

Winter update

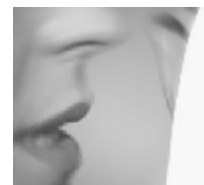
Winter 2004/5



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News from CKFT



FAMILY

Josie O'Brien joined the family department in January. She was born in Gold Coast, Queensland but worked and lived in Sydney, New South Wales for the last four years. Josie is an Australian Qualified lawyer, having graduated with a 1st class Honors Bachelor of Laws degree in August 2000. After graduation, Josie specialised in family law, working initially for a Senior Judge of the Family Court of Australia and thereafter for a niche family law firm dealing with ancillary relief for

high net worth clients and also contested children's residence and contact applications. She was admitted to practice in the Supreme Court of New South Wales and High Court of Australia, and became a member of the Family Law Section of the Law Council of Australia and the Law Society of New South Wales.

Josie is currently studying for the Qualified Lawyers Transfer Test which she plans to sit in April 2005 and her arrival at the firm increases the number of fee earners in the family department to six.

Employment Update

Important changes from 1 October 2004

Disciplinary and grievance procedures

In a previous edition of the newsletter we advised about the effect of the proposed new procedures which came into force on 1 October 2004 together with the revised ACAS Code of Practice. As we reported earlier, there are new statutory grievance and disciplinary procedures. Whilst compliance with the disciplinary procedure does not guarantee that a dismissal is fair, a failure to comply renders a dismissal automatically unfair. If the failure to comply is the employee's, then the employee will be prevented from bringing a claim. There is an automatic three month extension to the time limits for bringing a complaint where either procedure is being followed. If either party fails to use the statutory procedures, the ET can increase or decrease (depending on who did not comply) the compensatory award by between 10% - 50%. Employers who fail to follow the disciplinary procedure will be additionally penalised by an award to employees of a minimum of four weeks' pay as compensation. Such adjustments will not affect the statutory cap.

Note too that the new regulations have changed the law so that the employer may now escape liability where there are procedural failings outside the statutory minimum by showing that following the correct procedure would have made no difference.

Disability Discrimination Act 1995 (DDA)–

New regulations came into effect from 1st October 2004 and among the changes are:

- the DDA now applies to all employers and not just those with over 15 employees. It also now applies to a broader category of relationships such as partners.
- There is a new definition of discrimination to the effect that an employer cannot treat an individual less favourably on the grounds of disability, rather than on a consideration of their abilities.
- In common with other areas of discrimination the burden of proof has shifted onto the employer to show that there has been no discrimination once the employee has proved facts from which the Tribunal could conclude that there has been discrimination. Therefore, as with all potentially discriminatory situations it is very important to retain proper records of the decision making process and the reasons for making a particular choice in relation to appointment, retention, promotion or termination
- the duty to make 'reasonable adjustments' has been extended to cover provisions, criteria and practices applied by employers and the justification defence has been amended so that it only applies where the employer does not know, and

- could not reasonably be expected to know that an employee is disabled.
- There is a new statutory offence of harassment which will be committed where a disabled person is subjected, for a reason which relates to the disability, to unwanted conduct which has the purpose or effect of
 - violating the disabled person's dignity, or
 - creating an intimidating, hostile, degrading, humiliating or offensive environment for him

Information and Consultation Directive

All employers should be aware of the Information and Consultation Directive which establishes a general framework for informing and consulting employees and will be implemented in the UK in April 2005. It will initially apply to undertakings

with 150 or more employees although it will extend to those with at least 100 in April 2007 and to those with 50 by April 2008.

The directive gives employees a right to be informed about:

- the business's economic situation
- employment prospects;
- decisions likely to lead to substantial changes in work organisation or contractual relations, including redundancies and transfers.

However, it may be possible to withhold certain confidential information, particularly if it is of a sensitive commercial nature.

A failure to comply may lead to the imposition of a fine of up to £75,000 although parties may agree procedures which are different to those set out in the directive where 50% of employees agree.

Litigation Update

Court fee rises

Court fees saw a hefty increase across the board from 1 January 2005 as part of the Government's aim to achieve full recovery of court costs. There were substantial rises in almost every category in the High Court and County Courts and lesser rises in the Family Courts.

Fees have particularly increased for the higher value claims with the introduction of three new fee bands for claims over £200,000. This has seen the issue fee for the highest band of claims over £300,000 more than doubling to £1,700. Fees remain the same only in cases under £50,000. In the case of non-monetary claims, fees will rise from £180 to £400 in the High Court.

In addition, the fees payable at stages other than on issue have risen greatly. In the High Court, the fee accompanying the allocation questionnaire rises from £120 to £200, various appeal fees double from £100 to £200 or from £200 to £400 whilst applications for detailed assessments will increase from £250 to £600.

On top of this, an hourly trial fee in the High Court and Court of Appeal is due to be introduced in April 2005, which many commentators believe will deter potential international litigants from coming to London.

Privilege – common sense prevails in the House of Lords

In our last update, we reported how the Court of Appeal had held that legal advice privilege was confined to advice on legal rights and obligations and that advice on presentational matters would not be privileged unless it was given in the course of litigation, when it would be covered by litigation privilege. We also reported that documents prepared by the client's employees and sent to legal advisers were held not to be protected because the documents were not prepared by the client itself but rather by its employees. It therefore appeared that the courts defined the client narrowly as those members of management entrusted with the task of obtaining legal advice.

More recently, the matter has been revisited by the House of Lords, which held that legal advice was not confined to telling the client the law but must also include advice as to what should prudently and sensibly be done in the relevant legal context. The House of Lords expressly stated that advice on inquests, planning inquiries, wills, conveyancing, tax planning etc would have the relevant legal context

and would therefore be privileged. However, advice given by a lawyer which is not using his or her legal skills, such as general investment advice, may not attract legal advice privilege since it may not be given in the relevant legal context.

