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EMPLOYMENT LAW BULLETIN

February 2018

Welcome to our February employment law bulletin.

This month we report on some important Court of Appeal decisions on whistle blowing. In *Malik v Cenkos Securities Plc,* the Court of Appeal has made it clear that an employer who does not know about a protected disclosure cannot be deemed to have subjected an employee to a detriment for the purposes of whistle blowing protection. Constructive knowledge is not to be imputed to the employer.

In *Wilsons Solicitors LLP v Roberts*, the Court of Appeal has ruled that whistle blowers can claim post-termination losses where their losses are attributable to pre-termination detriments.

In *Donelien v Liberata UK Ltd*, the Court of Appeal has extensively reviewed whether an employer should have constructive knowledge of an employee's disability for the purposes of making a reasonable adjustment claim. In this particular case the employer had made all reasonable efforts and the employer could not have reasonably known about the employee's disability during her employment as it had done all it could have reasonably done to find out whether she was disabled.

In *South Yorkshire Fire & Rescue Service v Mansell and others*, the EAT held that an award for injury to feelings may be made in cases of detriment relating to an employer's breaches of the Working Time Regulations (WTR).

Finally, on the subject of TUPE, the EAT has in *Hare Wines Ltd v Kaur* considered a case when an employee was dismissed shortly before the transfer. The motive of the new employer in encouraging this dismissal was to avoid employing the employee because she had ongoing difficulties in her working relation with her supervisor. Not withstanding these personal issues, the EAT upheld the employment tribunal decision that the sole and principal reason for the dismissal was the transfer and therefore it was automatically unfair.

Finally, may I remind you of our forthcoming events:

- **Redundancy Handling: A practical guide**
  Breakfast Seminar, Leeds, 17th April 2018
  For more information or to book

- **Save the Date for Employment Law Update for Charities 2018**
  A full day conference, Leeds, 26th June 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, Birmingham, 26th March 2018
  For more information or to book

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

Government response to Taylor Review of Modern Working Practices

Earlier this month the Government published its response to Matthew Taylor's November 2017 review of current issues in the world of work, including the gig economy. The Government has announced its intention to take action in line with some of Matthew Taylor's recommendations and to consult on the impact of others.

We highlight below the Government's key announcements.

Four consultations have been announced in response to the Taylor Review. The consultations cover:

- employment status and the best way to ensure individuals and organisations understand their rights and responsibilities (including consultation about amending the definition of working time for gig economy and online "platform" workers);
- agency workers;
- the enforcement of employment rights, including the extent of non-compliance with holiday pay and statutory sick pay obligations; and
- measures to increase transparency in the labour market.

Links to these consultations can be found here.

The Government has announced its intention to:

- Develop an on-line tool to determine employment status (similar to the existing HMRC tool);
- Extend the right to a written statement of terms to all workers;
- Introduce a right for all workers to request a "more predictable" contract, including agency workers and those on zero hours contracts;
- Extend the right to receive a payslip (showing the number of hours worked) to all workers;
- Name and shame employers who do not pay tribunal awards and increase the penalty for non-payment (paid to the Government) from £5,000 to £20,000;
- Ask the Low Pay Commission to consider the impact of a higher National Minimum Wage rate for those with no guaranteed hours (on "zero hours" contracts);
- Increase HMRC enforcement to reduce the number of "illegal and exploitative" unpaid internships;
- Increase the gap required to break continuity of service between contracts above the current one week period;
- Increase the Working Time Regulations pay reference period for workers with variable hours from 12 weeks to 52 weeks (to increase fairness in the calculation of holiday pay for those whose hours vary across the year); and
- Clarify guidance on maternity and pregnancy rights for workers and review the legislation relating to redundancy during pregnancy and maternity leave.

The Government has stated that a number of Matthew Taylor's recommendations will not be taken forward, for example, allowing workers the choice of being paid rolled-up holiday pay (which the Government noted has been ruled to be unlawful by the ECJ) and proposals for expediting employment status tribunal decisions. It has also confirmed that it does not intend to revisit the proposal to increase NICs for the self-employed or to extend auto-enrolment pension rights to the self-employed.

Author of whistle-blowing detriment must know about protected disclosure

In *Malik v Cenkos Securities Plc*, the Court of Appeal has made clear that someone who does not know about a disclosure cannot subject an employee to a detriment for the purposes of whistle-blowing protection. This decision does not extend to whistle-blowing claims relating to dismissal.

