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Employment Law BULLETIN

Welcome to our April employment law bulletin.

Some interesting cases have been decided in the Employment Appeal Tribunal, the Court of Appeal and the Supreme Court, together with an interesting opinion from the CJEU Advocate General.

In *Born London Limited v Spire Production Services Limited* the EAT has decided that when a transferor, in providing Employee Liability Information to a transferee pursuant to regulation 11 of the TUPE Regulations 2006, incorrectly stated that a Christmas bonus was non contractual, when it turned out to be contractual, there was no claim available to the transferee for compensation under TUPE itself. The case highlights the need for any transferee to undertake due diligence on the status of employment terms and conditions it inherits.

In *HMRC v Garau* an employee who intended to claim unfair dismissal obtained an ACAS early conciliation certificate. Just before the three month limitation period for making a claim expired, the employee consulted ACAS again and ACAS issued a second certificate. The EAT held that the second conciliation certificate did not extend the original time for making a claim and the claim could not proceed. That was not to say that voluntary conciliation through ACAS is to be discouraged. But the second attempt at conciliation could not have modified the strict time limits for making a claim.

In the joined cases of *Essop v Home Office* and *Naeem v Secretary of State for Justice* the Supreme Court has overruled decisions of the Court of Appeal in both cases, holding there is no need for a claimant in a discrimination claim to establish the reason for a particular disadvantage suffered by a group sharing a protected characteristic. It is enough just to show there is a disadvantage.

In *Adeshina v St George's University Hospitals NHS Foundation Trust* the Court of Appeal has ruled that a manager's poor attitude and failure to lead change in the organisation was capable of being gross misconduct.

In *Agarwal v Cardiff University* the EAT has confirmed that, in a claim for unauthorised deduction from wages, an employment tribunal cannot consider the claim if the employee's entitlement is disputed and requires a construction by the tribunal of the terms of the employment contract. If the terms of the employee's entitlement are in dispute the employee must pursue an alternative remedy, by way of a contractual claim before an employment tribunal (if the employment has ended) or by a contract claim in the civil courts.

For some time it has been the rule in UK law concerning TUPE transfers that TUPE applies when a business is sold by an insolvent company in administration to a "rescuer" via a so called "pre-pack" insolvency sale. The Advocate General of the European Court has now confirmed this in relation to the interpretation of the Acquired Rights Directive (on which TUPE is based) in the case of *Federatie Nederlandse Vakvereniging v Smallsteps BV*.

May I also remind you of our forthcoming events:

Click any event title for further details.

Employment Law Update for Charities

- Full day conference, Leeds, 15th June 2017

In conjunction with ACAS

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

- Full day conference, Leeds, 4th May 2017

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

- Full day conference, Sheffield, 21st June 2017

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1: TUPE: No Employee Liability Information claim when transferor mis-stated contractual nature of an employee bonus

When giving Employee Liability Information to a transferee pursuant to reg 11 of TUPE, a transferor incorrectly stated that a Christmas bonus was non-contractual, when it turned out it was contractual. Was this a breach of reg 11, giving rise to a compensation claim under reg 12? No, said the EAT in *Born London Limited v Spire Production Services Limited*.

Born took over a contract from Spire to print Sotheby's catalogues. Prior to the transfer Spire provided Born with Employee Liability Information. Spire provided details of the employees' Christmas bonus, but stated that it was "non-contractual". Born contended that, because the bonus was contractual in nature, Spire had given incorrect Employee Liability Information and Born should be compensated for this misstatement under reg 12 of TUPE.

The ET concluded that Born's claim had no reasonable prospect of success. For, even assuming the bonus was contractual, all regulation 11 had required Spire to do was to provide particulars of employment as defined by section 1 of the Employment Rights Act 1996. This did not require Spire to state whether or not remuneration was contractual.

The EAT agreed. Section 1 of the ERA 1996 sets out the requirements on employers in respect of a statement of employment particulars. Those particulars were not to be read as limited to contractual terms and conditions. But there was no obligation to state whether the particulars were contractual or not. Saying that the bonus was non-contractual went further than the particulars required to be provided for reg 11 purposes. There was therefore no breach of reg 11.

In cases like this it is up to the transferee to undertake more due diligence on whether employee remuneration is contractual or not. And had this been a case where the transferee enjoyed well drafted warranties and indemnities from the transferor, a claim against the transferor might have arisen accordingly. But in service provision change cases these are usually non-existent.

2: ACAS Early Conciliation: Second EC Certificate did not extend time

If ACAS issues a second early conciliation certificate in respect of the same matter, does this extend the time for making a claim? No, said the EAT in *HMRC v Garau*.

