting the requirements: ..."

"... charges [for NEST] are designed to make NEST self-financing in the longer term. Income from these charges will take some time to build up, however, so the scheme will be funded in the short to medium term by a loan from Government. It is estimated that NEST will be self-financing by around 2030".

"... There is one important change that we do recommend. The currently proposed threshold is very low, well below the current income tax threshold. In addition, contributions are due from the first pound earned above that threshold. This means that many people on very low earnings will build up very small pots indeed, potentially damaging the credibility of the reforms. We propose that people should only be automatically enrolled once they reach the income tax threshold (which the Government has announced will be increased to £7,475 in 2011, equivalent to £7,336 in today's prices), but that contributions should be on earnings in excess of the National Insurance earnings threshold (£5,715 in today's prices). This will avoid automatically enrolling those not earning enough to pay income tax, will ensure that the very tiny levels of pension contribution possible under the current proposals are avoided, and will ensure that many who would benefit from automatic enrolment are not excluded by a higher threshold. Our intention is that workers who earn between these two thresholds would be able to opt in and receive an employer contribution if they choose to do so".

- *For further information generally click here on Pensions / NEST scheme to go to notes on our website.*

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2. Discrimination - religion or belief

Along with the rest of British anti-discrimination law the Employment Equality (Religion or Belief) Regulations 2003 were replaced by the Equality Act 2010 with effect from 1st October 2010. Reflecting changes originally made in 2007, the new wording ensures that any philosophical belief is covered whether or not it is "similar" to a religious belief.

This has recently produced some interesting discussion (and litigation).

The Employment Appeal Tribunal confirmed in October that there is an important distinction between *"a person's beliefs"* and "*manifestation of those beliefs".* In the case in question a spiritualist policeman employed as a Special Constabulary Trainer had a genuine belief that psychics could help solve criminal investigations. He distributed CDs and posters relating to spiritualism. Greater Manchester Police, for whom he worked, dismissed him, saying that his "*work in the psychic field*" was incompatible with his employment by them. He brought a discrimination claim against the Police but lost before an employment tribunal and again on appeal to the EAT on the basis that the protection provided by the law is simply against detrimental treatment because of "belief". The EAT held that in this case the detrimental treatment (dismissal) was not because of the belief but was because of the way that belief was manifested, which is not protected *(Power v Greater Manchester Police Authority, EAT on 8th October 2010).*

The distinction between "belief" and "manifestation of belief" is a fine one. In other circumstances it would be interesting to consider whether the wearing of a Burka by a Muslim woman at work would count as an integral part of her "belief" (protected by the law) or as a "manifestation of her belief" (unprotected).

Other cases have concentrated on whether a particular belief amounted to a "philosophical" belief, testing the limits of relevant law. One such case, concerned with whether a belief that *"mankind is headed towards catastrophic climate change"* is protected, has been decided. The other, concerned with whether a belief in animal rights, in particular opposition to hunting, is protected is still ongoing.

In the first of these two cases, a person of strong green views, Tim Nicholson, was made redundant from his job as "head of sustainability" at Grainger plc. He claimed that he had been unable to work out the carbon footprint of his employers because staff had refused to give him the necessary data and that as a result he had been unable to set up a carbon management system for the company. He also claimed that the chief executive had once flown a member of staff to Ireland to deliver his Blackberry which he had left in London and had showed "contempt" for his concerns. The employer argued that "*What Mr Nicholson asserts is a scientific claim that if we don't urgently cut carbon emissions, we will not avoid catastrophic climate change. There is nothing philosophical about that*". The EAT dismissed this argument and accepted that Mr Nicholson's beliefs were "capable" of amounting to a "philosophical belief". The EAT remitted the case back to the original tribunal to decide on the evidence whether in Mr Nicholson's particular case the belief attained "*a certain level of cogency, seriousness, cohesion and importance*" which is "*worthy of respect in a democratic society, [would] be not incompatible with human dignity and not conflict with the fundamental rights of others*" (Grainger plc v Nicholson EAT on 3rd November 2009).

The *Nicholson* case was eventually settled out of court so the question posed by the EAT was never answered. However the principle was established and it is now clear that subjecting an employee to a detriment because of his or her strong green views can be unlawful discrimination.

