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Employment Law BULLETIN

Welcome to our August employment law bulletin.

Alongside our news items, the cases reviewed in this issue concern a number of interesting areas.

In *Ngwenya v Cardinal Newman Catholic Secondary School* the EAT considered a case where an employee was dismissed following an unsuccessful employment tribunal claim against the employer. Because the allegations made against the school were made in bad faith there was a total breakdown in the employment relationship and, in these circumstances, the school was justified in dismissing.

In *Adjei-Frempong v Howard Frank Limited* the EAT considered the dilemma facing an employee who alleges that the employer has committed a fundamental breach of the employment contract. In such circumstances an employee can resign and claim constructive dismissal but delay in acting upon the breach can sometimes stop the constructive dismissal, because remaining too long after the breach will mean that the employee has "affirmed the contract". In this case the EAT stressed that the reasons for the employee's delay must be looked at carefully, and the context in which the delay occurred considered, before deciding whether the employee was too late to bring a claim.

Biggin Hill Airport Limited v Derwich concerns one of those rare cases where a defective dismissal was cured on appeal. The EAT gives guidance in these circumstances.

Employers frequently rely upon the band of reasonable responses test in unfair dismissal. This test allows considerable managerial prerogative in deciding whether dismissal is appropriate in the circumstances of the case. However, *Newbound v Thames Water Utilities Limited the Court of Appeal* has held that the band of reasonable responses is not infinitely wide and applying the test is not merely a tick-box exercise.

In *Harden v Wootlif* the EAT stressed that the position of different respondents must be considered separately when considering whether an employee should enjoy an extension of time in a discrimination case.

Our client briefing this month is on the subject of data protection.

Finally, may I remind you of our forthcoming events:
Click any event title for further details.

Changing Employment Contracts: New cases and Practical Guidance

- Breakfast Seminar, 20th October 2015

and in conjunction with ACAS:

Understanding TUPE: A practical guide to business transfers and outsourcing

- A full day conference, Leeds, 9th September 2015

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

1: Changing tax and NICs on termination payments

The government has launched a consultation on “simplifying” the tax and NICs treatment of termination payments.

Historically, whilst payments on termination of employment are taxable, the first £30,000 of such payments are tax free (Income Tax (Earnings and Pensions) Act 2003, sections 403 to 404).

An exception is where a payment is deemed to be contractual, such as a payment made pursuant to a contractual payment in lieu of notice (PILON) clause. Now the government is proposing to change this. It intends to remove the distinction between contractual and non-contractual payments. All payments will be treated as earnings, making them subject to tax. An exemption will still apply but it will be greatly restricted. The limit of the exemption will increase proportionately according to years of service. Entitlement to the exemption would only arise after two years service and then would increase by a set rate after every year’s additional service up to a maximum amount.

2: European Commission’s new Roadmap on work-life balance

The European Commission has published a Roadmap addressing the challenges faced by working families in achieving a work-life balance and carrying both caring and work responsibilities.

The aim of the programme is to redress the balance so that women are better represented in the work place by updating the EU legal and policy framework. The Roadmap presents a range of options to potentially address this issue. There are three options. The first involves strengthening the implementation and enforcement of legislation on equal treatment between men and women. The second is to evolve a wider range of policies to support parents’ participation in the labour market and a more equal use of leave and flexible work arrangements between men and women. The third, finally, would be a combination of the legislative and non-legislative measures contained in Options 1 and 2.

The Commission is expected to set up an Inter-service steering group by this autumn.

3: ACAS publishes new guides on equality and diversity in the workplace

Three new guides have been published by Acas on identifying, addressing and preventing discrimination in the workplace. The three guides are as follows:

Equality and discrimination: understand the basics - this sets out the basics on discrimination and gives examples to help employers understand their obligations.

Prevent discrimination: Support equality - is a practical guide on how to prevent discrimination and promote equality in the workplace.

Discrimination: What to do if it happens - provides advice on how to investigate and handle grievances relating to discrimination.

4: Teacher dismissed after unsuccessful tribunal claim

Many employment tribunal claims can be brought whilst the employee is in continuing employment with the employer, for example, claims under the Equality Act 2010 and claims for deduction from wages. An employer must be very careful not to treat such an employee adversely, including in cases where the employee's claim is dismissed by a tribunal as having no basis.

