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AUGUST 2016

Employment Law BULLETIN

Welcome to our August employment law bulletin.

August is traditionally a quiet time for the courts and tribunals but there are, nonetheless, a number of interesting cases from the EAT.

In *Royal Mail Group Limited v Jhuti* the EAT has held that a dismissal was automatically unfair on the ground that the employee had made protected disclosures. And this was the case even though the dismissing officer was unaware of the disclosures. Another manager, who was aware of the disclosures, had deliberately created a paper trail which indicated that the employee was performing poorly. This led to the employee's dismissal on performance grounds. Underlying the supposed performance reason for dismissal was the real reason, namely that the employee had made protected disclosures.

In *McTigue v University Hospital Bristol NHS Foundation Trust* the EAT has held that a nurse assigned by an agency to work for an NHS trust came within the extended definition of a 'worker' which applies for the purposes of whistleblowing legislation.

In *Dronsfield v University of Reading* the EAT held that a decision to dismiss an employee based on an investigation report, from which a number of statements in favour of the employee had been redacted was potentially unfair. The case also raises interesting issues around a university's disciplinary procedures.

In *XC Trains Limited v CD and Aslef & Others* the Advocate General of the European Court considered whether a dress code applicable to all employees was direct and/or indirect discrimination under the EU Equal Treatment Framework Directive when it affected a Muslim worker who refused to remove her headscarf when requested by her employer and was dismissed.

In *AA Solicitors Limited v Majid the EAT* considered the size of an award to an employee for injury to feelings following a successful discrimination claim. The EAT, looking at the guideline case of Vento v Chief Constable of West Yorkshire Police, considers that it is appropriate for tribunals to apply an increase to the "Vento guidelines" in line with RPI inflation.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

Redundancy and Restructuring: A Practical Guide

• Breakfast Seminar, 18th October 2016

and in conjunction with ACAS in the North East:

Understanding TUPE: A practical guide to business transfers and outsourcing

• Full Day Conference, **Sheffield**, 5th September 2016

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

• Full Day Conference, **Hull**, 20th October 2016

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Wherever you see the BAILII logo simply click on it to view more detail about a case

1: Statutory Code of Practice published on the English language requirement for public workers

On 21 July 2016 the Cabinet Office and the Home Office published a draft Code of Practice which public authorities must have regard to when fulfilling their obligations under the English language requirement.

The requirement, which the Government intends to bring into force in October, states that all public sector staff working in customer-facing roles will be required to be fluent in English (or, in Wales, to be fluent in either English or Welsh). Public authorities include government departments, public bodies, local government, NHS bodies and state-funded schools, including academies. It will not apply to people who are employed directly by private sector or voluntary sector employers.

The Code provides guidance to public authorities in deciding the necessary standard of fluency, establishing a complaints procedure for members of the public, and remedial action where a member of staff falls below the necessary standard.

The standard applicable to a particular worker will depend on the nature of their customer-facing role. Amongst other things, the public authority should consider how often the worker speaks to members of the public, the content and likely duration of the contact and the significance of the spoken interaction to the delivery of the service.

The Code provides guidance for assessing language skills and developing policies and practices to comply with the new duty. It also states that public sector employers should consider providing training to support staff in meeting the fluency requirement. Section 3 of the Code covers action which can be taken by employers in the event that an existing member of staff does not attain the necessary standard, such as adjusting the role to reduce its customer-facing element, redeployment and dismissal.

The Code reminds employers of their duty to act fairly and reasonably in sanctioning staff and provides guidance on the employer's duties under the Equality Act 2010, including ensuring that staff are not discriminated against on the ground of race or disability.

2: Publication of gender pay gap regulations postponed

Regulations governing the reporting of gender pay gap statistics were due to be published this Summer and to come into force on 1 October 2016. The Government Equalities Office has suggested that the regulations will go before Parliament this Autumn. It is now expected that they will come into force in April 2017.

