



# Clarendon Chambers

## Employment Review

### CHAMBERS MERGER

As will be apparent to regular readers, the name of this Review has changed. Clarendon Chambers has been created by a merger between 11 Bolt Court and 7 Stone Buildings, in October 1999 and the opening of 5 St. Giles Terrace, Northampton, in December 1999. The effect of this merger is to create a set of 52 barristers and to significantly strengthen the existing specialist groups within Chambers. The employment group has acquired a number of new members

(see back page) and now includes the considerable experience of Shabbir Lakha, from the original 7 Stone Buildings, and the talents of David Willans in Northampton.

Chambers will retain its existing London premises until suitable accommodation is found to place everyone under one roof. Meanwhile, Chambers continues to operate annexes with full conference facilities at St. Giles Terrace, Northampton and in brand new office premises at Crown House, Redhill, Surrey.

### SEXUAL ORIENTATION ~ THE CURRENT STATE OF PLAY

Discrimination against homosexuality is not covered by the sex discrimination legislation per se because it is discrimination by reason of sexual orientation rather than because the employee is a man or a woman. In *Smith -v- Gardner* [1998] IRLR 510 the Court of Appeal held that harassment at work by reason of the Applicant's homosexuality was not within the Sex Discrimination Act but the case was remitted back to the Employment Tribunal in order to decide whether (a) the homophobic abuse was worse than would have been meted out to a homosexual woman and (b) whether he was less favourably treated because he was a male rather than a female homosexual. In *Grant-v- South West Trains Ltd* [1998] IRLR 206 the European Court of Justice held that the refusal by the employers to issue a travel pass to the employee's lesbian partner which would have been issued to a male partner was not discrimination because it applied equally to men and women. On 27th September 1999 the European Court of Human Rights unanimously ruled in *Lustig-Prean & anor v United Kingdom; Smith & anor -v- United Kingdom* that the British armed forces' decision to discharge four homosexual personnel on grounds of their sexuality constituted a violation of their rights under Article 8 (the right to respect for private life) and Article 13 (the right to an effective remedy in the domestic court) of the European Convention.

On 12th January 2000 the Government lifted the ban on homosexuals in the armed forces and announced that those sacked for being homosexual will be invited to ask for their jobs back. 39 former military personnel are involved in employment tri-

bunal cases, and another 31 are starting other legal action. The cases had been frozen while a new code of social conduct was developed. The code, which is to be used by all commanding officers as a guide for deciding whether any disciplinary action is justified, has been modelled on the Australian forces policy which makes it an offence to discriminate against gay and lesbian servicemen and women.

It is not clear how far reaching the Government's decision will be and at present the code of social conduct only applies to the armed forces. In October 2000 the Human Rights Act 1998 will be in force, giving courts the power and duty to provide remedies, including compensation, for breaches under the Act. In August 1999 the Government announced its intention to introduce a non-statutory code of practice on combating discrimination on the grounds of sexual orientation in the workplace. The Government proposed that the code would be produced in conjunction with the Equal Opportunities Commission and in full consultation with relevant organisations. To date no code of practice has been produced. In any event a code of practice would be non-statutory and outside the ambit of sex discrimination legislation. It is questionable whether it would have the teeth required to combat workplace discrimination on the grounds of sexual orientation. If an employer were to dismiss solely on those grounds it would be difficult for them to assert they had acted fairly. However, this is likely to be the case whether or not there is a code of conduct in place. The only way to effectively combat this type of discrimination is by statute.

*Matthew Rudd*

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CHAMBERS  
MERGER

SEXUAL  
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RECENT  
DEVELOPMENTS  
IN TUPE

CLARK V TGD LTD  
T/A NOVACOLD  
REVISITED



## RECENT DEVELOPMENTS IN TUPE

The mere mention of the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE") would normally be enough to discourage all but the most dedicated from reading further. However, it is important to be aware of recent changes in the law which alter the obligations of any corporate client who is contemplating a transfer of any part of its operations to another company or entity. Although the Government's proposed new consultation regulations have yet to be published, significant amendments to TUPE came into effect in November 1999. Meanwhile the steady stream of case law offers some hope of clarity in this unsettled area of law.