This is because an employee who is dismissed for asserting a statutory right is automatically unfairly dismissed for the purposes of the Employment Rights Act 1996 and victimising a person on the ground that they have brought proceedings under the Equality Act 2010 is itself an act of unlawful discrimination.

In ***Ngwenya v Cardinal Newman Catholic Secondary School*** Mr Ngwenya, a school teacher, brought unsuccessful tribunal claims of race discrimination and underpayment of salary against his school, in the course of which he made serious allegations. The school later investigated the allegations and found them to be unsubstantiated. It then bought disciplinary proceedings on the basis that the allegations were vexatious and malicious and/or frivolous. In other words, the school viewed them as being made in bad faith. At a disciplinary hearing the charges were upheld and the teacher was dismissed. He claimed unfair dismissal. The employment tribunal dismissed his claim.

He appealed, arguing, first, that the tribunal had not tested whether the school actually believed that the allegations had been made in bad faith and, secondly, that it had failed to consider whether another teacher, who had made similarly unfounded allegations, had been treated more leniently.

The EAT rejected the appeal. First, the employment tribunal had satisfied itself that the employer genuinely believed that the employee had acted in bad faith in bringing his tribunal claim in the first place. The school had in mind the terms of the employee's correspondence, his "outlandish" offer to settle his claim at over £250,000, his attempt to excuse his conduct on an unsustainable basis relating to ill health, and other factors going to his motive. The school had also found that Mr Ngwenya's language had been "excessively emotive and designed to upset". Therefore the School had a genuine belief that the employee was acting in bad faith.

Secondly, Mr Ngwenya had not been unfairly treated as between himself and a comparator who had also made unfounded allegations against the school. The comparator employee had retracted and apologised at the first opportunity. On the other hand Mr Ngwenya had made persistent and numerous allegations against multiple staff at all levels of seniority and had not retracted or apologised at any time prior to his dismissal.

This was the kind of case where there was a total breakdown in the relationship between employer and employee and the school was justified in dismissing Mr Ngwenya for his behaviour.

5: Constructive dismissal: delay in acting on breach and affirmation

If an employee is subject to a fundamental and repudiatory breach of contract he or she is entitled to accept this breach as terminating the employment contract, resign and claim constructive dismissal. But delay in acting on a repudiatory breach can be fatal. After a reasonable period, delay will stop a constructive dismissal claim on the basis that continuing in employment for too long after the breach will mean that the employee has 'affirmed' the contract and lost the right to terminate.

In ***Adjei-Frempong v Howard Frank Limited*** the claimant, who worked in a small accountancy practice as an accounts assistant, was faced with a unilateral change to his job content, made without consultation, and effecting a reduction of 30% of his workload. This was a fundamental and repudiatory breach of contract.

The claimant resigned and claimed constructive dismissal some two months after the breach had occurred. When claiming unfair dismissal, the employment tribunal agreed with him that there had been a serious breach of contract potentially entitling him to resign and claim constructive dismissal, but that he had waited too long, and therefore affirmed the employment contract before resigning.

On appeal, the claimant asked the EAT to take into account the context in which the delay in accepting the breach occurred.

The EAT agreed that the reasons for the delay had to be examined by the tribunal. In this case there had been a failure to take into account that the claimant had been away from work due to ill health until his resignation. Furthermore it was his case that he was expecting to receive written confirmation of the employer's decision and he was biding his time until receipt of this. Finally, the EAT held that any employee is entitled to some time for reflection before it is to be implied that he or she has affirmed the contract after the employer's repudiatory breach.

The employment tribunal had not taken all this into account as part of the relevant factual matrix i.e. a case involving someone who had been employed for some 12 years, who was still awaiting written confirmation of the employer's meeting at which changes were introduced, and whose case was that he was biding his time until he got this, and who worked his new duties for only 10 days before being signed off due to stress.

The case was remitted to the employment tribunal for consideration of these matters.

