EMPLOYMENT LAW BULLETIN

April 2018

Welcome to our April employment law bulletin.

Litigation about workers' rights in the "gig economy" sector continues. 20 bicycle couriers working for CitySprint are reported to have filed unlawful deductions from wages claims for backdated holiday pay, totalling £200,000. The workers are described as self-employed contractors and the employment tribunal will have to rule on their employment status.

In *Capita v Ali* the EAT has held that it is not unlawfully discriminatory to fail to offer a man enhanced shared parental pay when it has offered enhanced maternity pay to females.

The Deductions From Wages (Limitation) Regulations 2014 have limited a claim for arrears for wrongful deduction from pay brought under the Employment Rights Act 1996 to the past two years. But in a case which arose before those Regulations, the EAT has held, in *Coletta v Bath Hill Court (Bournemouth) Property Management Ltd*, that an employee claiming for underpaid sleep/in shifts could claim arrears over a period in that case of 15 years.

In *Abertawe Bro Morgannwg University Local Health Board v Morgan* the Court of Appeal has clarified that the 3 month limitation period for a reasonable adjustment claim under disability discrimination law runs from the end of the period during which the employer might reasonably have been expected to comply with its duty to make reasonable adjustments.

In X*erox Business Services Philippines Inc v Zeb* the EAT had to consider the application of TUPE to a transnational transfer.

Although the law on TUPE in the UK and Ireland differs on the subject of service provision change, the law on transfer of undertakings and employee rights on a business transfer is broadly the same. In *Cahill T/A Jerpoint Inn v Greene* an employee who was taken on by a purchaser of a thriving public house was entitled to transfer with no break in continuity in service and no redundancy payment was due from the former employer since, when there is a transfer of an undertaking, the employee is not deemed to be dismissed.

Finally, may I remind you of our forthcoming events:

- **Annual Employment Law Update for Charities**
  A full day conference, Leeds, 26th June 2018
  For more information or to book

- **Recent Developments in Whistle-blowing Protection**
  Breakfast Seminar, 7th August 2018
  For more information or to book

In conjunction with ACAS

- **Simplifying TUPE in a day: Understand the rules and avoid the pitfalls**
  A full day conference, Newcastle, 6th June 2018
  For more information or to book

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Contents

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

Changes to the taxation of termination payments from 6 April 2018

New rules about the taxation of termination payments are now in force. According to HMRC guidance, the new rules apply where both the termination date and the termination payment fall on or after 6 April 2018.

These rules require that employers tax as general earnings a portion of a termination payment which is equivalent to the amount the employee would have earned during an unworked notice period. Deductions must be made from this amount even if there is no contractual right to pay in lieu of notice.

Employers should take this change into account when negotiating termination awards as the potentially tax free element of an award is likely to be considerably reduced under the new rules. Where notice is being worked (and so there is no unworked notice period), HMRC may require documentary evidence of this.

HMRC has published new guidance in its Employment Income Manual (at EIM13874 – EIM13898 and EIM14000) on calculating "post-employment notice pay" or PENP, which is available here.

EHRC publishes report on sexual harassment in the workplace

The Equality and Human Rights Commission (EHRC) has published its findings after taking evidence on the experiences of around 750 people who reported suffering sexual harassment in the workplace, witnessing such harassment or supporting victims and on employers' steps to prevent and deal with such treatment.

The report, entitled *Turning the tables: Ending sexual harassment at work*, includes key recommendations for legislation, statutory guidance and employer best practice. These recommendations are aimed at transforming workplace cultures, promoting transparency and strengthening legal protections for those who suffer sexual harassment in the workplace.

The EHRC reports on individuals' experience of being silenced by inappropriate reporting procedures, victimisation following disclosure and a "toxic" culture of ignoring and belittling sexual harassment. It took evidence from 250 large UK employers across the private, public and third sector and it criticises inconsistent and ineffective employer procedures to prevent and deal with sexual harassment. The report particularly cites failures of employers to deal with sexual harassment by senior staff of more junior staff and by third party customers, clients and service users.

