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1: Can liability for enhanced redundancy payments arise from a policy in an employee handbook?

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Yes said the EAT, on the facts in *Allen v TRW Systems Limited*.

In 1999 TRW agreed a policy with its works council for enhanced redundancy payments. The promise was subsequently added to the employee handbook and repeated in letters to the workforce on a number of occasions thereafter. The employment tribunal held however that because the policy was not referred to in the written statement of terms, it was not incorporated into employment contracts.

The EAT overturned the tribunal decision. In *Keeley v Fosroc International* [2006] IRLR 961 the Court of Appeal held that if provisions about severance payments were apt for incorporation it was no obstacle in principle that they were in a handbook, as opposed to a statement of terms

The tribunal was therefore wrong in this case to ignore the works council agreement, the express promise in the employee handbook, and the subsequent repeated promises in correspondence, in determining whether the enhanced redundancy payments had been incorporated into the contract of employment. As the EAT put it: "how can an employer, having acted in this way, sensibly deny that employees could have a reasonable expectation that payment would be made in accordance with the promise?"

The case was remitted to a differently constituted employment tribunal to address these matters.

2: TUPE and Collective Agreements

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The Advocate General in the European Court case of *Alemo-Herron and others v Parkwood Leisure Ltd* (case C-426/11) has given his opinion in this matter on 19 February 2013. The decision of the European Court itself is still awaited. But the opinion of the Advocate General which precedes it is often influential, and is usually followed.

This case concerns the question whether a transferee, following a TUPE transfer, is bound to follow, not just the collective agreement (setting, for example, pay and conditions) currently in force at the time of the transfer relating to transferring employees, but also *future* collective agreements setting pay and conditions in the sector. This issue came up in Britain in the 1990s in relation to public sector to private sector transfers where, in the employees' contracts there was a clause to the effect that pay would be determined in accordance with a national joint council (for example) for the industry sector. The public sector organisation would be a party to that national joint council but, following the privatisation, the new, private sector would not be a member of that negotiating body. It was common ground that the new employer would have to honour the collective agreement decided upon by the negotiating body that was in force at the time of the transfer. But given the wording of the employees' contract did the new employer have to follow future pay awards settled by the national negotiating body, in circumstances where the new employer was not a party to the negotiating machinery?

In Britain, the answer was that it all depended on the terms of the employees' contract. If the employees' contract stated that terms and conditions would be determined by a third party, that contractual clause travelled under TUPE and bound the new employer and so the new employer would also be bound by the determinations of that third party. Inconvenient and impractical (and perhaps even unfair) this might be, it was not impossible to put into practice.

In Europe, however, the approach was rather different. In *Werhof v Freeway Traffic Systems GmbH & Co KG* [2006] IRLR 400 the European Court held that the new employer could not be held to future collective agreements. Collective agreements are of a "static" nature, not of a "dynamic" nature. Another ground for the court's decision was that it would be contrary to the notion of freedom of association (or rather, here, the freedom not to associate) for an employer to be bound by future collective arrangements to which he was not and did not want to be party to.

With that view from the European Court in mind, the Court of Appeal in the case of *Alemo-Heron* [2010] IRLR 298 considered that *Werhof* trumped the earlier British case law. The static interpretation was to be applied in the UK and the transferred employees could not rely on a fresh collective agreement after the transfer in which the transferee had not been involved. An appeal was made to the House of Lords and the House of Lords, instead of deciding on the matter, referred the case to the European Court. The question they referred was whether Article 3(1) of the Acquired Rights Directive precluded national courts from giving a dynamic interpretation to Regulation 5 of TUPE notwithstanding the ruling in *Werhof*. In other words, could Britain (through case law interpretation) give workers better rights than had been decided upon in the European Court?

The decision of the European Court on this matter will be critical to the rights of many public sector workers transferred to the private sector.

The Advocate General (Snr Cruz Villalón) has opined as follows

In his view, Article 3 of the Directive does not in principle preclude member states from allowing dynamic clauses referring to existing and future collective agreements that are freely agreed by the parties to an employment contract to be transferred as a result of a transfer of an undertaking. On this view, it would be up to British courts to reapply their original view that if there is, in the contract, a clause allowing for pay and conditions to be

determined by a third party body in the future, that would be binding on a transferee, thereby obliging him to follow future collective agreements.