This change in timetable should not affect the obligations on employers who are subject to the new rules. It is likely that calculations will still have to be made in relation to the relevant date of 30 April 2017 and that the first gender pay gap reports will, as expected, be due in April 2018.

Only those employers with 250 or more "relevant" employees will be subject to the new regulations. The draft regulations currently define relevant employees as those who are employed under a contract of employment who ordinarily work in Great Britain and whose contracts are governed by UK law.

3: Whistleblowing charity publishes five year review

The whistleblowing charity Public Concern at Work published a five year review on 1 August. The review highlights the fact that those who blow the whistle at work often report negative outcomes, such as victimisation or dismissal, and reports that there has been a small, but continuous, drop in the number of those questioned who would raise a concern about serious malpractice at work.

The review calls for Public Concern at Work's Code of Practice for whistleblowing arrangements to be put onto a statutory footing with a view to improving practices in the workplace.

Public Concern at Work's review of whistleblowing cases in employment tribunals shows that only 12% of claims brought between 2011 and 2013 were successful. A slight increase is reported in the number of cases struck out at a preliminary stage in that period. These figures, however, pre-date the 2015 EAT decision in Chesterton Global Ltd v Nurmohamed UKEAT/0335/14/DM which made strike out of a whistleblowing claim relating to an employee's own employment contract less likely. The Court of Appeal will hear the appeal from this case in October.

Public Concern at Work provides a free confidential advice line for workers who are unsure about whether to raise a concern about risk, malpractice or wrongdoing at work and how to raise their concerns. The review shows that the majority of calls to this advice line come from the health, care and education sectors.

Those who attended Wrigleys' annual Employment Law Update for Charities in June will have heard our key note speaker, Cathy James, Chief Executive of Public Concern at Work, discussing the importance of making whistleblowing policies and procedures accessible and workable in practice and the importance of encouraging workers to come forward with their concerns without making the process too legalistic or overly complex.

4: Whistleblowing was reason for dismissal even though dismissing officer was not aware of protected disclosurest

In ***Royal Mail Group Limited v Jhuti***, the EAT held that a dismissal was automatically unfair, as the reason or principal reason for the dismissal was the making of protected disclosures by the employee.

Ms Jhuti was employed by Royal Mail Group in its media sales team. She made protected disclosures to her line manager, Mr Widmer, concerning a breach of compliance rules by another long-serving sales person in her team. Mr Widmer tried to convince her that she was unclear about the compliance rules. He advised that she retracted her allegations. Motivated by her desire to keep her job, Ms Jhuti sent an email retracting her allegations.

Following this, Mr Widner made working life difficult for Ms Jhuti. She complained several times to HR, but no action was taken. She went on sick leave and raised a grievance about Mr Widmer's bullying and harassment. A settlement package, including one year's salary, was offered to Ms Jhuti but was rejected.

A different manager, Ms Vickers, was appointed to review Ms Jhuti's case during her sick leave. She did not speak to Ms Jhuti or have sight of her grievance. Mr Widmer told her very briefly that Ms Jhuti had alleged improper conduct but had subsequently retracted her allegations. Ms Vickers dismissed Ms Jhuti on the ground of poor performance.

Ms Jhuti brought a claim for automatic unfair dismissal in an employment tribunal, arguing that her protected disclosures were the reason, or a principal reason for her dismissal. The tribunal

dismissed her claim on the basis that the person who made the decision to dismiss did not know about the protected disclosures and so could not have been motivated by them. It made this decision despite finding that the disclosures were protected and that Mr Widmer had deliberately created a paper trail which indicated that Ms Jhuti was performing poorly.

The EAT disagreed, stating that the employment tribunal had incorrectly followed a case on direct discrimination which was not applicable to a case concerning protected disclosures. In a direct discrimination case, the decision-maker must actually know about the protected characteristic in question and be motivated by it to some extent. Where whistleblowing is concerned, the legislation states that a dismissal will be automatically unfair if "the reason (or if more than one, the principal reason) for the dismissal" is the protected disclosures.