The recommendations include:

1. A mandatory duty on employers (enforceable by EHRC) to take reasonable steps to protect workers from harassment and victimisation in the workplace;
2. A statutory code of practice on sexual harassment and harassment at work specifying the steps that employers should take to prevent and respond to sexual harassment and a 25% uplift on employment tribunal compensation where an employer does not follow the code;
3. Legislation to make void any contractual clause which prevents disclosure of future acts of discrimination, harassment or victimisation;
4. Limiting the circumstances in which confidentiality clauses in settlement agreements can be used to prevent disclosure of sexual harassment which occurred in the past;

5. Extending the limitation period for harassment claims in an employment tribunal from three months to six months; and
6. Restoring and strengthening previously repealed legislative protection against harassment by third parties in the workplace.

CitySprint couriers bring claims for £200,000 in unpaid holiday pay

Last July, an employment tribunal found that a bicycle courier for CitySprint was a worker and so was entitled to two days' holiday pay (*Dewhurst v Citysprint UK Ltd* ET/220512/2016).

Following this case, twenty CitySprint couriers, supported by the Independent Workers' Union of Great Britain, are reported to have filed unlawful deductions from wages claims for backdated holiday pay totalling £200,000.

It is reported that CitySprint have, since the decision in *Dewhurst*, attempted to bring in a new contract for its couriers, whom it considers to be self-employed contractors and so not entitled to the National Minimum Wage or holiday pay.

Not discriminatory to fail to offer a man enhanced shared parental pay when offering enhanced maternity pay

In *Capita v Ali*, the EAT overturned an employment tribunal's decision that failing to offer enhanced pay to a man on shared parental leave was directly discriminatory. We reported on the decision of the employment tribunal in the June 2017 edition of this Bulletin.

Mr Ali transferred under TUPE from Telefonica to Capita in 2013. Female employees who transferred were entitled during maternity leave to 14 weeks' on full pay and 25 weeks' statutory maternity pay. Male employees who transferred were entitled to 2 weeks' ordinary paternity leave on full pay followed by up to 26 weeks' additional paternity leave with no guaranteed pay.

Mr Ali's wife suffered from post-natal depression after the birth of her daughter and was advised to return to work. Mr Ali took his two weeks' paid leave and explored the option of taking shared parental leave (SPL). His employer informed him that he could take SPL but would only be paid statutory shared parental pay. He brought claims of direct sex discrimination, indirect sex discrimination and victimisation in the Employment Tribunal.

An employment tribunal found that he had been directly discriminated against. The decision was based on its view that Mr Ali could compare himself with a hypothetical female employee who was on maternity leave after the initial two week compulsory maternity leave. It considered the requirement in section 13(6)(b) Equality Act 2010 which states that no account is to be taken of the special treatment afforded to women in connection with pregnancy or childbirth when determining if a man has been sexually discriminated against. However, it decided that the enhanced maternity pay available to women under the contract after the initial two weeks was not protected as special treatment in connection with pregnancy and childbirth. Rather it was special treatment for caring for a newborn baby, which role is not exclusive to women. In reaching this decision, the tribunal commented that the purpose of the shared parental leave and pay rules is to encourage men to take a greater role in caring for their babies.

The EAT disagreed. It noted that the right to maternity leave and pay and the right to shared parental leave and pay spring from two different European directives which have different

purposes. The Pregnant Workers Directive (the source of maternity leave and pay rights) has the primary purpose of protecting the health and wellbeing of the mother during pregnancy and the period following birth. It requires member states to provide a minimum of 14 weeks' paid maternity leave, although UK legislation provides for 39 weeks statutory maternity pay. On the other hand, the Parental Leave Directive (the source of shared parental leave rights) is focused on care for the child and does not require member states to provide for pay during shared parental leave, although UK legislation provides for statutory shared parental pay at the same level as statutory maternity pay to be paid for up to 37 weeks.

The EAT held that the correct comparator for Mr Ali's direct discrimination claim was a woman on shared parental leave rather than a woman on maternity leave after the two week compulsory maternity leave period. A woman on shared parental leave would have been offered pay at the same rate as Mr Ali and so he had not been treated less favourably.

This decision is helpful as it resolves the uncertainty following the conflicting employment tribunal judgments in *Ali* and *Hextall v Chief Constable of Leicestershire Police*. The EAT heard the appeal of Hextall in January and its judgment is expected shortly. It will reassure employers who offer enhanced maternity pay to women on maternity leave but pay only statutory shared parental pay. Interestingly, the EAT commented in the Ali judgment that the purpose of maternity leave may change after 26 weeks from the wellbeing of the mother to the care of the child, leaving open the possibility of direct discrimination claims where enhanced maternity pay is paid following the first 26 weeks.