But the Advocate General made a (slightly delphic) caveat to this. His opinion was on the proviso that this obligation on the transferee is not “unconditional and irreversible”. It would be for the national court to assess, whether in the specific circumstances of the present case and, pursuant to national law, the obligation was in fact unconditional and irreversible in nature. This seems to depend on whether it is possible for the new employer to renegotiate the collective agreement clause. That is a very grey area in the context of TUPE.

The story is far from over. The European Court itself has to rule on the matter. And then the matter will return to the Supreme Court to apply the court’s advice to the facts of the *Alemo Heron* case itself.

3: Whistleblowing – Recent Developments

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With the implementation of the Enterprise and Regulatory Reform Bill expected to happen imminently and an important decision of the EAT, the law protecting whistleblowers is changing significantly. Three key developments are:

Introduction of a ‘public interest’ requirement

There is currently no requirement that qualifying disclosures must be in the public interest. In fact, as the EAT held in *Parkins v Sodexho* [2002] IRLR 109, the definition of a qualifying disclosure, in s43B of the Employment Rights 1996 (“ERA 1996”), covers the breach of any legal obligation including a breach of the whistleblower’s contract of employment. This, however, is about to change.

Clause 15 of the Enterprise and Regulatory Reform Bill (“the Bill”) is intended to close what the government has described as the “loophole” in the current whistleblowing legislation which allows an employee to blow the whistle about breaches of their own employment contract. The Bill will, for the first time, introduce a public interest requirement.

This change is intended to be brought into force in April 2013 and will require that all categories of qualifying disclosures (as set out in s43B of the ERA 1996) must, in the reasonable belief of the worker, be made "in the public interest". The amended s43B(1) of the ERA 1996 will read as follows:

"In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following-."

Whistleblowers to be protected from bullying or harassment from co-workers

On 21 February 2013, the government announced further plans to change whistleblowing legislation by amending the Bill to protect whistleblowers from bullying or harassment by co-workers.

The current law only protects a whistleblower from bullying or harassment from their employer and the government believes that the amendment to the Bill will improve the protection offered by the whistleblowing legislation. The new protection will mirror the existing vicarious liability provisions in equality legislation and, in particular, the government has announced that the amendment will:

- introduce a provision which treats detrimental acts of one co-worker towards another who has blown the whistle as being done by the employer and therefore makes the employer responsible; and
- provide a defence for an employer who is able to show that they took all reasonable steps to prevent the detrimental treatment of a co-workers to towards another who blew the whistle.

Disclosure after employment ends can still be protected

In *Onyango v Berkeley (t/a Berkeley Solicitors)* the EAT considered, for the first time, whether a disclosure made after a contract of employment has ended can be a protected disclosure in accordance with the whistleblowing legislation.

Mr Onyango was employed as a solicitor by Berkeley Solicitors between March 2009 and 15 June 2010 and after his contract of employment with Berkeley ended, he wrote a letter before claim to Berkeley, relating to his former employment, and a letter to the Legal Complaints Service about Berkeley. Following this, Berkeley reported Mr Onyango to the Solicitors Regulation Authority for alleged forgery and dishonesty, which resulted in him being investigated by the SRA.

In response, Mr Onyango brought a whistleblowing claim (together with a number of discrimination claims) in which he argued that, by reporting him to the SRA, Berkeley had subjected him to a detriment.

The employment tribunal dismissed all of Mr Onyango's claims, but he appealed on the whistleblowing issue to the EAT. The employment tribunal had held that a protected disclosure could not occur after the end of employment but the EAT disagreed and remitted the whistleblowing claim to a different tribunal to assess the merits of the claim.

The EAT, with "no hesitation" accepted the submission that "there is no limitation in the statutory wording to protected disclosures made during the relevant employment". In particular, the EAT noted that "worker" and "employer" are defined in s230 of the ERA 1996 as including those people who have ceased to be in a contractual relationship and that as the detriment (following the case of *Woodward v Abbey National* [2006] ICR 1436) can occur post-employment, there was no reason to limit the period in which a protected disclosure could be made to the duration of the contractual relationship.

The EAT believed this to be consistent with the legislative purpose of the whistleblowing provisions and that "as a matter of pure construction of the statute post-termination disclosures may be relied on if they lead to detrimental treatment".