Following comments made by the Court of Appeal in Co-operative Group Limited v Baddeley [2014] EWCA Civ 658, the EAT determined that "a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to the employer of both of them".

Employers should be aware that this case may make it easier for employees to bring automatic unfair dismissal claims where there is no evidence that the dismissing officer knew of the disclosures but where someone responsible for the employee did know about the disclosures and lied about or manipulated evidence concerning the employee.

5: Agency nurse was a worker for the purposes of whistleblowing legislation

In ***McTigue v University Hospital Bristol NHS Foundation Trust***, the EAT held that a nurse assigned by an agency to work for an NHS Trust came within the extended definition of a worker which applies for the purposes of legislation protecting those who blow the whistle at work.

Ms McTigue was employed by an agency and was assigned to an NHS sexual assault referral centre as a Forensic Nurse Examiner. She made certain disclosures to the NHS Trust and the agency and was subsequently removed from her assignment. She brought detriment claims, alleging that she had been removed from her assignment because of protected disclosures.

An employment tribunal struck out her claims against the NHS Trust on the basis that, in relation to the NHS Trust, she was not a worker under the standard employment law definition, nor under the extended definition for the purpose of whistleblowing protection. This extended definition includes those who are introduced or supplied to perform work by a third person (i.e. an agency) and whose terms of engagement are not "substantially determined" by the worker but by the agency and/or the end user. The tribunal found that Ms McTigue did not come under this definition because the majority of terms (or at least the more significant terms) in her contract were not determined by the NHS Trust.

The EAT disagreed and remitted the case to a different tribunal. It held that the tribunal was wrong to ask whether the majority of terms or whether significant terms had been determined by the NHS Trust. Rather, it should have considered to what extent the contractual terms were determined by Ms McTigue and whether the NHS Trust and/or the agency in large part determined her terms.

As most agency workers cannot be said to have substantially determined their own contractual terms, this decision indicates that most agency staff are likely to be protected from being subjected to detriments by the end user because they have made disclosures which qualify for whistleblowing protection.

6: Decision to dismiss based on an investigation report redacted by HR and an in-house lawyer was unfair

In ***Dronsfield v University of Reading***, the EAT held that a decision to dismiss based on an investigation report, from which a number of statements in favour of the claimant had been redacted, was not fair in all the circumstances.

The case concerned Dr Dronsfield, a professor of Fine Art at the University of Reading. He had a sexual relationship with a student he was supervising and failed to report this to his head of department. Under the university's statutes, dismissal of Dr Dronsfield could only be where there was "good cause" for reasons including "conduct of an immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment". An investigation was jointly conducted by another professor and an HR officer. The first draft of the investigation report included a number of statements which were in Dr Dronsfield's favour. It suggested that he had made an error of judgment in not reporting the relationship, but that he was not guilty of immoral, scandalous or disgraceful behaviour. The report was then reviewed by the HR department and an in-house lawyer. A number of redactions were made, including removing the opinion that Dr Dronsfield's behaviour had not been immoral, scandalous or disgraceful. Following a disciplinary hearing, Dr Dronsfield was dismissed.

Dr Dronsfield brought a claim for unfair dismissal. An employment tribunal dismissed his claims. It found that the wording of the statute could be equated with gross misconduct and that the university had been reasonable to find that the claimant's conduct amounted to gross misconduct. It also found that the redacted investigation report accurately represented the investigating officer's opinions, even though it was clear that he had reconsidered his findings in the light of advice from HR.

On appeal, the EAT disagreed and remitted the case to a fresh tribunal. It made clear that the university should have considered the wording of its statute when deciding whether to dismiss rather than applying a general concept of what constitutes gross misconduct. It also held that the employment tribunal had accepted the findings of the investigation report as conclusive because it had found that the investigating officer genuinely believed it reflected his own opinions. The EAT stated that the correct test was whether the employer's decision to dismiss on the basis of the redacted report was objectively fair.