Tribunal award for underpaid sleep-in shifts brought before 1 July 2015 could include arrears over a 15 year period

In *Coletta v Bath Hill Court (Bournemouth) Property Management Ltd*, the EAT held that a porter who had not been paid the National Minimum Wage in respect of sleep-in shifts and had brought his claim before the Deductions from Wages (Limitation) Regulations 2014 (the Regulations) came into force could claim arrears going back 15 years.

Mr Coletta began working as a porter for Bath Hill Court (Bournemouth) Property Management Ltd in 2000. In 2014, Mr Coletta commenced proceedings against his employer in the Employment Tribunal claiming that he had not been paid the National Minimum Wage for a period of 15 years. An employment tribunal upheld Mr Coletta's claim and awarded him £44,603.05 for underpayments over the six years prior to issue of the claim.

In coming to their decision, the tribunal considered provisions in the Limitation Act 1980 (the Act). Section 9 of the Act prescribes a six-year limitation period for all statutory monetary claims. However, section 39 of the Act provides that where a claim is brought under a statute that already prescribes a period of limitation, this six-year limitation period does not apply. Claims for unlawful deduction of wages must be brought within three months under the Employment Rights Act 1996. The tribunal considered that as this was a period of limitation for jurisdictional (rather than remedy) purposes, this time limit was not a period of limitation for the purposes of the Act. Therefore, s.39 did not apply and the limitation period to be applied to unlawful deduction of wages claims was six years.

The EAT disagreed. The EAT held that the three month time limit to bring a claim of unlawful deduction of wages is an alternative period of limitation for the purposes of the Act, and therefore the six year limitation period under the Act did not apply. Mr Coletta had brought his claim within the prescribed 3 month time limit and was therefore able to recover the sums owed to him for the entire 15 year period.

Whilst this judgment is likely to concern employers, particularly as the amounts owed could

go back a considerable number of years, it will come as some relief that this case will only apply to claims issued before 1 July 2015. Since that date, the Regulations limit awards for unlawful deductions from wages to a period of two years before the claim is brought. However, employers should be aware that breach of contract claims for underpayments can include up to six years of arrears.

When does the three-month time limit for a reasonable adjustments claim start to run?

In *Abertawe Bro Morgannwg University Local Health Board v Morgan*, the Court of Appeal has clarified that the three month limitation period for a reasonable adjustment claim runs from the end of the period during which the employer might reasonably have been expected to comply with its duty to make reasonable adjustments.

Ms Morgan worked as a psychiatric nurse therapist for the Local Health Board. The employer accepted that her depressive illness was a disability for the purposes of the Equality Act 2010 (the Act). Following a period of 18 months' sick leave, she was dismissed in December 2011.

Ms Morgan brought claims to an employment tribunal for unfair dismissal and disability discrimination. The tribunal dismissed some of her claims but found that she has been harassed on the ground of disability and that her employer had failed in its duty to make reasonable adjustments when it did not redeploy her to another role. Ms Morgan had brought her claim after the three month time limit for employment-related disability claims. However, the tribunal decided that it was just and equitable to extend time in this case.

The EAT upheld the employer's appeal in part. It held that the tribunal had been wrong to uphold Ms Morgan's claim for failure to make reasonable adjustments relating to the period after August 2011 when she was signed off as unfit for work of any kind (and so could not have been redeployed to another role). It remitted the case to the same tribunal to consider the reasonable adjustments claim in relation to the period before Ms Morgan was found to be not fit for work and to reconsider its decision to extend time.

The employment tribunal on remittal found that the employer had failed in its duty to make reasonable adjustments by not attempting to redeploy her before she was signed off work. It found that the three-month time limit for bringing the claim had started to run in August 2011. It also decided that it was just and equitable to extend the time limit, taking into consideration Ms Morgan's ill health and her difficulty in dealing with an internal grievance at the same time as tribunal proceedings.

The EAT and Court of Appeal both dismissed further appeals by the employer. In its judgment, the Court of Appeal made clear that in an Equality Act claim founded on an omission by an employer which extends over a period of time (in this case a failure to redeploy), time begins to run at the end of the period in which the employer might reasonably have been expected to comply with its duty. Time does not begin to run from the date on which the duty begins. The Court of Appeal commented that this would unfairly prejudice an employee who wrongly believes its employer is taking action to comply with its duty and so waits too long to bring a claim.

