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EMPLOYMENT LAW BULLETIN

SEPTEMBER 2018

Welcome to our September employment law bulletin.

Our September bulletin includes a selection of interesting cases heard over the Summer in the Supreme Court, Court of Appeal and the Employment Appeal Tribunal.

In *R (on the application of AR) v Chief Constable of Greater Manchester Police and another*, the Supreme Court agreed with the Court of Appeal that the disclosure of a teacher's acquittal for rape in an enhanced DBS check was not in breach of the claimant's privacy rights.

We report on the recent decision of the Court of Appeal in *Royal Mencap Society v Tomlinson-Blake* that care workers on sleep-ins were not working simply by being present overnight, a decision which bucks the trend of recent similar cases.

We also consider a number of recent EAT judgments such as the decision in *Saad v Southampton University Hospitals NHS Trust* that an employee's ulterior motives for raising a grievance about racist comments did not mean he was acting in bad faith for the purposes of his victimisation claim. In *Mutombo-Mpania v Angard Staffing Solutions Ltd*, the EAT considered the questions of whether a claimant had discharged the burden of proof to establish disability and whether the employer should reasonably have known about his disability. And in *East Kent Hospitals University NHS Foundation Trust v Levy*, the EAT determined that an employee had not issued a valid resignation in the circumstances and had in fact been dismissed when the employer refused to allow her to retract her notice.

Finally, may I remind you of our forthcoming events:

- **Annual Charity Governance**
  A full day conference, Leeds, 8 October 2018
  For more information or to book

- **Northern Education Conference**
  A full day conference, Leeds, 27 November 2018
  For more information or to book

- **What's new in Employment Law**
  Breakfast Briefing, Leeds, 4 December 2018
  For more information or to book

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Increase in employment tribunal claims following abolition of tribunal fees

Employment tribunal quarterly statistics for the period April to June 2018 have been published by the Ministry of Justice. The number of single claims received by employment tribunals when compared to the same period in 2017, before tribunal fees were abolished, has increased by 165%. Outstanding caseload in the tribunals has also increased by 130% since April to June 2017.

Despite the abolition of fees, more claimants are now representing themselves in tribunal rather than being legally represented. 17% of claimants were unrepresented in the year 2017/2018 compared to 9% in 2016/2017.

Following the abolition of fees, the government launched a fee refund scheme for those who had paid tribunal fees. As at 30 June 2018, over £10.5 million has been refunded.

The statistics show that disability discrimination claims achieved on average the highest awards when compared with awards for other discrimination claims in 2017/2018. The highest disability discrimination award during the year was £242,000. The average disability discrimination claim for the year stands at £30,700. For unfair dismissal, the maximum award was £415,227 and the average award was £15,007.

A quarter of all employment tribunal claims disposed of in the period from April to June 2018 reached a conciliated settlement through Acas, 26% were withdrawn by the claimants, 18% were dismissed upon withdrawal, 9% were struck out (not at a hearing) and 7% were successful at hearing.

HMRC: Pre-transfer NMW liabilities will now be enforced against the transferee

From 2 July 2018, HMRC will apply all National Minimum Wage (NMW) liabilities, including the full penalty amount, to the new employer following a TUPE transfer.

It was previously the case that HMRC charged the former employer for all or part of the penalties arising from NMW arrears which accrued before the TUPE transfer.

Incoming employers should be aware of this change of approach and ensure that the risk of taking on liability to pay penalties arising before the transfer is taken into consideration when negotiating any transfer agreement.

Hours spent sleeping by sleep-in care workers should not be taken into account when calculating NMW

In Royal Mencap Society v Tomlinson-Blake, the Court of Appeal overturned an EAT decision that care workers were actually working throughout a sleep-in shift.

According to the National Minimum Wage (NMW) Regulations, a worker is entitled to the NMW for time when they are actually working or for time when they are available and required to be available at or near a place of work for the purposes of working. But a worker who is "available" for work rather than working will not be entitled to the NMW for time when they are at home or when the worker is provided with facilities to sleep during a shift – in this case, only time spent actually responding to calls will be counted.