The EAT commented that an HR officer should not have been jointly charged with producing the investigation report. Referring to the case of Ramphal v Department of Transport UKEAT/0352/14/DA, the judgment reiterates that HR's involvement should be limited to advising on law, procedure, clarity and consistency and should not include input on culpability. The judge also suggested that the university's failure to interview the student involved was not in line with good practice.

7: Indirect sex discrimination: Employment Tribunal must weigh discriminatory impact of PCP against legitimate aims of the employer

In ***XC Trains Ltd v CD and Aslef & Others***, the EAT held that an employment tribunal had failed properly to consider the objective justification of the employer in its imposition of anti-social shift patterns on train drivers.

The claimant in this case was a single mother of three children under the age of five. She was employed as a train driver and was frequently expected to work shifts at anti-social hours and at weekends. She submitted a series of flexible working requests (for shifts between 8am and

6pm and not including weekends) which were turned down, although some temporary adjustments were made to her working pattern. The Local Level Committee (LLC) which represented the claimant's mainly male colleagues, stated that agreeing to the claimant's requests would disadvantage the other drivers as they would have to take more shifts outside of normal working hours.

The claimant brought a claim for indirect sex discrimination in an employment tribunal. The tribunal upheld her claim, finding that the provision, criterion or practice (PCP) of requiring that all drivers worked over 50% of rosters, including Saturday, put women at a disadvantage because women are more likely to have caring responsibilities and put the claimant at that disadvantage for the same reason. The tribunal considered that the provision of a rail service outside of normal working hours was a legitimate aim but found that imposing an anti-social shift pattern was not a proportionate means of achieving that aim. It determined that the employer could have achieved its aim in less discriminatory ways. It also considered that the employer and the LLC were perpetuating a male-dominated workforce by putting barriers in the way of family friendly working practices.

The EAT disagreed, holding that the tribunal had failed to weigh the legitimate aim of the employer against the discriminatory impact on the claimant. It stated that the tribunal had failed to consider properly the legitimate aims put forward by the employer, and had instead wrongly considered its own aim of creating a gender-balanced workforce. It had not given due consideration to the employer's need to run a rail service at anti-social times in accordance with its franchise agreement and to balance the rights and needs of the existing workforce. The case was remitted to a differently constituted tribunal to consider the employer's justification defence.

8: Discrimination: Employment Tribunals can increase injury to feelings award bands in line with inflationy

In ***AA Solicitors Ltd v Majid***, the EAT considered whether an injury to feelings award made by a tribunal was "manifestly excessive". Deciding that it was not, the EAT commented that tribunals are able to apply an increase in line with RPI inflation to the Vento bands when determining the amount to be awarded for injury to feelings.

The case concerned a Legal Practice Course student, Miss Majid, who was employed by AA Solicitors during the period of her studies. The firm's only solicitor subjected her to sexual advances which she rejected. This led to Miss Majid losing her job. She brought a successful claim for sexual harassment and was awarded £14,000 for injury to feelings. On appeal, the EAT held that the amount awarded was "on the high side" but that it was not so high as to allow the EAT to interfere with the tribunal's decision, based as it was on hearing the evidence.

The EAT commented that tribunals are able to apply an increase to the Vento bands to reflect RPI inflation and need not wait for guidance from the EAT or higher courts.

The 2002 sex discrimination case of Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871 set out three bands applicable when determining injury to feelings awards. These figures were increased following the EAT case of Da'Bell v NSPCC [2010] IRLR 19 and the Court of Appeal case Simmons v Castle [2012] EWCA Civ 1039. Commentators have suggested that, applying the current RPI, the bands should now be:

Lower band:	up to £8,100 (for less serious cases, such as a one-off event);
Middle band:	£8,100 - £24,300 (for serious cases, but not those which fall into the top band);
Higher band:	£24,300- £40,500 (for the most serious cases, such as extended campaigns of harassment).

