

# EMPLOYMENT LAW UPDATE

August 2011

## WHAT'S NEW.....

### Recovering from the Riots: What businesses can do in the aftermath

Whilst the Kaiser Chiefs may have predicted a riot back in 2004, we doubt they foresaw the recent scale of events.

The riots earlier this month have left many businesses ruined because of damage to property and looting. Affected businesses may be contemplating closure because they are unable to pay for property repairs and / or replacement stock particularly if they are uninsured or because the policy terms do not cover all losses. However, an ancient Law offers businesses in England and Wales a chance to recover from the turmoil.

The Riot (Damages) Act 1886 ("RDA"), allows uninsured businesses to recover compensation for damage caused by the riots directly from the Police. Section 2 of that Act confirms that where "a house, shop, or building... has been injured or destroyed, or the property therein has been injured, stolen, or destroyed, by any persons riotously and tumultuously assembled together", compensation will be paid out of the Police fund in the Police area which the person who has sustained the loss lives in.

Insured businesses can also claim compensation although this right will normally be subrogated to the insurers.

Section 1 of the Public Order Act 1986 defines what constitutes a riot and sub-section 1 states:

*'Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot.'*

If company vehicles were damaged or destroyed in the riots, the right to claim compensation is less generous. For example, if a vehicle was damaged inside a building / depot then compensation should be recoverable because the vehicle is "property therein". If, however, a vehicle was damaged or stolen whilst parked on a street, it seems that the RDA would unfortunately not compensate such losses. Notwithstanding that, we advise that claims are submitted for all property damage because there is an



outside chance businesses will be compensated for their vehicular losses irrespective of the circumstances.

### How to claim for compensation

A claim must be made in writing using a prescribed form specified in the 1921 Regulations made under the RDA (SI 1536). The form states what specific information is required (including details of the actual or estimated costs of repair) together with who the form should be sent to (normally the Chief Executive of the Authority).

### Urgent Deadline

The deadlines for making compensation claims are strict and must normally be made **within 14 clear days** after the day when the injury, stealing or destruction took place. However, the Government has recently announced it will extend the window to 42 days. Insurance policy terms may, however, require policy holders to notify property insurers about riot damage within 7 days so that they have sufficient time to make a subrogated claim under the RDA. We therefore advise businesses submit their claims as soon as possible.

**For further legal advice, please contact Steven Meyerhoff on 01254 828300.**

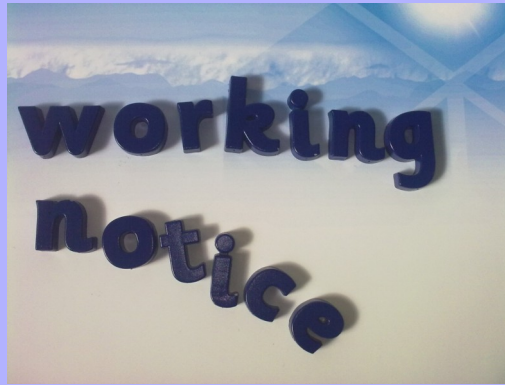
### Summary Dismissal Beats Notice Period

In *M-Choice UK Ltd v Aalders*, the EAT has handed down a useful judgment which confirms the proposition that where an employee is summarily dismissed during their notice period, the date of that termination will be the effective date of termination ("EDT") for unfair dismissal purposes and not the date on which employment would have ceased had the notice period continued to run.

#### Background

The Claimant, Miss Aalders, began her employment with M-Choice on 1 February 2010. Under her contract of employment, she was entitled to 6 months notice of dismissal. On 26 July 2010, the Claimant was sent a letter giving notice to terminate her employment by 1 February 2011 at the latest. The Claimant subsequently presented a claim for Unfair Dismissal on 11 January 2011 to the Employment Tribunal explaining that her employment would terminate on 1 February 2011, by which date she would have accrued the all-important one year's service to entitle her to bring such a claim.

Her employers then wrote to the Claimant on 21 January 2011, informing her that her employment was being terminated with immediate effect i.e. summarily dismissing her before a year's service had been completed. The Claimant then amended her ET claim to add a further complaint that her employment had been terminated early on 21 January 2011 because she had asserted a



statutory right to claim the right not to be unfairly dismissed.

The assertion of a statutory right is one of the limited situations where an employee's unfair dismissal claim can proceed even if the one year's service has not accrued.