Mrs Tomlinson-Blake was employed by Mencap as a care worker supporting two people with learning disabilities living in the community. As well as her day shifts, she undertook sleep-

in shifts for which she was paid a fixed amount. She had her own bedroom in the house and was expected to sleep for most of the night. Her contract required her to remain in the house and she was expected to intervene to support her clients when necessary during the night. This happened only rarely (six times in 16 months). She received additional pay for time spent assisting her clients during these shifts.

Mrs Tomlinson-Blake brought a claim that she had not been paid the NMW when taking into account time spent on sleep-in shifts. An employment tribunal upheld her claim, finding that she was actually working throughout each sleep-in shift. This was on the basis that Mencap had regulatory and contractual obligations for a care worker to be in the house at all times and that Mrs Tomlinson-Blake was obliged to remain in the house and to listen out in case she was required to intervene. In other words, it was part of her work simply to be there. The EAT agreed.

The Court of Appeal did not agree. Lord Justice Underhill held that Mrs Tomlinson-Blake and another care worker in a similar case were rightly classified as "available for work" during their sleep-in shift, rather than actually working. Therefore only the time when they were required to be awake for the purpose of working counted for NMW purposes. Lord Justice Underhill stated that an arrangement where "the essence of the arrangement is that the worker is expected to sleep" falls squarely under the exception set out in the NMW Regulations, that is when a worker is available to work but provided with facilities to sleep. He did not agree with the EAT that Mrs Tomlinson-Blake was actually working simply by being present on the premises.

Lord Justice Underhill took into account the Low Pay Commission report which influenced the drafting of the NMW Regulations 1999. This report recommended that workers who were "required to be on-call and sleep on their employer's premises (e.g. in residential homes ...)" should not have the sleep-in hours counted for NMW purposes.

This decision goes against a recent line of cases where workers have been found to be actually working when contractually or statutorily obliged to be present throughout the night. It suggests that care workers who are usually expected to get a good night's sleep during the sleep-in shift should not have hours spent sleeping taken into account when carrying out the NMW calculation. However, tribunals will still determine each case on its facts. It is also questionable whether this decision will apply to cases which do not involve care worker sleep-in arrangements.

Employers should note that Unison has sought permission to appeal this decision to the Supreme Court and it is therefore possible that the interpretation of the NMW Regulations will change once again.

In many cases, following the Tribunal and EAT rulings, employers in the care sector have already taken action to ensure that carers are paid the NMW overall, taking into account sleep-in hours in their entirety. The issue for those employers has been the question of liability for back pay (for service pre-dating the Tribunal decision) which it was estimated could cost the care sector £400m. With the Court of Appeal decision such claims also now fail. However, employers should also take into account that any reduction in pay for existing workers on the basis of the Court of Appeal decision would be a fundamental change of contract and require the workers' agreement to the change.

Victimisation under the Equality Act 2010: a dishonest allegation will not be protected

In Saad v Southampton University Hospitals NHS Trust, the EAT has ruled that the key question for deciding whether an allegation was made in bad faith is whether the claimant acted honestly in making the allegation. The motives of the claimant is making the allegation are a less relevant consideration for the tribunal.

Mr Saad was a trainee cardiothoracic surgeon, employed by Southampton University Hospitals NHS Trust. His employer and the training body responsible for him had concerns about his performance. Mr Saad raised concerns in a grievance that the director of his training programme had made racist jokes about him, described him as a "terrorist-looking person" and likened him to the doctors who carried out the terrorist attack on Glasgow airport. The grievance complained that these comments were discriminatory on racial or religious grounds. The NHS Trust did not uphold the grievance and Mr Saad's employment and training were both subsequently terminated on performance grounds.