Unfortunately, the House of Lords did not re-examine the question as to who constitutes the client for the purpose of requesting such advice although Lord Carswell did state that he was not to be taken as accepting that the Court of Appeal's decision was correct.

ADR

In a previous update we reported on the increasing pressure placed on parties by the Courts to attempt to settle their disputes by mediation and the consequences where they fail to do so. Further guidance as to when the courts should penalise in costs a successful litigant who has refused to mediate was recently given by the Court of Appeal in the case of *Halsey v Milton Keynes General NHS Trust*. In this case, it was held that

- The court cannot force an unwilling party to enter into ADR, which is a voluntary process and to do so would be to impede a party's human rights since it would obstruct the right of access to the court.
- However, the courts may vigorously encourage participation in ADR and where there has been an unreasonable refusal to mediate, the normal costs rule that costs follow the event may be deviated from.
- The burden is on the unsuccessful party to show that the successful party behaved unreasonably.
- In deciding this, the courts will consider all the circumstances of the particular case and in particular:
 - The nature of the dispute since some cases may be intrinsically unsuitable, such as those seeking injunctive relief.
 - The merits of the case. If a party reasonably believes it has a strong case, this will be relevant to the reasonableness of refusing ADR.

- Whether other settlement methods have been attempted since it may be relevant that one party has refused previous offer.
- Whether the costs of ADR would be disproportionately high, particularly where the financial amount in dispute is relatively small.
- The question of delay where ADR has been mooted at a late stage and its uptake could delay the trial.
- Whether the ADR had a reasonable prospect of success. The burden is on the unsuccessful party to show that there was a reasonable prospect that mediation would have been successful.

This case provides useful guidance to the approach a court will take when deciding whether a refusal to consider ADR will lead to costs sanction and a speedy illustration of the implementation of its principles was recently provided in a Court of Appeal case, where the largely unsuccessful claimants demanded that the defendants be penalized in costs on the basis that the defendants had refused their offers of ADR. The Court examined whether the defendants had acted unreasonably in refusing to pursue ADR and found that they had not since the offer to mediate had come very late in the day, by which time substantial costs had already been incurred. Accordingly, the Court held the defendants should not be penalised in costs. This demonstrates how vital it is for any offer of ADR to be made as early as possible in the proceedings.

The Court of Appeal also examined the question as to whether it could compel the parties in relation to issues of costs to disclose the detail of "without prejudice" negotiations and held that it could not without the parties' consent. If a party wished to use any offer of ADR against the other side when costs fell to be considered, then that party should consider making an open offer or an offer that was without prejudice save as to costs.

Matrimonial Update

Division of income in high-earning divorce

The recent case involving Ray Parlour has attracted a great deal of attention, being portrayed in the press as a victory for a greedy footballer's wife condemning her ex-husband to spend the remainder of his career as her wage slave. Some commentators have even predicted that the very institution of marriage has been dealt a blow.

Parlour was heard in the Court of Appeal at the same time as *McFarlane*, another case involving a high earner.

In both cases, whilst the facts were very different, there was insufficient capital available to achieve a financial clean break between the parties. Both cases were appeals from the decision of the High Court (in the case of *McFarlane* a second appeal). The High Court Judge had awarded maintenance sufficient to meet the wives' needs along with an additional element on the basis that the payments would continue during the parties' joint lives, until the wives remarried or further order of the Court.

This issue before the Court of Appeal was the extent to which the wives should benefit from the surplus of their husbands' income, after the needs of the parties and their children had been met. The wives argued that income should not be treated any differently from capital assets built up during a marriage and they should be entitled to an "equitable" share of their husband's future income based on their past and future contribution to the marriage. The husbands argued that the purpose of maintenance was to meet their wives' reasonable needs and should not be used as a way of augmenting the capital settlement.

The Court of Appeal held that where a clean break could not be achieved through the division of capital, then any surplus income should be used to "save" towards effecting a clean break in the future. It would be discriminatory for the husbands to do the "saving" alone, so the Court awarded both wives roughly one third of their husband's net salary for a period of four years in *Parlour* and five years in

McFarlane. The Court made it clear, however, that these were exceptional cases and that these judgments would only apply to those divorces where there was a very high level of income but a relatively low capital base.

Ray Parlour's reaction to the decision was to leave Arsenal FC and move to Middlesbrough FC no doubt on a much reduced income.

Mr McFarlane was by far the happiest of all four protagonists. His wife was initially awarded maintenance of £250,000 net per annum during her and her husband's joint lives, until she remarried or until the award was varied by the Court. Following the Court of Appeal hearing a term of five years was imposed in relation to her maintenance at which point the expectation was that a clean break could be achieved.

One hearing and two subsequent appeals has not however dented Mrs McFarlane's appetite or stamina. She has recently obtained permission from the House of Lords to appeal the decision of the Court of Appeal.

The decision of the House of Lords is expected next Winter when the appropriate division of high earner's income on divorce will be clarified. Whether this creates a culture of wage slavery on the part of high flying husbands remains to be seen.

The following family lawyers at CKFT, Pamela Collis, Miles Geffin, Shikha Datta and Tom Farley-Hills, are all members of [the Solicitors Family Law Association](#).

This newsletter is designed to give a general guide to legal developments and while we have used reasonable endeavours to ensure its accuracy, it should not be relied upon as constituting legal advice.

If you would like to follow up any of the issues raised, or have a specific legal query, please contact the partner with whom you usually deal.

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