6: Procedurally defective dismissal was cured on appeal

In ***Biggin Hill Airport Limited*** v Derwich Ms Derwich was employed as a handling agent at Biggin Hill Airport. There was a promotion opportunity. Ms Derwich's friend, Ms King, applied for the job. Before taking up her new post Ms King took the step of "un-friending" Ms Derwich and her colleagues on Facebook. That did not go down well. From that point Ms King was cold-shouldered by colleagues. Someone put a "Witch" image on Ms King's computer as a screen saver. Ms Derwich and others were interviewed. Ms Derwich admitted choosing the Witch

image and using it as a screen saver on Ms King's computer. She did not deny making obscene gestures behind Ms King's back. Her case was that she was upset that Ms King had unfriended her on Facebook.

Ms Derwich was suspended and invited to a disciplinary hearing, the charges being her behaviour towards Ms King, the "Witch" screen saver, and searching Google for offensive expressions for use in connection with Ms King. Before the disciplinary hearing the employer did not disclose the results of interviews of colleagues to Ms Derwich before summarily dismissing her. Ms Derwich then exercised her right of appeal. All witness statements taken during the investigation were now disclosed to Ms Derwich and, following this, her appeal was dismissed. It was common ground that Ms Derwich had no complaint regarding the manner in which the appeal hearing was conducted.

The employment tribunal found that there was an unfair dismissal on the ground of the procedural defect (not disclosing the statements) at the dismissal stage.

The employer appealed on the basis that the employment judge should have taken into account what happened at the appeal hearing and considered whether it cured the original defect. The EAT allowed the appeal. It is a settled principle in unfair dismissal law that, in determining fairness for the purposes of the Employment Rights Act, the tribunal must consider both the original dismissal decision and any subsequent appeal. Here, the employment judge should have considered whether, as a matter of fact, the appeal in this case cured any procedural deficiency. The matter was remitted to a fresh employment tribunal for this to be properly considered.

The case illustrates that, on occasion, a procedurally defective dismissal can be put right by proper treatment of the employee during the appeal process. Therefore, if an appeal chairman looks at a case and considers that the disciplinary process was not properly conducted, he would be well advised to reopen the case and look into the matter again in the same detail as should have been undertaken at the dismissal stage.

7: Unfair dismissal and the band of reasonable responses

In misconduct cases, provided that the employer believes an employee to be guilty of misconduct and has reasonable grounds for believing the employee was guilty of that misconduct, and having formed that belief after carrying out as much investigation as was reasonable in the circumstances, the burden of proof will be satisfied. An employment tribunal then has to consider whether the employer's decision to dismiss on ground of that conduct fell within the range of reasonable responses available to a reasonable employer. An employment tribunal must not substitute its own view for that of a dismissing employer. These rules mean that employers are allowed to exercise considerable managerial prerogative in deciding whether dismissal is appropriate in the circumstances.

In ***Newbound v Thames Water Utilities Limited*** the Court of Appeal has however held that the band of reasonable responses is not infinitely wide and applying the band of reasonable responses test is not merely a tick-box exercise.

In this case Mr Newbound was summarily dismissed by Thames Water Utilities Limited after 34 years unblemished service. He was a penstock coordinator and responsible for annual inspections. A penstock regulates water flow in sewers. A penstock in Albert Road, East London was to be inspected. Mr Newbound and his manager discussed the equipment needed and whether a contractor would be able to use Thames Water's breathing apparatus. Mr Newbound's manager went through safety requirements for the exercise, including a relatively new safe system of work form (SHE4). It made clear that breathing apparatus was to be used.

Mr Newbound and the contractor went to Albert Road. They put on protective equipment and discussed whether it was safe to enter the sewer without breathing apparatus. Checking of the gas monitor by Mr Andrews, the health and safety manager in charge, indicated that it was safe to do so. Mr Newbound and the contractor went in wearing respiratory dusk masks and taking a gas monitor with them but they did not wear breathing apparatus. Mr Gunn, a field service manager, arrived on site and noticed that the two were not wearing breathing apparatus. This was in breach of the SHE4 form that had been issued. Mr Gunn did not speak to Mr Newbound. But he considered that Mr Newbound should be subject to gross misconduct proceedings.

At those proceedings Mr Newbound acknowledged that he signed the SHE4 document but admitted he had not read it fully. He had not seen it before, had not been trained on its use, and thought it was simply a method statement. He made a decision not to use breathing apparatus based on his experience.