The changes introduced by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 SI 1999/1925 relate mainly to an transferor employer's obligations to consult employees and to provide information in relation to the time of and reasons for the transfer and the measures which that employer or the transferee employer will be taking in relation to employees. The duty to consult arises as soon as the transfer is proposed, before the plans in relation to it have taken effect. Whereas before, the employer could opt either to consult trade union representatives or other employee representatives, now the trade union representatives must be consulted if they exist. In a further change, the employee representatives need not be specially elected for the purpose of consultations on the transfer but can be those already appointed by the employees for other purposes. If they are to be specially elected, the Regulations contain new and detailed provisions for the procedure by which the employer will arrange their election, by secret ballot. Formerly, it was not clear what the employer's duty was in a situation where there were no appropriate representatives in existence. The new Regulations make it quite clear that it is for the employer to arrange an election in these circumstances.

The employment protection given to such representatives is also improved. The Regulations amend the Employment Rights Act 1996, creating a right not to be subjected to a detriment on grounds of participation in an election and making a dismissal automati-

cally unfair if the principal reason for it is the participation in an election. The Trade Union and Labour Relations (Consolidation) Act 1992 is also amended to give elected representatives a right to time off to take part in consultation related activities, which is comparable to that currently enjoyed by union representatives. Finally, the regulations significantly increase the maximum compensation available to affected employees for breach of the employer's duties in relation to consultation, from four to thirteen weeks pay per affected employee.

Moving to the case law, various recent cases in the UK courts qualify the unfortunate judgment of the ECJ in *Suzen v Zehnaker Gebäudereinigung GmbH* [1997] ICR 662 in relation to the circumstances in which TUPE applies. *Suzen* decided that the mere fact the service provided by old and new contractors is similar does not mean there has been a TUPE transfer, in the absence of a transfer of significant assets or a major part of the workforce. In the recent case of *ECM (Vehicle Delivery Service) v Cox* [1999] ICR 1162, the Court of Appeal found that there had been a transfer in circumstances where none of the original staff were transferred and the methods of carrying out the contract were altered. They said that the importance of *Suzen* had been overstated and nothing had been said by the ECJ in that case to cast doubt on its earlier decisions interpreting the directive. Moreover, *Suzen* did not state that the fact no staff were transferred would be fatal in any particular case. The Court of Appeal found that *Suzen* did set certain limits on the application of TUPE, but it was still for the national court to carry out a full factual appraisal. The sentiment of this case was echoed by the Employment Appeal Tribunal in *OCS Cleaning Scotland v Rudden & Olscott* (EAT 290/99) in which they suggested that as a result of apparently conflicting decisions of the ECJ, the law on whether a transfer has occurred is so confused that where a tribunal at first instance has sought to apply the law as best it can, the decision it arrives at should be supported unless there has been an obvious misdirection.

*Peter Linstead*

## CLARK V TDG LTD T/A NOVACOLD REVISITED

The decision of the Court of Appeal in *Clark v TDG Ltd t/a Novacold* [1999] IRLR 318 was welcomed by many practitioners as an overdue clarification of, inter alia, the correct comparator to be used when considering whether an employee, disabled within the meaning of section 1 of the Disability Discrimination Act 1995, had for a reason relating to his disability, been treated

less favourably than others to whom that reason did not apply, within the meaning of section 5(1)(a) of the Act. The Court of Appeal held that in deciding whether the reason for less favourable treatment does not or would not apply to others, it is simply a case of identifying others to whom the reason for the treatment does not or would not apply. The test of less favourable treatment is based on the

reason for the treatment of the disabled person and not on the fact of his disability. It does not turn on a like-for-like comparison of the disabled person and of others in similar circumstances. The Act does not contain an express provision requiring a comparison of the cases of different persons in the same, or not materially different, circumstances. The statutory focus is narrower. The result is that the reason would not apply to others even if their circumstances are different from those of the disabled person. In this case the persons who are performing the main functions of their jobs are “others” to whom the reason for dismissal of the disabled person i.e. inability to perform those functions would not apply.