In the second case an animal rights campaigner, Joe Hashman, claims he was dismissed from his job at the Orchard Park Garden Centre, Gillingham because of his beliefs. He has previously taken, and won, a case to the European Court of Human Rights concerning disruption of a fox hunt. In the present case Mr Hashman was dismissed from his job shortly after he had given evidence which helped convict Clarissa Dickson Wright of "Two Fat Ladies" fame of attending an illegal hare coursing event in Yorkshire in 2007. His employers are hunt supporters and he claims that their disapproval of his belief in animal rights was the main reason for his dismissal. The employers say his dismissal had nothing to do with his opposition to hunting and that anyway his beliefs could not amount to a "philosophical belief" for the purposes of the relevant anti-discrimination law. That case is still ongoing. A preliminary hearing has been fixed for January 2011 when no doubt the basic question noted above will be resolved by an employment tribunal. So watch this space!

- *For further information generally click here on Equality Act 2010 / protected characteristics / religion or belief to go to notes on our website.*

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3. Employment tribunals' decisions are always final unless challenged on a genuine point of law

The loser in a case before an employment tribunal is often very tempted to appeal simply because they lost. A recent case is a salutary reminder of the important point that that is generally not enough - an appeal can only be made on a point of law.

As most employment tribunal cases turn on questions of fact and as the decision of the tribunal is final on matters of fact (save in those few cases where the decision was "perverse" or was so defective that justice requires the matter to be remitted back for rehearing), it follows that in most cases there is no point in appealing against an employment tribunal's decision. Of course, if pressed to do so, those acting for the losing party will try to find a point of law on which to hang an appeal. Advisers are generally well aware that a "perversity" argument is unlikely to succeed (except in the most extreme cases) so they may attempt a more sophisticated approach - for example in discrimination cases it is not uncommon for an appeal to be presented on the basis that the employment tribunal wrongly applied the rules relating to the burden of proof as this can sometimes be a way of getting around the difficulty. In general if arguments of this sort are really no more than dressing up a point of fact as a point of law the appeal will be dismissed without a full hearing - it will get no further than the preliminary "sift" stage at the appeal tribunal.

Nevertheless some litigants persist. It has to be said that the appeal tribunal generally leans over backwards to give them a fair hearing but at the end of the day it must apply the law. And that says the Employment Appeal Tribunal has jurisdiction to hear appeals only on points of law *(Employment Tribunals Act 1996 s.21).*

In the recent case noted above an agency worker, Ms Arrowsmith, was interviewed for a post at Nottingham Trent University, where she worked. She did not get the job. She brought a sex discrimination claim against the University saying she was rejected because two members of the panel which interviewed her knew that she was pregnant. The critical question in the case was whether those two members of the panel (or either of them) knew that the she was pregnant at that time. Clearly this was a question of fact. After a four-day hearing, the Nottingham Employment Tribunal, faced with a straight conflict of evidence between the the two sides (claiming and denying knowledge of her pregnancy on the panel members' part) found in the University's favour.

Ms Arrowsmith went on to use all avenues available to her to contest that decision. Including the original hearing her case eventually had no less than seven judicial hearings, five of them at the Employment Appeal Tribunal. However no point of law was involved. The question of whether any of the interview panel members knew that the she was pregnant was simply a matter of fact for decision by the original tribunal. The EAT judge concluded by adopting words used by a judge in the Court of Appeal in a different case, saying *"I feel that like many highly intelligent non-lawyers, the applicant puts a great deal of faith in detail and in complexity. This is actually a quite simple case."*

While only indirectly relevant, given that an appeal can only be on a point of law, it is worth noting the slight oddity that the Employment Appeal Tribunal normally consists of two non-lawyer members as well as a legally qualified judge. Indeed, perhaps even odder, it is theoretically possible for the two lay members to overrule the judge - indeed this actually happened in a case called Moores v Bude-Stratton Town Council EAT [2001] ICR 271.

The moral is clear: employees who are dissatisfied with the judgment of an employment tribunal, even those who have so far dispensed with the services of a professional advocate, should be careful to take and heed proper legal advice before deciding to mount an appeal. Otherwise they may face an expensive, time consuming and stressful experience which turns out to be completely pointless.