Mr Garau was given notice of termination of his employment by HMRC on 1st October 2015, expiring on 30th December 2015. On 12th October 2015 he contacted ACAS for the first time, using the mandatory early conciliation procedure. On 4th November 2015 ACAS issued an early conciliation certificate. On 28th March 2016, he contacted ACAS for a second time. The next day, 29th March 2016, was the day on which the primary 3 month limitation period expired. On 25th April 2016 ACAS issued a second certificate.

On 25th May 2016 Mr Garau presented his claims for disability discrimination and unfair dismissal. In deciding whether the claims were presented in time the employment tribunal held that he could rely upon the second early conciliation certificate to "stop the clock". In its opinion the claims were issued in time.

But HMRC contended that the second certificate was unnecessary, and had no effect on the running of time for limitation purposes. The limitation period of 3 months therefore expired in the normal way on 29th March 2016. This was because the first early conciliation certificate did not affect the running of the primary limitation period, since it was issued before the limitation period had started to run at all.

The EAT agreed. Construing s.207B of the Employment Rights Act 1996 (and its counterpart in s.140B of the Equality Act 2010) the legislation allowed for only one certificate to be required for "proceedings relating to any matter". A second certificate was unnecessary and did not assist the claimant. The second, voluntary certificate could not modify the limitation period.

That was not to say that voluntary conciliation through ACAS was to be discouraged. But it could not, in this case, modify the time limits concerned.

3: No need to show reason for disadvantage in indirect discrimination claim

The Supreme Court has recently handed down its decision in the joined cases of ***Essop v Home Office and Naeem v Secretary of State for Justice.*** The Supreme Court overruled decisions of the Court of Appeal in both cases, holding that there is no need for a claimant to establish the reason for a particular disadvantage suffered by a group sharing a protected characteristic in an indirect discrimination claim. It is enough first to show there is a disadvantage.

The case of Essop v Home Office concerned a number of claimants from black and ethnic minority (BME) backgrounds who were over 35 years old. The Home Office imposed a core skills assessment which had to be passed before any positions above that of higher executive officer could be attained. The claimants did not pass the assessment and were not promoted as a consequence.

The claimants brought claims in the Employment Tribunal of indirect discrimination on the ground of race. They argued that the core skills assessment was a provision, criterion or practice (PCP) which was applied to everyone but which put older people from a BME background at a disadvantage. They put forward statistical evidence that BME candidates over the age of 35 were less likely to pass the test than those who were younger and from a non-BME background. Although the tribunal accepted that the statistical evidence showed older BME candidates were less likely to pass, the claims were rejected on the basis that the claimants has failed to show the *reason* why they had suffered the disadvantage, in other words *why* they had failed the assessment.

The EAT disagreed, holding that it was not necessary in an indirect discrimination claim for claimants to show why they had suffered a particular disadvantage. On further appeal to the Court of Appeal, this finding was overturned on the basis that it was necessary for the claimants to show why the assessment put them at a particular disadvantage and that they had failed the assessment for that reason.

In the case of *Naeem v Secretary of State for Justice*, Mr Naeem worked as an imam in the Prison Service. Until 2002, the Prison Service employed only Christian chaplains on a permanent basis. Chaplains of other religions were employed temporarily from time to time. Chaplains' salaries increased with length of service and through performance appraisals. Mr Naeem complained to an employment tribunal of indirect discrimination on the grounds of both religion and race. He brought statistical evidence to show that Christian chaplains were more likely to be at the top of the pay scale than Muslim chaplains.

The employment tribunal found that the claimant had established indirect discrimination but that the employer's PCP of rewarding length of service through pay was justified as a proportionate means of achieving a legitimate aim.

On appeal, the EAT disagreed, stating that the tribunal was wrong to include Christian chaplains who had been employed before 2002 in the comparison pool. It found that the circumstances of these Christian chaplains were materially different to those of employees who were engaged after 2002. It held that chaplains of any religion who were appointed at the same time as the claimant would all face the same disadvantage and so the pay system could not be said to be indirectly discriminatory against the claimant.

The Court of Appeal agreed. It found that Muslim chaplains were not put at a particular disadvantage and also stated that the claimant had to show that the reason behind the disadvantage was connected to the protected characteristic in question.

The Supreme Court, dealing with both appeals in conjoined cases, overturned both Court of Appeal decisions. It held that there is no requirement for a claimant to show the reason *why* a PCP puts a disadvantaged group sharing a protected characteristic at a particular disadvantage and that there is no need for there to be a connection between the reason why the PCP disadvantages the group and the protected characteristic.