In a recent case in which I appeared for the respondent, the applicant, found to be disabled within the meaning of section 1 of the Act, had not received sick pay for periods of absence which were due to his disability. His contract of employment provided that the payment of sick pay was at the discretion of the respondent and was, in any event, subject to a maximum period calculated by reference to his length of service. Prior to the beginning of 1999 the applicant had received sick pay at the discretion of the respondent. The Tribunal made a finding of fact that at the beginning of 1999 the respondent decided not to exercise its discretion to pay sick pay generally by reason of the high level of sickness absence and a budget deficit. Furthermore, the Tribunal found that the respondent stopped paying sick pay in relation to absences of all other workers in similar situations and, following an examination of the staff sickness records, that there was no discernible difference between the treatment of the applicant and the treatment of others in the same grade. The Tribunal nevertheless held that the respondent had discriminated against the applicant within the meaning of, inter alia, section 5(1)(a) of the Act. It held that the applicant was not paid sick pay for a reason which related to his disability and was thereby treated less favourably than others to whom that reason does not or would not apply. The Tribunal felt bound by the decision in *Clark v Novacold* to find that the correct comparator was an employee who was not absent and receiving full pay. It is submitted that the decision was wrong for the following reasons:

1. It is contended that the “treatment” was the exercise of the respondent’s discretion not to pay sick pay. The applicant’s disability was the “reason” for his absence but not the “reason” for the treatment. The “reason” for the treatment was the high level of sickness absence and a budget deficit and not one that related to the applicant’s disability.
2. If it be right that the reason for the applicant’s treatment was one that related to his disability, it follows from the Tribunal’s interpretation of *Clark v Novacold* i.e. that the correct comparator is an employee who is not absent and who was receiving full pay, that the applicant, if absent for a reason related to his disability, must be paid in full during such periods of absence, whereas his colleagues to whom that reason

did not apply would receive nothing. Furthermore, the maximum period of absence over which sick pay might be paid, as set out in the applicant’s contract of employment, may well fall foul of section 9(b) of the Act (proscription of contracting out) and accordingly the respondent might be required to pay the applicant for all periods of absence for a reason related to his disability and not just up to the contractual limit. It follows from this that the respondent would be required to treat the applicant more favourably than it treats or would treat others, contrary to section 6(7) of the Act.

An alternative reasoning would be that those not absent and receiving full pay were not receiving sick pay and that if this is the correct comparator, the applicant was not entitled to receive sick pay. Either way, to produce such results was surely not the intention of Parliament.

3. Applying a purposive approach to the Act, as is required, the Tribunal’s decision that the applicant had been treated less favourably than someone to whom that reason did not apply, was surely perverse having regard to the findings of fact that the respondent stopped paying sick pay in relation to absences of all other workers in similar situations and, following an examination of staff sickness records, that there was no discernible difference between the treatment of the applicant and the treatment of others in the same grade.

Whether the reasoning in *Clark v Novacold* is flawed, was misconstrued or misapplied by the Tribunal or should be distinguished on the facts of this case remains to be seen. What is clear is that the matter must be revisited.

*Simon Livingstone*



# Clarendon Chambers

*Chambers is based in London, Northampton and Redhill, Surrey.  
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- Wrongful and unfair dismissal
- ❖
- Sex, race and disability discrimination
- ❖
- Redundancy
- ❖
- Transfer of undertakings
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- Restrictive covenants and restraint of trade
- ❖
- Contracts of employment
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- New legislation including Working Time Regulations

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