Mr Saad brought claims for unfair dismissal on the basis of whistle-blowing and for victimisation. He argued that his complaint concerning the comments comparing him to terrorists were both a protected disclosure (for the purposes of the whistle-blowing claim) and a protected act (founding his victimisation claim).

The tribunal did not uphold his claims. It found that Mr Saad had subjectively believed that the training programme director had made the comments but that it was not reasonable for him to believe this; the whistle-blowing claim therefore failed. Disclosures made before 25 June 2013 which were made in bad faith were not protected under the whistle-blowing legislation. The tribunal found that Mr Saad has raised his complaints in bad faith with the main purpose of the grievance being to delay the performance-related processes. The tribunal read across this bad faith finding to the victimisation claim in determining that the complaints in the grievance could not be a protected act. The tribunal found however that (if it was wrong on this point), the NHS trust had not proved that the complaints were not a significant influence on the decision to subject the claimant to detriments.

In his appeal to the EAT, Mr Saad argued that the good faith tests for whistleblowing and victimisation were not the same. The EAT allowed the appeal. It clarified that the primary question on good / bad faith in a victimisation claim is whether the worker has acted honestly in carrying out the protected act. The employee may have an ulterior motive for making a complaint but this should not be the focus of the tribunal's enquiry. The EAT pointed out that under the old whistle-blowing legislation, a tribunal would first consider whether the claimant reasonably believed the concerns to be true and then go on to consider whether they were made in bad faith. In contrast, in victimisation claims, the tribunal need not consider the truth of the allegations before it considers whether there is bad faith. The tribunal should therefore focus on whether the complaints are made honestly. The EAT made clear that the ulterior motives of the claimant may be relevant in some cases, but this should not be the focus of the enquiry.

Because the tribunal had found that Mr Saad did believe the comments had been made, the EAT held that he had acted honestly in raising these complaints, despite his ulterior motive. The EAT substituted a finding of victimisation.

Employers should be aware that a victimisation claim under the Equality Act can be brought when a claimant has been subjected to a detriment for doing something connected to the Equality Act, for example, raised an internal complaint or brought a tribunal or court claim relating to the Equality Act, or been a witness in relation to someone else's discrimination complaint or claim. As this case shows, raising complaints which are honestly believed for the purpose of avoiding disciplinary or performance proceedings will not necessarily stop the complaints being protected.

Qualified teacher's privacy rights were not breached by disclosure of rape acquittal in enhanced DBS check

In R (on the application of AR) v Chief Constable of Greater Manchester Police and another, the Supreme Court has upheld a judgment of the Court of Appeal that the disclosure of an acquittal for rape in an enhanced Disclosure and Barring Service (DBS) check for a lecturer post was not a breach of the right to respect for a private and family life. We reported on the Court of Appeal's judgment in this case in our July 2016 bulletin.

The applicant in this case was a qualified teacher who applied for a lecturer post. The educational institution requested an enhanced DBS check. The applicant was working as a taxi driver the time of his application. He had been prosecuted for the alleged rape of a 17 year old woman while she was in his taxi but was acquitted two months before the DBS check was requested.

Where a job entails working with children or vulnerable adults, enhanced disclosure is available. This will include disclosure of spent and unspent convictions and cautions, police reprimands and warnings and other "relevant police information". This is information which a chief officer of police reasonably believes to be relevant and which ought to be disclosed given the purpose for which the DBS check is being made. The fact of the applicant's acquittal in this case was disclosed by the police as "relevant police information" in the enhanced DBS check.

The officer making the decision disclosed the acquittal on the grounds that: the rape allegation was more likely to be true than false on the balance of probabilities given that the CPS had decided to prosecute; the acquittal was recent; and the allegations were very serious in nature. She decided that the potential risk to vulnerable people (including students of a similar age to the alleged victim) outweighed the impact on the teacher.

The teacher applied for judicial review of the decision to disclose and claimed that his right to be presumed innocent under Article 6 of the European Convention on Human Rights (ECHR) and his right to respect for his private life under Article 8 of the ECHR had been breached. Both of these human rights can be interfered with by a public authority in certain circumstances.