At a pre-hearing review, the employment Judge had to consider which date was the EDT and whether or not the Claimant had sufficient continuous service to bring her claim. The ET Judge found that the second dismissal did not deprive the Claimant of the right to claim 'ordinary' unfair dismissal and held the 1 February 2011 date as the EDT. M-Choice then appealed.

The EAT allowed the appeal and held that the Claimant's summary dismissal had terminated her employment on 21 January 2011. The EAT referred to the case of *Stapp v The Shaftesbury Society 1982* stating that there was a 'clear and unambiguous' statement of the law, which meant that the summary dismissal of an employee who is serving notice brings forward the EDT, even if that deprives him / her of sufficient continuous service to claim Unfair Dismissal. Accordingly, the Claimant had not acquired the requisite one year's service to claim Unfair Dismissal.

Notwithstanding the fact that the Claimant could not claim 'ordinary'

Unfair Dismissal, the EAT has referred the claim back to the ET to determine the principal reason for dismissal so as to consider the merits of the automatic Unfair Dismissal claim.

If the ET considers that the reason for summarily dismissing the Claimant on 21 January 2011 was because she had asserted her statutory right not to be unfairly dismissed on 1 February 2011, the ET will have jurisdiction to hear the claim as the Claimant will not be required to establish one year's service. Furthermore, the employer may then have to incur not only the legal costs involved in defending this claim but also an award of compensation to the Claimant.

#### Comment

The EAT's finding that a summary dismissal can bring forward the EDT where an employee is already working their notice seems sensible. However, employers should take note of this case because it reminds us that employees can still bring claims for Unfair Dismissal without having accrued a year's service. Accordingly, employers should be reluctant to make hasty decisions to terminate an employee's employment before one year's service has accrued. If in doubt, employers should seek legal advice as to what procedures should be followed so as to avoid ET claims being presented.

**For further information on this article or the dismissal procedure generally, please contact Steven Meyerhoff on 01254 828300 or via email [steven.meyerhoff@backhouses.co.uk](mailto:steven.meyerhoff@backhouses.co.uk)**

## Case Bulletin Continued.....

### **EAT examines the “some other substantial reason test” for refusing pay cut dismissal**

In the case of *Garside & Laycock v Booth*, the EAT decided that the key issue when considering if a dismissal is fair for “some other substantial reason” (“SOSR”) was not whether it was reasonable for the employee to accept the lesser terms offered to him / her but whether it was reasonable for the employer to dismiss the employee, having regard to all the circumstances.

#### Background

Due to the economic climate, the employer realised it needed to reduce costs and the only way it could envisage avoiding redundancies was if the workforce agreed to a salary reduction of 5%. Mr Booth and the other 76 employees were subsequently asked if they would agree to the same. Mr Booth rejected his employer’s proposal and refused to agree to vary his contractual pay terms. He was then dismissed as a result of that refusal, at which point all other 76 employees had agreed to accept the pay cut.

Mr Booth then brought a claim for unfair dismissal, which was upheld by the ET (on the basis that it was reasonable for him to want to retain his original terms and conditions). However, this decision was subsequently overruled by the EAT on Appeal by the employer.

The EAT found two important errors in the ET’s earlier decision. Firstly, the ET should have considered the reasoning and



reasonableness of the employer for dismissing Mr Booth for not accepting the pay reduction as opposed to the reasonableness of Mr Booth’s decision to reject the same. Secondly, the ET has mistakenly applied the *Catamaran Cruisers Ltd v Williams and ors* case which had rejected the contention that a dismissal for refusing a pay reduction could be fair depending on whether or not the employer was in a position so desperate that the only foreseeable way of saving the business was to “propose stringent reductions in pay and conditions”.

The case will now be considered by a fresh Tribunal but the EAT did give guidance about dismissals saying that Tribunals must, when assessing reasonableness, consider all the circumstances (including the size and resources of the business) whether it was reasonable for the employer to treat the employee’s refusal to agree the pay variation as sufficient to dismiss him.

The EAT went on to say that on the basis that SOSR has been established, the new Tribunal must also consider whether (taking into account all of the circumstances, equity and the substantial merits of the case), it was fair or not to dismiss Mr Booth.

#### Comment

This case reminds us that the correct focus for Tribunals is the

reasoning and reasonableness of employers’ actions.

