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EMPLOYMENT LAW BULLETIN

MARCH 2019

Welcome to our March edition of the employment law bulletin.

We cover a number of helpful and interesting judgments given recently in the EAT and Court of Appeal.

In *Hare Wines Ltd v Kaur*, the Court of Appeal considered whether dismissal was because of a TUPE transfer where the reason for dismissal was a difficult relationship between the claimant and a colleague who was going to be a director of the transferee company.

In *London Borough of Lambeth v Agoreyo*, the Court of Appeal deliberated on whether a teacher's suspension was in breach of contract as behaviour likely to destroy the relationship of trust and confidence between employee and employer.

The EAT case of G*range v Abellio* London Ltd focused on the question of whether compensation for Working Time Regulation breaches can include personal injury damages.

In The *Governing Body of Tywyn Primary School v Aplin*, the EAT considered whether failings in a school's disciplinary procedure were in breach of contract and sexual orientation discrimination.

The Court of Appeal considered in *North West Anglia NHS Foundation Trust v Gregg* whether the High Court was right to grant an injunction to halt internal disciplinary proceedings pending the outcome of criminal proceedings.

Finally, may I remind you of our forthcoming events:

- **Employment Breakfast Briefing: An updte on handling disciplinary issues**
  Breakfast Seminar - 16th April 2019, Leeds
  For more information or to book
- **Employment Law Update for Charities**
  A full day conference - 18th June 2019, Hilton City Centre, Leeds
  For more information or to book
- **SAVE THE DATE - Northern Education Conference**
  A full day conference - 20th November 2019, Hilton City, Leeds

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Was a TUPE transfer the principal reason for a dismissal related to the employee's poor relationship with a manager?

Court of Appeal: TUPE transfer was principal reason for dismissal in the context of claimant's poor relationship with director of the transferee

A dismissal will be automatically unfair if the sole or principal reason for the dismissal is the TUPE transfer. A tribunal will consider what reason was operating on the mind of the employer when making the decision to dismiss. If the main reason was the transfer and there is no economic, technical or organisational (ETO) reason for the dismissal entailing changes in the workforce, such as a redundancy situation, the new employer will be liable for the dismissal under TUPE.

In the case below, the tribunal had to decide whether a dismissal was by sole or principal reason of the transfer where, on the facts, the reason was a difficult relationship between the claimant and a colleague who was going to be a director of the transferee company.

Case details: Hare Wines Ltd v Kaur

Mrs Kaur was employed by a wine wholesaler from 2002. She had a strained relationship with a colleague, Mr Chatha. This difficult relationship pre-dated the TUPE transfer which took place when the business transferred to Hare Wines Ltd on 9 December 2014. Mr Chatha was to become a director of the new employer. On the day of the transfer, Mrs Kaur was told in a meeting that her employment was being terminated as the business was ceasing to trade.

Mrs Kaur brought claims for statutory redundancy pay, notice pay and automatic unfair dismissal to an employment tribunal. The outgoing and incoming employers argued that she had objected to the TUPE transfer and so her employment had not transferred but had terminated by operation of law. The claimant gave evidence that her employer had told her that the new employer did not want her because Mr Chatha did not want to manage her and that she was dismissed on that basis.

The tribunal found that the claimant's evidence was more credible than that of the transferor and that she had not objected to the transfer. It found that her employment had transferred to Hare Wines Ltd and that the TUPE transfer was the sole or principal reason for the dismissal, which was therefore automatically unfair. It also found that Hare Wines Ltd was liable for her notice pay.

The EAT and Court of Appeal upheld the tribunal's decision. They confirmed that the tribunal was entitled to find that Mrs Kaur was dismissed because the transferee did not want to employ her; the reason for that being her poor relationship with its director. When considering whether the transfer was therefore the principal reason for the dismissal, the court commented that it was significant that the problems between Mrs Kaur and Mr Chatha had been going on for some time. Lord Justice Underhill commented that the employment

judge had found that these problems had been tolerable before the transfer but would not be tolerable after the transfer; it was clear that it was the transfer which made the difference and triggered the dismissal.

What are the risks of dismissal before or after a TUPE transfer?

Employers should be aware that there is a risk of claims when employees are dismissed before or after a TUPE transfer. There is no "safe" period after which a dismissal will not be found to be by reason of the transfer. However, there is a greater risk of a successful claim where the dismissal takes place close to the transfer.