Mr Newbound was summarily dismissed for gross misconduct on the ground of committing a serious breach of health and safety policy. His appeal was rejected. An employment tribunal held, however, that in the circumstances, no reasonable employer would have dismissed Mr Newbound and the dismissal was therefore outside the band of reasonable responses.

In particular, the employment judge found that the SHE4 form had been introduced comparatively recently and employees had not been trained in its significance. The regional manager had not explained that failure to wear breathing apparatus could lead to disciplinary action. Mr Newbound genuinely believed that SHE4 was a method statement and Thames Water had previously been prepared to rely on his experience in deciding whether to use breathing apparatus. Thames Water had not taken into account Mr Newbound's contrition and his offer to be retrained. Finally, his length of service and clean disciplinary record had not been given sufficient weight.

The Employment Appeal Tribunal overturned this decision, considering that the employment tribunal had substituted its own view of whether Thames Water acted unreasonably. In its view, the dismissal fell within the band of reasonable responses.

The Court of Appeal overturned the EAT and restored the employment tribunal decision. The employment judge was entitled to reach the conclusion that no reasonable employer would have dismissed Mr Newbound in the circumstances.

The Court disagreed with Thames Water's submission that an employment tribunal should give a very wide margin of appreciation to employers on health and safety. There was no special rule about assessing the reasonableness of a dismissal on conduct ground where the alleged misconduct involved in a breach of health and safety requirements.

While the band of reasonable responses test was very well established, the band was not "infinitely wide". In every case an employment tribunal must consider whether, on the facts, the employer acted reasonably or unreasonably in deciding to dismiss. Parliament did not intend a tribunal's consideration of the test to be a matter of procedural tick-boxing. Thames Water was attempting to stretch the band of reasonable responses to an infinite width. Finally, Mr Newbound had been treated unfairly compared with the treatment of Mr Andrews, who was the competent person in charge, and who had been given only a final warning.

8. Must a tribunal consider the position of different respondents separately when considering an extension of time?

Yes, said the EAT in ***Harden v Wootlif.***

An employee bought various claims against his employer, including direct discrimination and detriment for making a protected disclosure. He also brought claims of harassment against both his former employer and against Mr Harden, the chairman of his former employer. These harassment claims were presented out of time.

The employment tribunal had to consider whether it was just and equitable to extend time under the Equality Act 2010, section 123(1)(b). The employment judge held that the determinative factor was the balance of prejudice. He held that the harassment claim could proceed against both respondents as it added little to the remainder of the claimant's claims and, that, allowing the harassment complaint to proceed would add nothing to the preparation of proceedings as a whole because the fact finding tribunal would be bound to consider the issue as background in any event.

Mr Harden appealed. He contended that his interests should have been considered separately from that of the company which employed the claimant. The considerations which the employment judge had taken into account did not apply to his circumstances.

The EAT agreed. His case could be distinguished from that of the company. He faced no other claim than that of harassment, whereas the company was subject to a number of claims. In circumstances where different considerations were in play in relation to each respondent, the employment judge should consider whether to extend time on a just and equitable basis in respect of each separately.

Therefore Mr Harden's appeal was allowed. The justification for considering it just and equitable that the harassment allegations might be heard late, namely that the background would be relevant to "the remainder of the claimant's claims", did not apply to the single claim against Mr Harden.

9: Client Briefing: Data Protection

This client briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.
This client briefing highlights the key legal obligations an organisation should consider when dealing with personal data about customers, suppliers, employees and any other individual who may be encountered during the course of business.

Penalties for failing to deal with personal data appropriately

There could be serious financial, commercial and reputational implications for an organisation (including possible criminal penalties and fines) if personal data is not handled properly.

Protecting and securing personal data

Personal data is any information about an individual held on computer or in organised filing systems that could identify the individual, either on its own or together with other information held by an organisation or a third party. Personal data needs to be protected and kept secure. This data may include:

- Name;
- Email address;
- Telephone numbers;
- Date of birth; and
- Notes written about someone (such as an annual performance review).

Particular care must be taken with sensitive personal data (for example, medical records) as there are more restrictive requirements applied to this type of data.