Dr Malik worked for Cenkos, a specialist securities firm, as a senior research analyst. Concerns arose as to whether Dr Malik had undeclared conflicts of interest due to his and his wife's involvement with some of Cenkos' clients. Dr Malik made a number of disclosures about Cenkos' alleged conflicts of interest and due diligence failures. Dr Malik was suspended by the Head of Compliance pending an investigation into alleged conflicts of interests. He resigned and brought a number of claims, including constructive unfair dismissal, automatic unfair dismissal, race/religious discrimination and detriments on the ground of whistle-blowing.

An employment tribunal dismissed all Dr Malik's claims. The EAT agreed.

Dr Malik argued that the decision to suspend him was part of a conspiracy to get rid of him and that, although the Head of Compliance may not have had direct knowledge of his protected disclosures, the decision to suspend him was influenced by others in the "chain of command" who did know about the disclosures.

On this point, the EAT disagreed with obiter comments in the EAT's judgment in ***Western Union Payment Services UK Ltd v Anastasiou*** UKEAT/0135/13 in which it was posited that there may be hypothetical cases in which the author of the detriment does not know about the disclosures but those disclosures influence their decision through the chain of command. It also distinguished the Court of Appeal case of ***Royal Mail v Jhuti*** [2017] EWCA Civ 1632 (which sets out some exceptions to the rule that the author of the detriment must know about and be motivated by the disclosures) on the basis that Jhuti was an unfair dismissal claim rather than a detriment claim.

The EAT made clear that a successful whistle-blowing *detriment* claim cannot be made out where the person carrying out the detrimental act does not know about the protected disclosure but is influenced by someone who does. This is similar to direct discrimination claims where the person meting out the less favourable treatment must have personal knowledge of and be motivated by the protected characteristic for the claim to succeed.

Where the whistle-blowing claim relates to dismissal, rather than detriment, there may be some cases in which someone else's knowledge of the protected disclosures will be attributed to the decision-maker. The two exceptions set out in *Jhuti* were where a) someone with responsibility for a disciplinary investigation; or b) someone very senior in the employer organisation manipulates the facts of the investigation because of protected disclosures.

Whistle-blowing: losses following termination are recoverable if caused by unlawful detriments occurring before termination

In *Wilsons Solicitors LLP v Roberts*, the Court of Appeal has ruled that whistle-blowers can claim post-termination losses where those losses are attributable to pre-termination detriments. The Court confirmed there is no rule of law preventing a claim, so it will be a question of fact as to whether the losses in question are recoverable.

Mr Roberts was the managing partner and compliance officer of Wilsons Solicitors LLP (Wilsons). Mr Roberts investigated allegations of bullying, which had been made against a senior partner at the firm. Following his report into this matter, the members of the firm voted to remove Mr Roberts from his roles as managing partner and compliance officer.

Mr Roberts issued proceedings in the employment tribunal, claiming that he had been constructively terminated. He also argued that the firm's alleged repudiatory breaches amounted to detriments on whistle-blowing grounds.

Wilsons argued that the members' agreement was continuing and denied being in breach.

Wilsons later used provisions of the members' agreement to remove Mr Roberts from the LLP. Mr Roberts did not claim that the decision to remove him from the LLP was an unlawful detriment.

After Mr Roberts issued his claim, the High Court's decision in ***Flanagan v Liontrust Investment Partners LLP*** confirmed that the doctrine of repudiatory breach does not apply to LLP agreements. Mr Roberts' claims for post-termination losses and constructive termination were therefore struck out at a preliminary hearing without a consideration of the evidence on the basis that they had no reasonable prospects of success.

Mr Roberts appealed on the issue of post-termination losses to the EAT, which held that the case of ***Flanagan*** did not prevent recovery of such losses. Nonetheless, it remained a question of fact as to whether Mr Roberts' losses could be recovered. Wilsons appealed to the Court of Appeal.

The Court of Appeal dismissed Wilsons' appeal and agreed with the EAT that the case of ***Flanagan*** did not help the LLP. It rejected Wilsons' argument that the chain of causation between pre-termination detriments and post-termination losses is broken by a lawful act of termination. It also confirmed the obiter comments in the case of ***Royal Mail Ltd v Jhuti*** [2017] EWCA Civ 1632 that post-termination losses caused by pre-termination detriments are recoverable.