A dismissal will not be automatically unfair where there is another principal reason for the dismissal, for example a misconduct or capability issue.

Dismissals which are because of a TUPE transfer will not be automatically unfair if there is an ETO reason entailing changes in the workforce, such as a reduction in the number of employees (in other words a redundancy situation). It is important to note that the outgoing employer cannot rely upon the incoming employer's ETO reason and is unlikely to have their own ETO reason. Transferors should therefore be very cautious about dismissing employees before the transfer. Likewise, a transferee employer cannot rely on the ETO reason of a transferor. To put this more simply, employers must have their own redundancy situation to rely on this as a defence. A redundancy is unlikely to arise until after the transfer and could then involve the transferred staff along with anyone employed by the new employer who does the same type of work.

Liability for automatically unfair dismissal because of the transfer passes to the new employer under TUPE. However, outgoing employers should be aware that pre-transfer dismissals which are not because of the transfer, or which are because of the transfer but for an ETO reason, can still be found to be unfair where a fair procedure is not followed. Liability for such a procedurally unfair dismissal remains with the transferor. It is also important to note that both old and new employers are likely to be named in a claim and to incur legal costs regardless of where liability properly sits. An agreement between the old and new employers may apportion such liability and costs and/or provide for one employer to take control of the defence of claims.

Teacher's suspension was not in breach of contract

Court of Appeal: employer had reasonable and proper cause to suspend pending investigation of allegations of unreasonable force against children.

Can suspension be a breach of contract?

Suspending an employee in some circumstances can be a breach of contract. Suspension can be in breach of the implied term of mutual trust and confidence when there is no reasonable or proper cause for suspending in the circumstances of the case.

What is the implied term of mutual trust and confidence?

Employers and employees must not, without reasonable and proper cause, act in a way which is likely to destroy or seriously damage the relationship of trust and confidence between them.

If an employer does act in this way, the employee is entitled to resign and can bring a claim based on constructive dismissal.

Case details: London Borough of Lambeth v Agoreyo

Ms Agoreyo worked as a year 2 teacher at a community primary school in Lambeth for a total of five weeks. Two of the children in her class showed challenging behaviour. Very early in Ms Agoreyo's employment, she communicated with other members of staff to ask for help in managing these children.

Over a two week period there were three incidents during which it was alleged by other staff, including a teaching assistant working with the class, that Ms Agoreyo had used unreasonable force to remove the children from the classroom. It was alleged, for example, that Ms Agoreyo had dragged a child "very aggressively" and picked a child up in a "heavy-handed" way.

During this period, Ms Agoreyo asked for help from the headteacher in encouraging other staff to provide support in dealing with these children. The headteacher assured her that support would be put in place. Following the last of the three incidents, the headteacher outlined the steps she proposed to take to support Ms Agoreyo.

Four days after this communication from the headteacher, and before some of the support plan had been put in place, the executive head suspended Ms Agoreyo pending investigation of the incidents. Ms Agoreyo resigned on the same day. She brought a claim for breach of contract in the County Court.

The County Court did not agree with the claimant. In the light of the seriousness of the allegations and the employer's overriding duty to protect the children in its care, the judge concluded that there was reasonable and proper cause for the suspension and so no breach of the implied term of mutual trust and confidence.

The claimant appealed to the High Court which overturned the judgment of the County Court. The High Court decided that there had been a breach of contract as there was no necessity to suspend the claimant in circumstances where the headteacher had inquired about two of the incidents and concluded that no more than reasonable force had been used.

On further appeal to the Court of Appeal, the decision of the County Court was reinstated. The Court of Appeal held that the High Court judge had applied the wrong test. The key question is whether the employer has reasonable and proper cause to suspend. There is no requirement for the suspension to be necessary. The Court of Appeal held that the County Court judge was entitled to find that there was reasonable and proper cause for the suspension in this case.

Is suspension a neutral act?

Many employers will use template suspension letters which include a statement that suspension is a "neutral act". Employers should be aware that this is not the way a court or tribunal will view the matter. Case law makes clear that suspension can be an act which is likely to destroy or damage the relationship of trust and confidence between employer and employee. This may be particularly the case where the employee is working in a sector such as teaching, where professional reputation could feasibly be destroyed by speculation on the reasons for suspension.