9: TUPE round-up

Local government: alternative models of service delivery

The House of Commons Library Briefing Paper No 05950, 27th April 2016 sets out a useful summary of the methods by which local authorities externalise their activities. Very often this will involve the application of TUPE.

The paper describes how local authorities have always had the legal power to make use of different forms of service delivery. After the introduction of compulsory competitive tendering in the Local Government Act 1998, authorities were legally required to tender their services competitively. That was replaced by the "Best Value" regime under the Local Government Act 1999. Since then, the 2011 Coalition Government's White Paper Open Public Services exhorted greater use of different forms of service delivery. Government cuts have also made local authorities think hard about savings and how these can be achieved by externalisation.

There are a number of examples quoted in the paper. Shared services refers to two or more authorities sharing a service. This can be done via a cooperation agreement or by the formation of a separate legal entity. The latter will often involve a TUPE transfer of staff from the local authority (see, for example, Lorenzo Amatori v Telecom Italia SpA, Telecom Italia Information Technology, formerly Shared Service Centre Srl (Case C-458/12)). In that regard the paper describes how the Public Contracts Regulations 2015 (SI 2015/102) may exempt authorities from public sector procurement rules if a contract is let to a subsidiary body which exists only to provide services to the local authority or authorities that control it (previously known as the so called "Teckal exemption" (Teckal Srl v Commune di Viano (C-107/98; [1999] ECR 1-8121).

Local authority trading companies are also permitted. These arrangements often involve the application of TUPE when staff are moved from the local authority into these separate entities. Following the Coalition government's emphasis on open public services, a number of local authorities have spun out services to staff owned companies or "mutuals". This, too, would involve the application of TUPE.

The note covers the law and practice in England only. It explains that local authorities in Scotland and Wales and Northern Ireland have explored similar alternative approaches to service delivery, but the legal landscape is different in each case.

TUPE and BREXIT

One day in the future might we have to advise on changes to the TUPE Regulations? Not for a long time. The outcome of the European Union referendum changes nothing. Notification to leave the EU under Article 50 of the TEU, says the Government, will not be triggered until January 2017. Negotiations to leave the EU could take up to two years following that trigger. And when there is an exit from the European Union we may well end up continuing to follow the EU Acquired Rights Directive. If the United Kingdom wants access to the single market it may have no practical alternative but to join the European Free Trade Association (the current members of which are Iceland, Liechtenstein, Norway and Switzerland). Iceland, Liechtenstein and Norway are members of the European Economic Area (EEA) agreement. Membership of the EEA entails following a number of European directives, including the Acquired Rights Directive. Switzerland is not a member of the EEA but has a number of bilateral agreements with the EU. Swiss law, although not incorporating the Acquired Rights Directive, nonetheless includes legal provisions which are similar in most respects.

Even if the UK were freed from European Court jurisprudence it is unlikely there would be an appetite for radically changing the TUPE Regulations. After all, in 2006 the government agreed to create the concept of service provision change in regulation 3(1)(b) of TUPE which exceeds, in its scope, the business transfer rules under the Acquired Rights Directive. The application of TUPE to outsourcing is therefore, already, in practice, largely independent of European law. The current balance between employer and employee, struck by amendments made to TUPE by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 is unlikely to be changed. After all, as the 2013 Government impact assessment in relation to these new regulations indicated: "there are currently between 26,500 and 48,000 TUPE transfers taking place each year, with the number of employees affected likely to be between 1.42million and 2.1million per year. The number of transfers is unlikely to reduce in the future". Whilst some more "business friendly" alterations to TUPE in the distant future are not inconceivable, we suggest there will be no appetite for activity on a scale such as this to be unregulated.

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