Coincidentally, shortly after the note above was written, a new Court of Appeal judgment became available on line, stressing the point that an appeal from an employment tribunal cannot be made against a finding of fact (Clarke v Zurich UK General Services Ltd [2010] EWCA Civ 1333 on 26th November 2010).

- *For further information generally click here on Employment tribunals / appeals from to go to notes on our website.*

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4. Collective agreements generally (and BA cabin crew in particular)

The definition of a "collective agreement" (in the Trade Union and Labour Relations (Consolidation) Act 1992) is *"any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more"* of seven specified matters including, for example, terms and condition of employment.

In some continental jurisdictions the terms of a collective agreement are automatically binding between a particular employer and a particular employee. That is not the case in the UK. In the UK the relationship between an employee and an employer is governed by the individual contract between them. Whether the terms of a collective agreement are binding as between them depends mainly on whether the individual's contract of employment provides for that. Case law also shows whether the term in question is "apt for incorporation" into an individual's contract is important - for example it has been held that selection procedures for redundancy set out in a collective agreement are not apt for implied incorporation into an individual's contract.

A legal aspect of the recent, and still unresolved, dispute between British Airways and their cabin crew over BA's decision to reduce the minimum number of cabin crew on long haul flights turned on exactly this point. The cabin crew alleged that a collective agreement between BA and the Unite trade union which stipulated crew complement levels was incorporated into their individual contracts of employment and was enforceable by them on an individual basis. BA accepted that some collective agreements negotiated between it and Unite were so incorporated but argued that the particular provisions relating to crew complements were not. BA argued that these terms were not apt for inclusion in individual contracts and that the parties to the collective agreements had never intended the crew complement provisions to be enforceable by individual employees.

BA won the original case in February 2010. It has now won again in the Court of Appeal. The Court of Appeal was persuaded that if the parties had thought about the issue at the time of negotiation, they would have immediately have said it was not intended that the relevant part of the collective agreement would be enforceable by individual employees. If that were so it would mean that an individual or a small group of cabin crew members could bring a flight to a halt by refusing to work without a full complement of cabin crew. That was an unthinkable consequence and could not have been intended. The Court of Appeal unanimously agreed that BA and Unite did not mean the relevant term to be individually enforceable when it was agreed.

- *For further information generally click here on Collective Agreements to go to notes on our website.*

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5. Default Retirement Age

The Government announced in July that as from October 2011, with phasing in from April 2011, the current exemption from anti-age discrimination law which allows compulsory retirement of employees at age 65 or over is to be abolished. The fact that there is still no official response to the consultation on the proposal although it ended two months ago may suggest a rethink is taking place (although it must be said that there is no evidence for this). If the government does back track on its proposal and decides to retain a "default retirement age" after all it would be likely to set it at a higher age than 65.

Currently, in law there are two ways in which an employer is able to force an employee to retire without risking a successful age discrimination claim. The first is to take advantage of the age 65 default retirement age exception noted above (provided proper procedures are followed). The second is to use the provision which allows an employer to require an employee to retire at any age if this can justified as *"a proportionate means to achieve a legitimate aim".*

No doubt from a strictly legalistic point of view reliance on the second of these on its own, as proposed by the government, is fine. However from a practical and human point of view relying on this second method alone has obvious disadvantages. It involves removing a simple and clear cut way to avoid the unpleasantness for both employers and employees of having to justify enforced retirement by, for example reference to the employee's capability. At the same time it almost guarantees more litigation to establish in particular cases whether dismissing an employee - for that is what enforced retirement is - was justifiable. For these and other reasons, many have argued that it would be sensible to retain a default retirement age, albeit increasing it to, say, 67 or aligning it in some way with State Pension age.

It is evident that the very process of removing the default retirement age could be counter-productive, at least in the short term. Doing so will no doubt encourage employers of at least some employees aged 65 or over to give them enforced retirement notices before April 2011, while there is still time. Indeed already there are signs that this may be happening. Although they have denied that the proposed abolition of the default retirement age has had anything to do with their decision it is reported that the Longleat Estate has recently given dismissal notices to all 27 of their staff who are aged 65 or over (see "Longleat staff aged over 65 made to retire", BBC News, 25th November 2010).