The Court of Appeal in this case suggested that it is effectively irrelevant whether suspension is described as a neutral act or not. The relevant question is simply whether there is reasonable and proper cause to suspend. That question can only be answered by looking at the circumstances of the suspension.

Employers should note that the ACAS Code of Practice on Disciplinary and Grievance Procedures stipulates that employers should make clear that suspension is not a disciplinary sanction. It is important that suspension letters make this clear and state that suspension does not imply any assumption of guilt.

When will there be reasonable and proper cause to suspend?

The decision to suspend should not be "knee-jerk" or automatic. Because of the risk of breaching the employment contract, an employer should give careful thought to whether it is reasonable to suspend on a case by case basis. It is likely to be reasonable only where the employee's presence at work will pose a risk to the organisation, its staff or the people it works with; or where there is a risk that the employee will interfere with the investigation. It is important to carry out an initial investigation before suspension in order to be able to assess these risks.

Alternatives to suspension should be considered such as moving the employee temporarily to different work or increasing supervision. If the decision is made to suspend, it is advisable to make a written note of the reasons for this decision. Suspension should be for as short a period as possible and should be regularly reviewed. It could also be in breach of contract to keep someone on suspension after facts come to light suggesting there is no risk in them being at work.

The Court of Appeal made reference to the case of Gogay v Hertfordshire County Council [2000] EWCA Civ 288. In this case a residential care worker was suspended following allegations of sexual abuse from a "troubled" child in a children's home. It was held that suspension of Ms Gogay before further investigations were carried out and without considering alternatives to suspension was in breach of the implied term of trust and confidence. In Agoreyo, the court pointed to the fact that the allegations against Ms Gogay were rather unclear, came from the alleged victim, and were not corroborated by others. By contrast, the allegations against Ms Agoreyo had been made by two members of staff and related to three separate incidents concerning two children. In this case, it was reasonable for the school to believe from initial investigations that there would be a risk to children if Ms Agoreyo was not suspended.

Employers should also be aware that the unreasonable use of suspension could found other

claims. For example, it could be argued to be unfavourable treatment in a discrimination claim, particularly where other employees have not been suspended in similar circumstances. In an unfair dismissal claim, an employee could argue the suspension itself, or the way it was managed, made the dismissal procedurally unfair. In that case, the tribunal would consider whether the use of suspension was fair in the circumstances. Having a contemporary note of the employer's very good reasons for suspension will help employers to defend such claims.

Can a failure to provide rest breaks under Working Time Regulations lead to personal injury damages?

Employers who refuse rest breaks may be liable for personal injury caused by the lack of breaks

In most circumstances, workers are entitled under the Working Time Regulations 1998 (WTR) to an unpaid rest break of 20 minutes if they work for more than six hours in a day. If an employer arranges work so that a worker cannot take this break, the worker can bring a claim in an employment tribunal. If the claim is successful, the tribunal must make a declaration that the right has been denied and may award compensation. The tribunal will consider what amount is just and equitable to award, based on the employer's default and any loss to the worker attributable to the breach.

The recent Court of Appeal case of *Gomes v Higher Level Care Limited [2018] EWCA Civ 418* confirmed that injury to feelings awards are not available to employees who have been denied rights under the WTR. However, the EAT has now held that personal injury awards are available in these circumstances. The injury suffered by the claimant was relatively minor in this case, but employers should be aware of the potential for significant awards where a worker suffers serious mental or physical consequences of WTR breaches.

Case details: Grange v Abellio London Ltd

Mr Grange worked for Abellio, originally as a bus driver and later as a Relief Roadside Controller (known as a SQS). As a bus driver, he was given fixed rest breaks in line with the WTR. As a SQS, he monitored and regulated bus services in response to traffic conditions. In this role, he worked for 8 hours a day and had a 30 minute unpaid lunch break which he found difficult to find time to take given the nature of his work. Mr Grange submitted a grievance complaining that he had been forced to work without a break and that this had contributed to a decline in his health. He then brought a claim under the WTR to an employment tribunal.

Mr Grange argued that, due to a bowel condition, the lack of rest breaks had caused discomfort that was more than a minor inconvenience. The tribunal made an award of £750 for the discomfort and distress he suffered during a 14 day period (the tribunal having determined that breaches relating to earlier periods were out of time).