Lady Hale's judgment brings clarity to the requirements for an indirect discrimination claim to be made out. She stated that there has never been any express requirement for an explanation of the reasons why a PCP puts a group at a disadvantage when compared with others. She noted that it has always been enough to show simply that there is a disadvantage. She observed that the purpose of indirect discrimination legislation is to achieve a level playing field for employees with and without protected characteristics. She notes that there may be various reasons why a group finds it harder to comply with a particular PCP than other groups, but that is not necessary to pin down the reason behind the disadvantage suffered. She also noted that the legislation allows an employer to justify the use of a discriminatory PCP, and that there is no shame in such justification as there may be very good reasons for the PCP in question.

The Supreme Court judgment also clarifies that all workers affected by a PCP should be placed in the pool for comparison. In the case of *Naeem*, the correct pool was all employed prison chaplains, including Christian chaplains employed before 2002. The Supreme Court found no error of law in the tribunal's finding that rewarding length of service through pay was a proportionate means of achieving a legitimate aim. As it was not able to disturb the factual finding of the tribunal on this point, the claim was ultimately unsuccessful on the facts.

This judgment makes clear that the purpose behind indirect discrimination legislation is to protect people with a protected characteristic from suffering disadvantage where an apparently neutral PCP is applied. While the reason for the disadvantage will often be obvious, it need not be and there is no need to establish the reason for the disadvantage before the claim can be made out.

4: Lack of engagement with organisational change could constitute gross misconduct

In ***Adeshina v St George's University Hospitals NHS Foundation Trust,*** the Court of Appeal has ruled that a manager's poor attitude to, and failure to lead change in, a organisation was capable of being gross misconduct.

We noted the decision of the EAT in this case in our July 2015 Bulletin. The key point from the EAT judgment, which was not the focus of this appeal, was that an employer can, under certain conditions, correct mistakes made during a disciplinary process at the internal appeal stage and that the dismissal was fair despite an possible breach of the Acas code. This remains good law.

The Court of Appeal was asked to consider the reason for Ms Adeshina's dismissal. Ms Adeshina was employed as principal pharmacist in the Prison Service as part of St George's University Hospitals NHS Foundation Trust. She was involved in leading a project to change the way prison pharmacy services were provided. She was dismissed due to her poor attitude to and lack of engagement with this project.

She brought claims in the Employment Tribunal of unfair dismissal, wrongful dismissal, race discrimination, victimisation and whistleblowing detriment. At first instance all of her claims were dismissed. The EAT agreed.

Her appeal to the Court of Appeal focused on whether her alleged misconduct could amount to gross misconduct, including whether the allegations against her had been properly set out in the invitation to the disciplinary hearing; and whether the appeal panel had breached her contract by finding that her misconduct was more serious than the disciplinary panel had determined it to be. The claimant sought to rely on the case of *McMillan v Airedale NHS Foundation Trust* [2014] EWCA Civ 1031, in which it was held that it is not ordinarily permissible for an internal appeal panel to increase a disciplinary sanction unless permitted to do so under the contract.

The Court of Appeal dismissed Ms Adeshina's appeal. It made clear that it was not material that the invitation to the disciplinary hearing had not set out the categories of gross misconduct which were alleged as it was clear that the claimant understood the allegations she was facing and she had been able to put her case on these. It was rather for the decision-maker to determine whether the alleged conduct was serious enough to constitute gross misconduct. It also held that the appeal panel had not found the misconduct to be more serious than the disciplinary panel had found. It commented that the case of McMillan was, in any event, not relevant to the facts of this case as the disciplinary sanction applied to Ms Adeshina had not been increased by the appeal panel.

5: Unlawful deduction from wages: no tribunal jurisdiction if the contract has to be interpreted to ascertain the amount properly payable

Under s.13 of the Employment Rights Act 1996 an employer must not make a deduction from wages from a worker unless authorised by a statutory provision or by the worker's contract, or unless the worker has previously signified in writing his agreement or consent to the deduction.

Under S.23 of the ERA a worker may complain to an employment tribunal to recover the deduction from the wages concerned. However, it is a strict rule that such sums from which a deduction was made have been "properly payable" to the worker in the first place.

In ***Agarwal v Cardiff University*** the EAT has confirmed that an employment tribunal does not have jurisdiction to hear and determine a claim under section 13 of the ERA if it requires a decision on the construction of the employment contract. In this regard the EAT followed the decision of the Court of Appeal in *Southern Cross Healthcare Co Ltd v Perkins* [2011] ICR 285. In that case the Court of Appeal held that an employment tribunal has no jurisdiction to construe a statement of written particulars in a claim for non compliance by an employee to supply particulars under s.11 of the ERA 1996. That applies equally where it is necessary to construe a contract in order to determine a claim under s.13 of the ERA not to suffer an unauthorised deduction from wages.