It is worth noting that the EU Directive which requires Member States to ban age discrimination does NOT ban provision of a "default retirement age". The directive itself specifically provides that *"differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary*".

Interpreting the Directive, the European Court of Justice has confirmed in various cases that Member States can lawfully set a default retirement age provided it can be objectively and reasonably justified. It has recently indicated the sort of considerations which should be taken into account in particular cases (Rosenbladt v Oellerking Gebäudereinigungsges mbH on 12th October 2010) and that whether a compulsory retirement age can be justified in any particular case is a matter for the national courts (Georgiev v Tehnicheski universitet Sofia on 18th November 2010), confirming what it had previously said in the well known British *Heyday* case in which Age Concern failed in its bid to have the British age-65 default retirement age declared unlawful.

Those interested should keep a careful watch out for the Government's response to the consultation noted above. Subject to that, however, the present position is that from April 2011 it will be unlawful to give notice to an employee requiring him or her to retire because they have reached age 65 (the reference to October 2011 above is because that is the final date at which such a notice can expire).

- *For further information generally click here on Age discrimination / retirement to go to notes on our website.*

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6. The Royal Wedding and bank holidays

Prime Minister David Cameron has announced that the day of Prince William's wedding to Kate Middleton - 29th April 2011, which according to Butler's "Lives of the Saints" is appropriately the day before the feast of St Catherine - will be a public holiday to mark a "*national day of celebration*" (see Directgov website, 23rd Nov 2010 - pedant's corner in Private Eye may yet note that the Prime Minister got it right and that the author of the Press Release, which calls it a "bank holiday", did not).

Also the Scottish Cabinet has confirmed that Scotland will have a public holiday. However the Scottish Cabinet point out that *"The wedding day will take place during the Scottish election period, which has implications for the electoral and parliamentary timetable, and we will work through these in close consultation with the Holyrood authorities"*. The date of the Scottish Parliament election is May 5th. At present the Scottish Parliament is due to be dissolved on March 23rd but this may be changed to 22nd March as there must be 28 working days between dissolution and an election - and there would only be 27 if 29th April is a public holiday.

The BBC has reported that Guernsey and Gibraltar are both considering similar proposals.

The Directgov website covering Bank Holidays has already been updated to show 29th April 2011 as a public holiday.

Employers and employees should note that there is no statutory right to holiday, with or without pay, on public or bank holidays. However, many workers are entitled either to paid leave or to overtime rates of pay on bank and public holidays either under customary arrangements, which may be implied terms of contract, or under express contract provisions. To avoid misunderstanding it may be prudent for employers to ensure that their staff are aware of their position well in advance.

The choice of 29th April for the wedding will mean that for many people the latter part of April 2011 may be one long break, although all the days off will count towards their annual statutory holiday entitlement. Good Friday is on 22nd April, the Easter Monday bank holiday is on 25th April and the first Monday in May is a regular bank holiday. So those who take the 3 days off from 26th to 28th April will be away from work from Friday 22nd April until returning on Tuesday 3rd May.

- *For further information generally click here on Holidays / public and bank holidays to go to notes on our website.*

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7. Phoney discrimination claims

One of the problems with anti-discrimination law is that it sometimes results in "phoney claims". The problem must, of course, be kept in perspective and overall the fact that the law is sometimes abused is a small price to pay for the valuable protections it affords to genuine victims.

The problems of phoney claims generally centre around job applications. At one time there were quite frequent newspaper reports of people with African or Asian names putting in two applications for the same job, identical in all respects except for the name. Typically the applicant would use a very anglo-saxon sounding name in one application and his real name in another. When the phoney anglo-saxon got invited to an interview but the real person did not, the real one would threatened to sue on the basis that the only reason for his not having been invited for interview must have been his race. Employers would be tempted to pay a few hundred pounds to get rid of the nuisance even if a tribunal would be unlikely to make an award if it was aware of the facts.

We haven't heard much of that particular scam recently (no doubt many employers now have systems in place which weed out phoney "dual applications"). Instead a new version of the same scam has appeared, this time making use of anti-age discrimination law.