The High Court found that neither of these human rights had been breached. It considered that the balancing exercise necessary to decide whether disclosure is proportionate in the circumstances had been correctly carried out.

Upholding this decision, the Court of Appeal stated that disclosing an acquittal did not contradict the effect of that acquittal, in other words it did not suggest that the applicant was guilty of the criminal offence of rape. The Court of Appeal held that the difficult balance between protecting vulnerable people and interfering with the right to respect for privacy had been correctly considered by the High Court.

In this recent decision, the Supreme Court has upheld the Court of Appeal's decision. The Supreme Court held that the lower courts had been entitled to find that the disclosure had not breached the right to privacy. In this case, the impact on the teacher's employment prospects had been weighed against the pressing social need which lies behind the enhanced DBS process, that is the potential risk to children and vulnerable adults.

However, Lord Carnwath commented that the guidance on what should and should not be disclosed as other relevant information in an enhanced DBS check is insufficient, particularly in cases where the relevant information is an acquittal for a serious offence of this nature. It is possible that his comments will lead to a review of the guidance in this area.

This case confirms the current position that information about acquittals can be included in an enhanced DBS check where, on the assessment of the police, the information is relevant and ought on balance to be disclosed. This does not mean that acquittals will always be disclosed (although, of course, the criminal proceedings will be a matter of public record in any event). Where the allegations are less serious, more historic or considered not to be relevant to the role, the police may take the decision not to disclose.

What evidence must a claimant bring to establish disability and when will an employer have constructive knowledge of disability?

In Mutombo-Mpania v Angard Staffing Solutions Ltd, the EAT upheld the preliminary decisions of an employment tribunal that the claimant had not done enough to prove disability because he had brought no evidence about the impact of his condition on day to day activities; and that the employer did not know and could not reasonably be expected to know about any disability.

Mr Mutombo-Mpania worked as a flexible resourcing employee of Angard Staffing Solutions (Angard) and was supplied on a casual basis to work for Royal Mail Group. If Angard offered work, Mr Mutombo-Mpania could choose to accept it or turn it down. He had been diagnosed in 2011 with essential hypertension, a condition which entails permanently high blood pressure and leads to a lack of energy, headaches and dizziness. It requires daily medication to prevent the greater risk of a heart attack. On his application form for the role, Mr Mutombo-Mpania indicated that he did not consider that he had a disability. On a subsequent health questionnaire, he did not take the opportunity to give any details of his condition.

The claimant worked mainly late shifts for the Royal Mail for around a year. These finished at 10pm. He was then informed that he was required to move to night shifts in the run up to Christmas 2016. He was offered and accepted a series of night shifts. The claimant then informed Angard that he had a "health condition" which did not allow him to work regular night shifts. He did not provide any further detail of this condition. Angard agreed to move him back on to late shifts for a week but thereafter he was expected to attend for the Christmas night shifts he had previously accepted. He failed to attend work on four occasions in November and December 2016 and was dismissed.

He brought a number of claims to an employment tribunal including disability discrimination claims. At a preliminary hearing, the employment tribunal considered whether the claimant's condition met the definition of disability in the Equality Act 2010 as being a mental or physical impairment which has a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities. The tribunal found that Mr Mutombo-Mpania was not disabled for the purposes of the Equality Act 2010. Angard conceded that the claimant had an impairment which was long term. However, the tribunal found that the claimant had failed to bring any evidence that this impairment had a substantial adverse impact on his ability to carry out normal day to day activities. Indeed, his evidence made no reference whatsoever to his day to day activities. As the burden of proof is on the claimant in establishing disability, this led to a finding that the claimant was not disabled.

The tribunal went on to find that Angard had no actual knowledge of any disability. The tribunal took into account that the claimant had not taken the opportunity when applying for the role to state that he had a disability or to give any details of his condition. It also noted that the claimant had worked for Angard for a year on late shifts with no apparent issues.