The Court of Appeal clarified that the question of when the employer might reasonably have been expected to comply should be considered in the light of the facts as they appear to the employee, including what the employer tells the employee.

The judgment also usefully clarifies the tribunal's consideration of when it will be just and equitable to extend time to bring a discrimination claim. The Court of Appeal states that a tribunal has the widest possible discretion in making this decision and that there are no particular factors the tribunal must take into consideration. However, it notes that tribunals usually consider the length of the delay, the reasons for the delay and whether the delay has

prejudiced the employer. The judgment makes clear that, in principle, there is no need for the tribunal to be satisfied that there was a good reason for the delay and no burden on the claimant to prove that it is just and equitable to extend time.

Employers should be aware that the duty to make reasonable adjustments is triggered when some aspect of working practices or the working environment puts a disabled person at a substantial disadvantage when compared with someone without their disability. This case highlights that a reasonable adjustments claim could be brought some considerable time after the duty is triggered and that the question of limitation will be a question of fact for the tribunal to determine.

TUPE and transnational transfers

In *Xerox Business Services Philippines Inc v Zeb* the employer, Xerox, decided to move some of its UK based accounting team's work offshore, choosing to transfer the finance accounting team function from Xerox UK in Wakefield to Xerox Business Services Philippines Inc. in Manilla. Mr Zeb was offered the opportunity to join the Philippines company but only on local terms and conditions. The dispute arose because Mr Zeb wanted to exercise TUPE rights to transfer to the Philippines company, but only on his UK terms and conditions of employment (which were ten times superior).

The outcome of the case was that this depended upon the terms of the employment contract. An employee is entitled to transfer under TUPE to a new employer, but only on the employee's present terms and conditions. In this case, the employee was employed to work in Leeds or Wakefield and not in Manilla, Philippines. He could not therefore unilaterally insist on a change to his employment contract to allow for this change of location. Therefore he was redundant and not automatically unfairly dismissed under TUPE.

Separately from this claim, Mr Zeb launched a race discrimination claim. It has reached the Court of Appeal in *Xerox (UK) Limited and Others v Zeb* [2017] EWCA Civ 2137. An employment tribunal struck out Mr Zeb's current claim of unlawful discrimination on the basis that he had no reasonable prospect of success. This was overturned by the EAT and the employer therefore appealed to the Court of Appeal.

The Employment Judge had held that it was impossible to see how putting Mr Zeb at risk of redundancy on the transnational transfer of the Xerox UK finance accounting team overseas could be by reason of any of the protected characteristics under the Equality Act, in circumstances where everyone else in the department was affected equally. The Court of Appeal agreed as the act of the employer in putting Mr Zeb at risk of redundancy was not unlawful discrimination, he could therefore only rely on two other alleged acts of discrimination by the employer, but these were lodged out of time and the proceedings as a whole were therefore dismissed.

TUPE in Ireland: No redundancy payment when pub business transferred

In *Cahill T/A Jerpoint Inn v Greene* (RPA/17/21) the claimant Greene worked as a bar worker in the inn in Thomastown, Co. Kilkenny. Her employer, Mr Cahill, a sole trader, ceased operating the business and entered into a lease/purchase agreement with a third party partnership. After this, Greene continued to work in the business in the same capacity although the new proprietors stated that they did not regard her as having transferred to their employment with continuous service. The new job was to be on the basis of a "clean slate" start. Having failed to resolve the issue of her continuous service, she put in a claim for a redundancy payment

against Cahill.

An Adjudication Officer allowed the claim. But this was overturned on appeal to the Irish Labour Court. The Labour Court held that on the lease purchase agreement and assignment of the lease of the pub to the third party partnership, there was a transfer of an economic entity retaining its identity. Applying the European Court test in the decision of *Spijkers v Gebroeders Benedik Abattoir CV* (Case 24/85) to the present case, there was a transfer of all stock, all furniture and equipment, fixtures and fittings, the publican's licence, use of the premises, accounts, the customer base and brand name of the business and goodwill. Finally there was no interruption or closure of the business and the activities before and after the transfer mirrored one other. And, of course, the complainant herself was taken on by the third party partnership. Accordingly, there was a transfer of an undertaking. As a result, she had not been dismissed and her continuity of employment was unbroken over the transfer. The same outcome would have arisen if the business had been situate in the UK as, on these facts, there would also be a business transfer under Reg 3(1)(a) of the UK TUPE Regulations.

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