This "age-discrimination" version is a little more subtle than the "race discrimination" variety as there are no relatively easy to spot double job applications. Instead an older job applicant applies for a job which is clearly most suitable for a young person and stresses his age in the application. If he is not invited for an interview he may claim, or threaten to claim, unlawful age discrimination. If the case goes to a tribunal and the tribunal is persuaded that the applicant never genuinely intended to take the job, the scamster is unlikely to get far. He will not have have suffered a detriment and so will not succeed in a discrimination claim (an example was an EAT case almost exactly a year ago - Keane v Investigo & ors).

In another case a Mr Berry, a man in his mid-50s, brought at least four sets of proceedings in the London (Central) Employment Tribunal claiming that job advertisements breached the (now-replaced) Employment Equality (Age) Regulations 2006 because words such as "recent graduate" or "school leaver" suggested that they were aimed at younger people. Mr Berry never actually applied for the jobs in question but nonetheless brought claims to an employment tribunal. He did so largely in reliance on a 2008 ruling by the European Court of Justice in which that court held that *"Public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory..."*. Mr Berry claimed in effect that what was sauce for the goose (EU immigrants) should also be sauce for the gander (British people of a certain age) and therefore that this 2008 ECJ ruling meant he had legal rights. He also claimed for good measure that the job advertisements breached his rights under the European Convention on Human Rights.

He lost his claims in the tribunal and, perhaps surprisingly, decided to appeal. In October 2010, Underhill J in the Employment Appeal Tribunal had no trouble in dismissing his appeals, stressing not only that the legislation is not designed to provide income for people who *"complain of arguably discriminatory advertisements for job vacancies which they have in fact no wish or intention to fill"* but also that those who did so are likely to be liable for costs.

While the cases show that employment tribunals will not support scamsters, notably job applicants and other who have no intention of taking up advertised jobs, the fact remains that in practice such claims can be a nuisance. Only too often it can be less costly and more convenient for an employer to simply pay off a potential claimant rather than fight a case. Notwithstanding the suggestion noted above by Mr Justice Underhill that an unmeritorious claimant is likely to be liable for costs, there is no certainty of a costs order being made and, even if it is, in practice there is no certainly of being able to enforce it against the scamster. The government's plan to abolish the 65 so called "default retirement age" (see the item immediately above this) will do nothing to help. However other government plans may - there are rumours that the official review of employment laws currently under way will consider recommending that more claimants should be required to put up some form of cash security before being allowed to bring cases to an employment tribunal. If so, this would no doubt deter at least some phoney claimants.

The moral for employers and especially employment agencies is that great care should be taken to ensure that job advertisements avoid use of any words, phrases or images which could suggest that a job is only suitable for people of a particular age unless they are quite sure that such a requirement can be justified as a "proportionate means to achieve a legitimate aim" (to quote the wording used in the relevant legislation). In any case of doubt a prudent employer should take expert legal advice.

- *For further information generally click here on Age discrimination / a general note to go to notes on our website.*

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8. Salaried Partners

The status of a "salaried partner" can be important. This is so not only if a firm is in financial difficulty (as partners but not staff are generally liable for a firm's debts) but also for employment law purposes (as partners, not being "employees", do not have many employment law rights such as unfair dismissal rights). With the arrival of LLP's (under the Limited Liability Partnerships Act 2000), new considerations have to be taken into account. A recent case shows that nevertheless the basic principles remain unchanged.

A firm of solicitors, Lester Aldridge, became an LLP in May 2007. Mark Tiffin who had joined in 2001 as an employed "associate" became a "salaried partner" in 2005 and then in 2006 became a "fixed share partner" and then an Equity Partner. He was henceforth paid monthly "drawings" (not salary), was a signatory on the partnerships bank accounts, had voting rights, and was required to contribute a sum of money into the partnership. He was then no longer considered an employee.

In 2008 Mr Tiffin's membership of the LLP was terminated. He sought to bring claims in the employment tribunal, including unfair dismissal. This led to consideration by the tribunal of the preliminary legal issue of whether he was an employee, in which case his claims could proceed, or a partner, in which case they could not. The tribunal concluded that he was a partner, not an employee, and so dismissed his claims.

Mr Tiffin appealed against that finding to the EAT - and lost.