The tribunal also found that Angard did not have constructive knowledge of any disability. That is, on the basis of the facts known to the employer, there was no reason to suggest that Angard ought to have known about any disability. The tribunal found that Angard was put on notice to find out more about his condition by the claimant's reference to his "health condition" and non-attendance for work. However, these facts were not enough to find that Angard had constructive knowledge of any disability. In this, the tribunal took into account that the claimant had actually worked some night shifts and had accepted the offer of a series of night shifts in the run up to Christmas.

The EAT agreed. It made clear that a health condition is not necessarily the same as a disability

for the purposes of a discrimination claim. It held that the tribunal was entitled to find that the employer was on notice to seek more information but that this was not the same as having constructive knowledge of disability.

Employers should be aware that some disability discrimination claims can be made out even where the employer had no actual knowledge of the disability. Where there is evidence to suggest to the employer that a worker has a mental or physical impairment (for example from sickness absence, the worker's conduct or performance or from information disclosed by the worker), the employer should take reasonable steps to find out about the condition and whether it may qualify as a disability.

When is notice of termination not a resignation?

When it is not reasonable in the circumstances for the person receiving the notice to construe it as a resignation.

In East Kent Hospitals University NHS Foundation Trust v Levy, the EAT upheld the decision of an employment tribunal that an employee's letter giving notice was not a valid resignation because of the particular circumstances at the time of sending the letter.

Mrs Levy worked for the NHS Trust as an assistant administrator in the health records department. Some issues arose during her employment: she had a difficult relationship with one of her colleagues and there were concerns about her absence record. Mrs Levy applied for an internal transfer to the radiology department, which she was offered, conditional on successful pre-employment checks.

Mrs Levy wrote to the hospital's operational manager, Mr Gorton-Davey on 10 June 2016 (following an incident with a colleague) giving one month's notice. Mr Gorton-Davey wrote back accepting what he called her "notice of resignation", setting out her last day of work within the health records department and wishing her well with her future employment. However, he did not at this stage take the usual steps following this letter which he normally took when an employee was leaving the Trust. For example, he did not explain how outstanding holiday entitlement would be dealt with or fill in a staff termination form.

On 16 June 2018, the role in the radiology department was withdrawn because of Mrs Levy's absence record. Mrs Levy contacted HR about retracting her notice and was told that her manager had discretion whether or not to agree to her retraction. The Trust received legal advice that it did not have to accept a retraction of resignation. It was decided that, because of her absence record, Mrs Levy should not be permitted to retract her resignation. On 26 June 2018, Mr Gorton-Davey wrote to the claimant to set out her last day of employment and details for recouping pay for unaccrued annual leave which she had taken. It was at this stage that he filled in the staff termination form.

Mrs Levy brought an unfair dismissal claim to an employment tribunal. It found that Mrs Levy had not offered a valid resignation as the wording of her letter was not clear and unambiguous and it was not reasonable for the recipient to construe the letter as being a resignation from employment. The tribunal found that Mr Gorton-Davey had not actually taken the notice letter to be a resignation from employment with the Trust but only as giving notice on the internal role. Evidence before the tribunal showed that another employee had given notice on an internal role in much the same way and that this was not taken as a resignation from the Trust. Since Mrs Levy had withdrawn from the radiology role, she was entitled to remain within her health care role. In denying Mrs Levy that role, the tribunal went on to find that the NHS Trust had dismissed Mrs Levy and that she had been unfairly dismissed.

While it is true that a valid resignation cannot be unilaterally retracted, employers should be aware that in some circumstances, an employee may not have issued a valid resignation at all. For example, in cases where an employee resigns in a moment of anger or distress. In

such cases, it is advisable to give the employee the opportunity to withdraw their resignation given in the heat of the moment. In the case of Mrs Levy, her notice was, in the circumstances, reasonably construed as referring only to her internal role and not to her employment with the Trust.

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