The Court of Appeal made clear that the question of whether post-termination losses are attributable to pre-termination detriments is a question of fact for the tribunal and remitted Mr Roberts' case to the employment tribunal to make this determination.

It would, of course, be open to an expelled LLP member to argue (although Mr Roberts did not) that being removed from the LLP amounts in itself to an unlawful detriment.

Employer took reasonable steps to establish whether an employee was disabled and so could not be expected to know of her disability

In *Donelien v Liberata UK Ltd*, the Court of Appeal has extensively reviewed whether an employer should have constructive knowledge of an employee's disability for the purposes of making a reasonable adjustment claim. In this particular case the employer could not reasonably have known about the employee's disability during her employment as it had done all it reasonably could have done to find out whether there was a disability.

Ms Donelien was employed as a court officer by Liberata for around 11 years. She persistently took short periods of time off sick and in her final year at work, she was absent for 128 days. The reasons for these absences were many and varied and, on one occasion, she gave no reason for her absence.

Liberata referred Ms Donelien to occupational health (OH), asking a number of questions about her condition. The OH report did not answer all of the questions posed, but stated that Ms Donelien was not disabled. Liberata returned to OH and received a more detailed report from a doctor who had not seen the employee, but who had spoken to the doctor who issued the first report. Liberata held return to work interviews with the employee and considered correspondence from her GP.

Following this, Liberata took the decision to dismiss Ms Donelien, citing her poor attendance and breaches of its absence notification procedures. She brought a number of claims to an employment tribunal. These included a claim that Liberata had failed in its duty to make reasonable adjustments for her as a disabled employee.

The employment tribunal determined that Ms Donelien was not disabled at the time of the OH report, but was disabled by the time of her dismissal. It also decided that Liberata could not reasonably have known about her disability during her employment as it had done all it reasonably could have done to find out if she was disabled.

The EAT agreed. It noted that the employer had not simply relied without question on the OH report (as had been the issue in ***Gallop v Newport City Council*** [2013] EWCA Civ 1583).

The Court of Appeal also agreed and dismissed Ms Donelien's appeal. It made clear that the test in reasonable adjustment claims is whether the employer could reasonably have been expected to know that the employee was disabled. The test is not whether the employer could have done more to find out about the disability. In reaching its decision, the Court of Appeal took into account that Ms Donelien and her GP reported a wide range of symptoms and conditions. It noted that Ms Donelien had been obstructive when asked by Liberata to allow OH to contact her GP. It did not consider it reasonable of the claimant to insist that Liberata contact her GP directly. Importantly, it held that the tribunal was right to determine that Liberata had not only relied on OH advice, but had also considered its own impressions of the employee's condition from interviews and correspondence from her GP.

This case highlights once again the importance of employers seeking clarification from OH when a report does not address questions asked, in particular those relating to whether the employee's condition might qualify as a disability. Employers should be aware that they must take reasonable steps to inform themselves about the employee's condition rather than relying on unsupported assertions in an OH report.

Injury to feelings awards may be made in working time detriment claims

In *South Yorkshire Fire & Rescue Service v Mansell and others*, the EAT held that an award for injury to feelings may be made in cases of detriment relating to an employer's breaches of the Working Time Regulations (WTR).

The claimants, including Mr Mansell, were firefighters working for South Yorkshire Fire & Rescue (the Fire Service). The Fire Service changed the shift pattern for firefighters without varying the collective agreement between the Fire Service and the Fire Brigades Union. Before the change, the firefighters were required to work two 12-hour day shifts, followed by two 12-hour night shifts and then four days off work. The new shift pattern called for a 12-hour day shift followed immediately by a 12-hour on-call night shift and then four days off. The firefighters refused to volunteer for the new shift pattern and were forced to move to different fire stations.
The firefighters brought claims under section 45A Employment Rights Act 1996 (ERA), arguing that they had been subjected to detriments (including increased travel time, interference with their care obligations, loss of free time and family time, and disruption to work patterns and working relationships).

At a preliminary hearing, an employment tribunal held that an award in such a claim could be based on non-pecuniary loss and include an award for injury to feelings. The tribunal noted that case law has already established that injury to feelings awards can be made in some detriment claims, namely those founded on whistle-blowing and trade union membership or activities. It held that a claim under section 45A, much like a whistle-blowing claim, is akin to a discrimination or victimisation claim, in which it is well established that awards for injury to feelings can be made.

