

e-post

Updating you on employment issues



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Welcome to the June issue of *e-Post*.

The next issue will be a combined edition for July and August, and will be circulated in early August.

For advice about any of the topics covered please contact [Martin Brewer](#), [David Mills](#), [Gillie Scoular](#) or your usual Mills & Reeve contact.

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The high price of breaching contractual procedures

According to the Court of Appeal, an employer's liability for breach of a contractual disciplinary procedure is potentially unlimited. It rejected the NHS trust's argument that the maximum liability should be limited to what the employee would have earned during the time it should have taken to operate the disciplinary procedure in accordance with the contract. On the contrary, if the employee would not have been dismissed at all had the procedure been operated correctly, he would in theory be entitled to compensation to reflect the resulting loss for the remainder of his career.

Although there have been earlier cases about the sanctions an employer faces for breaching a contractual disciplinary procedure, this is the first time this issue has been considered by the Court of Appeal since the House of Lords' decision in *Johnson v Unisys*. That decision made it clear that in general it is not possible to obtain compensation for the manner of dismissal, on top of an award for unfair dismissal. This case shows that if the manner of dismissal also amounts to a breach of an express term of the contract, then damages can be awarded in the normal way. However, it may be difficult for employees to obtain more than the pay they would have earned while the contractual disciplinary procedure ran its course, because they would have to show that their employer would not have decided to dismiss them in any event.



For the full decision (*Edwards v Chesterfield NHS Trust*) click [here](#).

The lessons of *BA v Unite*

Having won two high court injunctions, the BA legal team narrowly lost in the Court of Appeal last month, when Unite succeeded in overturning an order restraining planned strike action because of alleged irregularities in the way their members had been told the result of the ballot. The Court of Appeal decided by a 2:1 majority that the relevant legislation did not require the union to notify every member individually of the full results of the ballot, including the number of spoilt ballot papers. Modern communication methods, such as the use of website and notice boards, had been sufficient for this purpose.

After a number of successes for employers in the High Court in recent months, this decision will give them pause for thought. Challenging the legitimacy of a ballot where there are significant procedural irregularities is likely to be successful. But the latest twist in this litigation shows that relying on relatively insignificant blemishes, which could not have affected the overall result, is a high risk strategy. At the time of writing the full decision of the Court of Appeal has not been published, so we do not know whether the decision is limited to the facts of this dispute, or has wider implications.



Knowing who your workers are

The Employment Appeal Tribunal has recently given some further guidance on how to draw the line between non-employee workers, who are protected by working time and minimum wage legislation, and the "genuinely self employed" who are not. In this case it was decided that a double-glazing salesman was a worker, even though he signed a contract that made it look (at least at first sight) as if he was in business on his own account.

The final ruling will always depend on the specific circumstances of each case, but two factors seem to have been crucial here. First, although the claimant was in theory free to work for other companies, in practice he could not. The contract he had signed with Yorkshire Windows precluded him from working from competitors, and with such a highly specialised sales job it was unrealistic to expect him to work in other fields. Secondly, while he could appoint a substitute to work on leads assigned to him, this was only possible when he was unable to work, and in addition the substitute had to come from a small group of approved people. Overall, that meant that he was so closely tied in with Yorkshire Windows that he could not be regarded as in business on his own account. The tribunal had therefore been right to ignore the fact that he was required to register as self-employed for tax and VAT purposes, and had on occasions made payments of commission to contacts who had given him valuable leads.



For the full decision (*Yorkshire Window Company Ltd v Parkes*) click [here](#).

Looking for clues in the Queen's speech

This year's Queen's speech gives little away about the Coalition's plans for employment legislation. However the following measures were announced, which are of interest to employers:

- Extending the right to request flexible working, though the Government will not be "rushing" legislation through on this.
- Taking steps to tackle the gender pay gap, which could include taking steps to promote flexible parental leave as well as flexible working.
- Abolishing ID cards.
- Limiting the number of immigrants from non-EU countries, though it is not clear how this will be achieved.



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