The EAT agreed that compensation for breach of the WTR could include personal injury damages. It pointed out that the decision in Gomes was concerned with injury to feelings awards and did not rule out personal injury awards. It also commented that the purpose of the European Working Time Directive, which was incorporated into UK law by the WTR, is to protect

the health and safety of workers and that it would therefore be "natural" for personal injury awards to be made on breach of the WTR.

What are the other entitlements to rest breaks under the WTR?

Workers are also entitled to 11 hours' uninterrupted rest per day and either 24 hours' uninterrupted rest per week or 48 hours' uninterrupted rest per fortnight. Some workers are excluded from these rules, for example, if they carry out activities which involve the need for continuity of service (such as staff in hospitals, residential institutions and prisons). In these cases, there are special rules about providing compensatory rest when normal breaks cannot be taken.

Are there any other risks for an employer who breaches the WTR?

The Health and Safety Executive can issue notices of improvement or prohibition. Employers who do not comply with these notices within the time limit commit a criminal offence and, in cases of high risk and serious non-compliance, could face prosecution, with the imposition of unlimited fines and up to two years' imprisonment for directors.

Workers or employees?

It is important to remember that the WTR give rights to workers. That is a wider category than just employees. A significant number of recent "gig economy" cases on the issue of worker status highlight the risk that nominally self-employed or freelance contractors could be found by a tribunal to be workers if they are not in business on their own account and have to provide the service personally. An employer's responsibility to provide in-work, daily and weekly rest periods, as well as limits to the working week, and following this case any potential liability for personal injury for breach, extends to this wider category of worker.

Was a head teacher discriminated against for being gay?

Did the treatment of a gay head teacher amount to constructive dismissal and sexual orientation discrimination?

When conducting an investigation and disciplinary process it is crucial to ensure it is carried out fairly and objectively. Failure to do so increases the risk of the employee resigning and claiming constructive dismissal and that the dismissal is unfair.

Biased and subjective disciplinary processes are particularly precarious where the employee

has a protected characteristic as it increases the risks of a claim of discrimination under the Equality Act 2010.

Case details

The case of The Governing Body of Tywyn Primary School v Aplin concerned a Head Teacher, Mr Aplin, who met and had sex with two 17 year-old males via a gay dating app. The police became aware and subsequently the local authority set up a Professional Abuse Strategy Meeting (PASM) which found that no criminal act had been committed and that no child protection issue arose. However, the PASM did recommend that the school consider disciplinary action.

The local authority briefed an investigating officer (Mr Gordon) to consider the impact the incident had had on the reputation of the school and of Mr Aplin and whether this called into question his continued role as head teacher. However Mr Gordon's investigation report, which was later heavily criticised at tribunal, used selective parts of the PASM report and police materials and approached the case on the basis that Mr Aplin posed a child protection risk, despite the PASM's findings to the contrary. Mr Gordon's report was also found to be 'laden with value judgments and conclusions which were hostile to Mr Aplin, despite Mr Gordon receiving clear guidance to produce a factual and objective report.

The disciplinary hearing suffered from a number of procedural issues, including the fact that Mr Aplin was not given access to the PASM report and relevant police materials that the investigating report relied on.

Mr Aplin appealed on a number of grounds, complaining of the unfair investigation report and various procedural issues. Following further procedural failings in relation to the appeal, Mr Aplin resigned. He brought claims of constructive and unfair dismissal and discrimination on grounds of sexual orientation.

Employment Tribunal

The tribunal found that Mr Aplin had affirmed (i.e. continued) his contract by appealing against his dismissal, but that the continued procedural errors relating to his appeal process entitled him to resign. His claim of constructive dismissal therefore succeeded.

On the issue of discrimination, the tribunal found that Mr Gordon had discriminated against the claimant on the basis of his sexuality and that the governing body was vicariously liable for this treatment. The tribunal did not agree with the claimant that the school governors or other local authority staff involved had discriminated against him.

Employment Appeal Tribunal

The EAT found that the tribunal had erred in its decision that Mr Aplin had affirmed his contract. Rather, Mr Aplin had simply given his employer a chance to remedy the breaches. This did not affect Mr Aplin's ability to then resign in the face of continued breaches of the appeal process.