The EAT agreed. It made clear that a breach of section 45A is a statutory tort. It noted that the correct approach to compensation in such a case is not that taken in breach of contract claims, where awards for injury to feelings are not available to a claimant. It agreed with the tribunal that the breach is comparable to discrimination as the claimant has suffered some form of

detriment on the grounds of a protected right.

This judgment suggests that an injury to feelings award is potentially available in any claim for detriment under Part V ERA. As well as working time and whistle-blowing, these include claims for detriments relating to jury service, health and safety, Sunday working, trustees of occupational pension schemes, employee representatives, exercising the right to time off work for study or training, leave for family and domestic reasons, tax credits, flexible working and employee shareholder status.

TUPE and automatically unfair dismissals

Under TUPE, where the sole or principal reason for an employee's dismissal is the transfer of an undertaking, the dismissal is automatically unfair (TUPE, Reg 7(1)). In *Hare Wines Ltd v Kaur* UKEAT/0131/17 the EAT had to consider a case where an employee was dismissed shortly before the transfer, but the motive of the new employer in encouraging the dismissal of the employee was to avoid employing the employee because she had ongoing difficulties in her working relationship with a Mr Chatha who would be her supervisor going forward.

Was this a case where the sole or principal reason for the dismissal was the transfer, or should the employment tribunal have found that the dismissal was really about the anticipation of ongoing difficulties in the working relationship and therefore reasons which were purely personal?

The facts were that the claimant was employed as a cashier by H&W Wholesale Limited (a wine and beer wholesale business). It got into financial difficulties and Hare Wines Ltd agreed to purchase it and take on any employees under TUPE. However, this was to the exclusion of the claimant whose employment was terminated two days before the transfer. The claimant brought a claim for automatic unfair dismissal. An employment tribunal found that the transferee did not want to employ the claimant because of ongoing difficulties in her working relationship with Mr Chatha, a transferring employee, and for that reason was told that she was not wanted. However, the tribunal found that the claimant would have been employed immediately before the transfer but for her dismissal two days earlier, and the real reason for the dismissal was therefore the transfer. Hare Wines appealed. The basis of its appeal was that the existence of purely personal reasons precluded the transfer from being the reason for the dismissal. The EAT rejected this and upheld the employment tribunal decision. It was influenced in particular by three things.

First, the TUPE Regulations are designed to protect workers' rights and according to Choudhury J: "one needs to be very careful in expanding or introducing what might appear to be new categories of defence and which may undermine the protection afforded to employees in this situation".

Second, it was clear from the European Court case of ***P Bork International v Foreningen AF Arbejdsledere I Danmark*** [1989] IRL 41 that an important factor that may be taken into account in deciding the reason for dismissal is its proximity to the transfer. In the words of the Court:

> "In order to determine whether the only reason for dismissal was the transfer itself, account must be taken of the objective circumstances in which the dismissal occurred, and in particular, in a case like the present one, the fact that it took place on a date close to that of the transfer and that the workers concerned were re-engaged by the transferee".

Third, although it was true to say that the ongoing work relationship difficulties could be described as "personal" to the claimant, the EAT was influenced by the fact that the difficulties were long standing and ongoing. In the words of the EAT:

> "that is to say, they did not arise just on the point of transfer and were not going to end just afterwards. They had been in existence, it would seem, before the transfer and were

likely to continue thereafter. It seems to me that in a situation where an employer had not taken action to resolve an ongoing relationship difficulty prior to the transfer, but does so only at the point of transfer by dismissing one of the parties in that difficult relationship, it is open to the tribunal to conclude that the reason for the dismissal was the transfer".

So even if an issue affecting an employee's conduct or capability was suddenly acted upon on the point of transfer, the transfer might well be the sole or principal reason for the dismissal.

Taking all of these factors into consideration, the employment tribunal decision was upheld.

The practical advice arising from this case is that potential new employers under TUPE are not permitted to "cherry-pick" or decide to take over employees who are assigned to the transferring organisation. Any perceived difficulties with transferring employees must be ironed out by the new employer following appropriate and fair employment procedures.

Taking all of these factors into consideration, the employment tribunal decision was upheld.

The practical advice is that potential new employers under TUPE are not permitted to "cherry-pick" or decide to take over employees who are assigned to the transferring organisation. Any perceived difficulties with transferring employees must be ironed out by the new employer following appropriate and fair employment procedures.

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