For further information on the consequences of this decision please contact Steven Meyerhoff on 01254 828300 or via e-mail [steven.meyerhoff@backhouses.co.uk](mailto:steven.meyerhoff@backhouses.co.uk)

### **EAT considers Working Time Regulations and what amounts to a ‘period of availability’ for Mobile Workers**

The EAT has allowed an Appeal against a ruling that the Claimant ‘mobile worker’ had not automatically been unfairly dismissed for working time, whistleblowing or health and safety reasons (*Ross v Eddie Stobart Ltd*).

#### Facts

The Claimant was employed as a HGV driver from June 2008 and was subject to the Road Transport (Working Time) Regulations 2005 (“RTR”). As drivers cannot exceed a 48-hour average weekly limit, it was necessary for the employer to instruct the Claimant not to undertake any further driving work for 3 days at the end of March 2009. However, the employer asked the Claimant to remain on site during his ‘period of availability’.

The Claimant disagreed that he was required to remain on site on the basis that the governing Regulations did not require him to do so. He even telephoned VOSA to double check. However, the Claimant remained on site as requested albeit under protest.

Just over a week later, the Claimant attended a training course on Working Time rules where he was found to be very

## Case Bulletin...

knowledgeable but arrogant and sarcastic.

In addition to the above, the employer had received previous complaints from customers and managers that the Claimant wasted time unnecessarily when getting his vehicle ready to leave the depot and had a poor and obstructive attitude.

On 16 April 2009, the Claimant was dismissed following a disciplinary hearing, the focus of which was his abusive language.

The Claimant then brought a claim for automatic unfair dismissal, which did not require one year's service, alleging that he had been dismissed for whistleblowing, for a working time reason and / or for a reason related to health and safety. The ET dismissed all of his claims and the Claimant appealed.

The EAT found that the Tribunal had failed to understand the basis of the Claimant's claim and had completely failed to "make proper findings about the issues relating to vehicle safety." They also found that the definition of 'period of availability' showed that it cannot include time when the driver is required to be at the depot where he works. Therefore, the Claimant was right and the employer was wrong. However, the EAT rejected the 'working time' dismissal claim because (surprisingly) the RTR are not covered by the ERA 1996.

The EAT also held that "It is one thing to say that an employee is 'difficult to work with' where there is a genuinely grey area about a regulatory matter; another thing altogether to make the same finding if the employee is plainly right on a subject which the employer should know and understand".

The matter will now be re-heard afresh by a different Tribunal.



### **SUPREME COURT'S RULING REDUCES SCOPE OF RIGHT TO LEGAL REPRESENTATION AT DISCIPLINARY HEARING**

In *R (G) v Governors of X School*, G was a music teaching assistant suspended in October 2007 following a complaint that he had had inappropriate contact with a 15 year old boy on work experience at the school. The CPS did not commence legal proceedings but the school conducted an internal investigation and disciplinary hearing, and dismissed the Claimant for abuse of trust. The school also reported G to the Secretary of State ("SOS") to determine whether or not to place G on a statutory register preventing him from working with children in the future. The Independent Safeguarding Authority ("ISA") replied, explaining their role was to advise the SOS who would then make his own decision.

Due to the allegations, G requested permission for legal representation during the disciplinary hearing but the school refused.

By way of Judicial Review, the Claimant sought to challenge the school's decision not to allow him legal representation at the disciplinary hearing (or the forthcoming appeal hearing) on the basis that those decisions violated his Article 6 ECHR rights. Such rights included the right to a fair hearing and to have legal assistance.

Despite the fact there were no criminal proceedings, the High Court found that the Claimant was entitled to legal representation in civil proceedings as did the Court of Appeal.

The school appealed again to the Supreme Court. By a majority, the Court held that the school's disciplinary proceedings only concerned G's employment and not the civil right to practise a profession. Accordingly, they held that G's Art.6 rights would only be engaged by the subsequent ISA proceedings (despite the fact that the school's findings could easily have a knock-on / influential effect on the subsequent ISA process) as it was for the Secretary of State to decide whether or not to place G on the 'barring register'.

#### **DID YOU KNOW... BACKHOUSE JONES PROVIDE THE FOLLOWING SERVICES:**

- Mergers & Acquisitions;
- Company disposals;
- Management buy-ins / buy-outs;
- Group and Company restructures;
- Joint Ventures;
- Investment and Shareholders Agreements;
- Banking and Finance;
- Corporate Recovery;
- Company Formations;
- Partnership and LLP advice & formation;
- Corporate Governance & Companies Act compliance;
- Commercial Contracts - Terms & conditions, Supply agreements etc;
- Agency, distribution and franchise agreements; and
- Commercial Property Services.