The EAT agreed in the main with the tribunal's decision in regard to discrimination. However, the EAT remitted to the same tribunal the question of whether the school governors' "abdication" of responsibility for the dismissal decision to a local authority lawyer was itself discriminatory.

Wrigleys comment

This case highlights the importance of following a fair and objective disciplinary process when dealing with employees, particularly ensuring that investigation reports make factual findings but do not include value judgments or conclusions on culpability. It is possible that, had a fair, objective and well-managed disciplinary process taken place in respect of Mr Aplin, he would have found himself being fairly dismissed from his position.

Employers should be sensitive to the personal bias of key members of a disciplinary process and of the need to guard against these biases creeping into decision-making process. Employers should remain especially vigilant where background circumstances, such as in this case, put an employee's protected characteristic at the core of the circumstances being investigated.

When disciplinary and criminal proceedings interact

Should an employer wait for criminal proceedings to conclude before undertaking an internal disciplinary process?

Employers can find themselves in a difficult situation when an employee is investigated by the police or a regulator. There are often good reasons why an employer will want to carry out its own disciplinary process rather than waiting for an outcome to external proceedings. Individuals can remain on police bail or a regulatory suspension for many months or even years, meaning employers can be faced with a long period of suspension on full pay.

A recent case has made clear that employers will not usually be expected to postpone disciplinary proceedings in these circumstances.

Case details: North West Anglia NHS Foundation Trust v Gregg

Dr Gregg was employed by the NHS Trust as a consultant anaesthetist. The death of two patients in his care were investigated by the trust. To protect patient safety, Dr Gregg was suspended (on full pay) by the trust which then referred the matter to the GMC. The police arrested Dr Gregg on suspicion of unlawful killing and released him on bail. The police had no objection to the employer continuing with its internal procedures. The GMC began an investigation and an Interim Orders Tribunal suspended Dr Gregg's GMC registration for 18 months. Dr Gregg refused to participate in the employer's investigation while criminal proceedings were ongoing.

The trust lifted its internal suspension on the basis that it was no longer necessary given the GMC suspension. The trust then decided to stop paying Dr Gregg, stating that he was in breach of contract as he was unable to perform his role due to the suspension of his GMC registration and police bail conditions. It reversed this decision the following month.

Dr Gregg sought an interim injunction in the High Court to prohibit the trust from continuing with its disciplinary process while criminal proceedings were underway. The High Court granted the injunction finding that continuing the disciplinary process would be in breach of the implied term that the employer will not without reasonable and proper cause act in a way likely to destroy or damage the relationship of mutual trust and confidence between employer and employee.

On appeal, the Court of Appeal overturned the injunction. It held that continuing with internal processes in the circumstances was not behaviour likely to destroy trust and confidence; the employer was simply following a contractual process with which the employee was obliged to cooperate. In any event, the court held that there was reasonable and proper cause to deal with the allegations internally before the criminal matter was concluded, asking: "Why should the Trust, and those who fund it or use its services, wait for a separate organisation to conclude its separate enquiries, which might be months or years in the future?" The Court of Appeal stated that it could see no reason in this case why continuing with the disciplinary process would cause injustice in the criminal proceedings.

The court also made clear that Dr Gregg was entitled to full pay while on suspension. It held that an employee is still ready, willing and able to work when prohibited from working by the decision of a third party (such as the police or a regulator). The court commented that withholding pay in such a case could be tantamount to an assumption of guilt.

Wrigleys comment

The Court of Appeal was clear that employers will often have good reason to begin and carry through procedures in these circumstances. It pointed out that the burden of proof is less onerous for disciplinary decisions than for criminal proceedings. Disciplinary conclusions are made on the balance of probabilities; that is, the allegations are more likely than not to be true. Employers can dismiss fairly on the basis of a reasonable belief in culpability based on a reasonable investigation. In criminal proceedings, on the other hand, guilt must be proven beyond reasonable doubt.

There will still be some cases in which it is not reasonable to proceed with the disciplinary process. For example, where this may cause a real risk of injustice in the criminal proceedings. Employers should liaise with the police to ascertain whether such risks could arise.

Please see my earlier article (Oct 2017) on dealing with employees who are being investigated by the police, with a particular focus on school employees, for further information on this topic.

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