In this case the claimant was employed under what was described as a "clinical academic contract", performing both lecturing duties for Cardiff University and clinical duties for Cardiff and Vale University Local Health Board. Following sickness absence the claimant returned to her lecturing duties, but not her clinical duties (as there were interpersonal issues to be resolved), and therefore was paid half her salary as a result. She brought a claim under section 13 of the ERA 1996 claiming that she had suffered unauthorised deductions from her wages in respect of the clinical sessions. An employment tribunal dismissed her claim on the basis that it did not have jurisdiction to hear it, as it was not possible to determine the claim without having to engage in the construction of the employment arrangements with Cardiff University and the Health Board, the terms of which, and the relationship between which, were in dispute.

The EAT agreed. If, therefore, the terms of the worker's entitlement are in dispute the employee must pursue an alternative remedy, by way of a contractual claim before an employment tribunal under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (if the employment has ended) or by a contract claim in the civil courts.

6: TUPE: the application of the Acquired Rights Directive to 'pre-pack' insolvency sales

For the first time, the European Court has been called on to examine the concept of 'pre-pack' insolvency sales and the application of the Acquired Rights Directive. Advocate General Mengozzi has given his preliminary opinion in *Federatie Nederlandse Vakvereniging v Smallsteps BV* (Case C-126/16).

A pre-pack insolvency sale is basically a sale organised prior to an administration of an insolvent company, with an expectation that, once appointed, the administrator will promptly implement the sale. It first developed as a concept in the US and the UK and then spread to a number of EU Member States, for example in Germany, France and the Netherlands. This case originated from the courts in the Netherlands.

In Article 5(1) of the Acquired Rights Directive 2001/23/EC it is provided that, unless Member States stipulate otherwise, Article 3 and 4 (the transfer of the employment contract and protection against dismissal) do not apply to any transfer of an undertaking "where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority)".

This is the pattern followed by the UK TUPE Regulations. Regulation 8(7) of TUPE provides that regulations 4 (transfer of employment contracts) and regulation 7 (control of dismissals because of the relevant transfer) do not "apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner".

In the UK, the Court of Appeal, in *De'Antiquis v Key2Law* (Surrey) LLP [2000] EWCA (Civ) 1567, adopted an absolute approach to the question of whether sales from by an administrator of an insolvent company are covered by TUPE. It held that regulation 8(7) can never apply to purchases from administrators. This is because the purpose of UK administration proceedings is not to liquidate the assets of the transferor but to ensure, if possible, its rescue. Upon an insolvency sale following administration in the UK, the full protection of TUPE therefore applies to the transferring employees of the transferor. This is so even though this is a "pre-pack" insolvency sale (see *OTG Limited v Barke* UKEAT/0320/09 and *De'Antiquis*).

In the Netherlands pre-pack procedures have not been regulated by statute but are, rather, a product of insolvency practice. In the present case the AG recognised that in dealing with the applicability of the Acquired Rights Directive to a pre-pack insolvency sale, it must strive to find a fair balance between, on the one hand, the imperative not to undermine the use of legal instruments such as the pre-pack, which in its opinion pursued the "laudable" aim of saving units which are still economically viable, and, on the other, the requirement not to circumvent the protection of employees, whose rights are guaranteed by EU law.

The Advocate General confirmed that in considering whether the Directive is applicable to a transfer taking place in these circumstances, the Court must consider two criteria, that is to say the objective of the procedure in question and the form of that procedure, whilst always having regard to the purpose of the Directive. He noted that the aim of the structure of the pre-pack procedure is to avoid the disruption that would result from the sudden cessation of the undertaking's activities at the point of declaration of insolvency, which would lead to a significant loss in the

value of the undertaking or viable parts being assigned. That is why, the Advocate General pointed out, these the preparatory steps towards a pre-pack sale are generally held in secret.

There was no doubt that the objective for this procedure was aimed at transferring the undertaking (or its still viable units) in order to restart the business without interruption. The Advocate General regarded this purpose as commendable. The aim was not therefore to liquidate the assets of the insolvent company but to ensure its continuance. So the procedure did not fall under the exception laid down in Article 5(1) and the full protection of the Directive and articles 3 and 4 applied. The domestic courts in the Netherlands (and in other Member States) should apply interpretative methods to achieve an outcome consistent with the objective perceived by Directive 2001/23 and therefore to ensure that, in the event of a transfer as part of a pre-pack, the protection scheme laid down in the Acquired Rights Directive is applied for the benefit of of the employees of the relevant parts of the undertaking.

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