The individual could be a potential or actual employee, customer or supplier or possibly someone captured on an organisation's CCTV footage.

Collecting personal data

An organisation can only collect personal data if it has a legitimate reason for doing so (for example, because a new employee is coming to work for the organisation).

When an organisation collects data about an individual, the organisation will need to tell that individual what it intends to do with their data (for example, if the organisation is collecting a customer's email address to confirm an order). If the purposes for which the organisation wants to use someone's data changes, the individual must be informed once again.

An organisation should only collect information they require at that particular time. For example a job applicant should not be asked for their bank details. This type of data should only be collected once the applicant has started work for the organisation.

If an organisation wants to use someone's data for marketing purposes, the individual must be informed. It is good practice to do this at the time the data is collected. In some cases (such as text or email marketing) an organisation will generally require the individual's explicit consent.

Using data collected on individuals

An organisation is generally allowed to use someone's personal data if they have given their consent. The data can also be used in other circumstances, for example if the organisation:

- needs to use the data to fulfil a contract with a customer (such as using their address to deliver goods to them); or
- has a legitimate interest in using it, although this must be balanced with the individual's rights. For example a part of the business has been sold to a third party and the business needs to transfer customer data to it.

Data should only be used for the reason that it was collected (for example, if calls between staff and customers are recorded for training purposes only, they should not be used to discipline a member of staff).

If an organisation wants a third party to manage data (such as carrying out payroll services) it should take legal advice. The organisation will still be responsible for protecting the data and will need to enter into a written contract with the third party.

Organisations should take advice if they are considering transferring any data outside the countries in the European Economic Area. It is very easy to transfer data outside the country an organisation is based in (for example by sending an email to an office or location outside the UK).

If an organisation is considering using sensitive personal data (for example information about ethnic origin, trade union membership or criminal records) it should take legal advice.

Storing personal data

All data must be accurate and up to date. Databases should be regularly cleaned and out of date information must be deleted.

Data should only be held for as long as it is required and for the reason it was collected. For example, if personal data was collected to deliver a product a year ago and has not been used since, it should not be held on the basis that it may be needed for another reason at some time in the future.

Keeping data secure and confidential

Personal data must be kept secure at all times. For example:

- Computers and files should be password protected;
- Personal data on laptops and other portable devices should be kept to a minimum;
- Manual filing cabinets containing personal data should be locked and only accessible to authorised personnel;
- Confidential documents should not be left unattended on desks; and
- Personal data should be removed promptly from fax machines, printers and photocopiers.

When an organisation sends personal data it must be done in a secure way (for example confidential information should not be sent in the internal mail).

Personal data must be disposed of securely (for example, by shredding, placing in confidential waste bags, destroying or securely deleting electronic files). Confidential papers should not be put in the recycling bin.

When working away from the office or in public areas:

- Ensure personal data stored on portable devices such as laptops, Blackberrys, tablets or memory sticks is encrypted and kept secure at all times;
- Avoid leaving papers or electronic devices lying around;
- Make sure members of the public cannot see confidential documents or computer screens; and
- Avoid talking about confidential matters when members of the public may be able to hear.

Security breaches (such as accidentally losing personal data) should be reported to the appropriate person immediately.

Electronic documents, including calendar entries and meeting requests should be password protected or designated private where appropriate.

Enquiries about personal data

Organisations should have a system in place to deal with individuals who request details of the personal information that the organisation holds on them. An organisation is permitted to charge an administration fee of up to £10 for responding to this type of request.

Individual employees should not deal with this type of enquiry, unless they have been given specific authorisation to do so. The request should be passed to the person within the organisation who has responsibility for data protection issues.

Personal data should not be given out to the friends or relatives of an individual without that individual's specific consent.

If you'd like to contact us please email john.mcmullen@wrigleys.co.uk

Wrigleys Solicitors LLP, 19 Cookridge Street, Leeds LS2 3AG. Telephone 0113 244 6100 Fax 0113 244 6101 If you have any questions as to how your data was obtained and how it is processed please contact us. Disclaimer: This bulletin is a summary of selected recent developments. Legal advice should be sought if a particular course of action is envisaged.