The EAT noted the definition of "partner" in the Partnership Act 1890 as *"the relation which subsists between persons carrying on business in common with a view of profit".* Albeit there are now different types of partners, the judge noted that for a partnership to exist three conditions must be satisfied - there must be (1) a business which (2) is carried on by two or more persons in common (3) with a view of profit. To determine whether someone was a partner in an LLP one must first determine if he would be a "partner" in a "partnership"; if not, is he an "employee" under common law tests?

The EAT ruled that any limits on Mr Tiffin's powers were irrelevant, saying: *"There is no statutory provision or authority, which states that for a person to be a partner, he or she has to have a certain minimum number or a certain minimum types of rights to vote or to participate in management decisions...".* Furthermore so was the fact that other partners might make more profit than he did: *"There is no statutory provision or any decided case which specifies that the share of profits of a person or his or her contribution must reach a certain level before he or she can be regarded as being a partner...".*

The EAT also ruled that the existence of facts which might point to someone being an employee do not prevent the conclusion that he is in law a partner - for example, in this case although Mr Tiffin was under the direction of other partners, this is not uncommon in partnerships and does not mean that that the person concerned must be an employee.

The distinctions can be fine, but the general principle is important. Employees can claim unfair dismissal but partners cannot. It should be noted however that partners in a partnership do have many other employment law related rights, notably the right under what is now the Equality Act 2010 not to be discriminated against.

- *For further information generally click here on Partnerships / general and/or Employee / employee or self-employed? to go to notes on our website.*

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9. New cases and statutes

You can find on our website summaries of all employment law cases reported in the most recent editions of the monthly ICR and IRLR case reports (the two leading series covering recent developments in employment related case law).

You can also find on our website notes on employment law related Acts of Parliament and statutory instruments.

- *For further information generally click here on Industrial Cases Reports (ICR) and IRLR and/or Acts of Parliament etc to go to notes on our website.*

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10. And finally...

Downton Abbey. It had to happen. Not the peerage for Julian Fellowes but an employment tribunal case involving domestic staff. This time it wasn't a lady's maid and a footman being accused of spreading malicious rumours to their employer about a fellow member of staff and the employer wasn't an Earl. But even better, the employer was a Princess. A maid and occasional nanny sued her, alleging that other staff had "made up stories, gossip and lies to brainwash the Princess". And since this is the 21st century, staff now have unfair dismissal rights once they have been employed for at least one year.

In this case the maid, Susanna Danio, worked in London for Crown Princess Pavlos of Greece, the wife of Prince Pavlos, eldest son of King Constantine II, exiled King of Greece. The Princess is an American heiress and successful business woman who owns and runs the Marie Chantal chain of children's fashion boutiques with branches in the UK, France and the USA. It seems she sacked Ms Danio for alleged dishonesty (stealing clothes), sleeping in guest bedrooms, not listening and being rude. The trouble seems to have been that Ms Danio was not given much chance to explain her side of the story - so

whether or not there were reasonable grounds for the dismissal it was probably unfair as a matter of law because of the way it was done.

In any event, the Princess did not argue that the dismissal was fair. However she did contest Ms Danio's claim for substantial compensation of at least £10,000. Ms Danio sought to justify this rather large amount on the basis that it had taken her 6 months to get a new job, a point which the Princess's barrister argued should be disregarded on the basis that it took her so long because she had not tried sufficiently hard. Newspaper reports of the case (for example in the Independent and the Daily Mail) drew the inevitable comparison with Downton Abbey and noted that in the event the tribunal awarded Ms Danio £7,442 compensation.

What with Baroness Scotland, then Attorney General in the Labour government, getting into a well publicised muddle last year for employing an illegal immigrant, financier George Soros losing the unfair dismissal claim brought by his butler and his wife who was their cook/housekeeper and Sir Paul McCartney's ex-wife Heather Mills being sued (albeit unsuccessfully) by a former nanny, it is clear that Downton Abbey days are now well and truly over. Those fortunate enough to be able to employ domestic staff must remember that even though they are upstairs, failure to respect the rights of downstairs can be at their peril.

- *For further information generally click here on Specific employments / domestic staff to go to notes on our website.*

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