4: The use of an expletive in relation to the Pope is held not to amount to religious harassment

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In *Heafield v Times Newspapers Limited*, the EAT has upheld the decision of an employment tribunal to dismiss a claim for religious harassment brought under the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) (see now the Equality Act 2010) relating to a comment about the Pope made by the employee's line manager, Mr Wilson, which contained an expletive.

Mr Heafield, a Roman Catholic, worked for *The Times* newspaper and on 12 March 2010 one of the stories on which the paper was reporting concerned an allegation that the Pope, in a previous role, had protected a paedophile priest. The article was referred to as "the Pope" in the newsroom and as the deadline for printing drew near, Mr Wilson shouted across the room: "Can anybody tell me what's happening to the f***ing Pope?". Two months after this incident, Mr Heafield issued various claims against *The Times*, including a claim for religious harassment.

The EAT held that the decision of the employment tribunal to dismiss the religious harassment claim was "unarguably correct". The employment tribunal had found no evidence that Mr Heafield had worked in a hostile environment of anti-Catholic sentiment and that Mr Wilson's comment referred to the article being written, rather than the Pope himself. In addition, although there was no doubt that Mr Heafield had found the comment upsetting, it was not reasonable for the comment to have had the effect of creating a hostile, intimidating, degrading, humiliating or offensive environment for Mr Heafield, as required by the Regulations in order to establish religious harassment.

According to the EAT, the employment tribunal had been "plainly right" in holding that to the extent that Mr Heafield felt his dignity to be violated or that an adverse environment had been created, that was not a reasonable reaction. The EAT stated that: "What Mr Wilson said was not only not ill-intentioned or anti-Catholic or directed at the Pope or at Catholics: it was *evidently* not any of those things. No doubt in a perfect world he should not have used an expletive in the context of a sentence about the Pope, because it might be taken as disrespectful by a pious Catholic of tender sensibilities, but people are not perfect and sometimes use bad language thoughtlessly: a reasonable person would have understood that and made allowance for it."

In reaching its decision, the EAT concurred with the comments made in *Richmond Pharmacology v Dhaliwal* (UKEAT/0458/08) that not every adverse comment or conduct may constitute the violation of a person's dignity. It is therefore important to consider the context in which offensive comments are made. The *Heafield* case confirms that just because a comment may be perceived to be disrespectful does not necessarily mean that it amounts to religious harassment.

5: It is not a reasonable adjustment to exempt a disabled employee from an absence policy

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In *Jennings v Barts and The London NHS Trust*, the EAT has upheld the decision of an employment tribunal that the dismissal of a disabled employee, Mr Jennings, who had been absent from work for a considerable period of time, was fair and that it would not have been a reasonable adjustment to exempt Mr Jennings from the employer's absence policy.

Mr Jennings was employed by the Trust for nine years until he was dismissed in January 2008 as a result of poor attendance due to ill health. During his employment with the Trust, Mr Jennings suffered from various health problems, both physical and mental, which caused him to be intermittently absent from work. Following a road traffic accident in February 2006, Mr Jennings was diagnosed with a stress-related psychiatric condition, initially identified as post-traumatic stress disorder (PTSD). The symptoms suffered by Mr Jennings included anxiety, panic attacks and sleep disorders.

The Trust applied its short-term absence policy to Mr Jennings, under which disciplinary proceedings were begun and a number of meetings were arranged. Following these meetings, in October 2007, the Trust commenced its long-term absence procedure without giving prior notice to Mr Jennings, in breach of its policy.

Despite an occupational health report and further assessment which concluded that Mr Jennings may be ready for a phased return to work, the Trust, after pursuing its long-term absence procedure, decided to dismiss Mr Jennings. The Trust determined that his continued absence was unfair to colleagues, his department was under pressure, and that there was a possibility that he might not return to work as no return date had been agreed.

Mr Jennings issued claims for unfair dismissal and failure to make reasonable adjustments, in accordance with the Disability Discrimination Act 1995 (see now Equality Act 2010), which were dismissed by the employment tribunal. The tribunal held that, even though the Trust had breached its own absence policy by not giving notice to Mr Jennings of the progression to the long-term absence procedure, this did not make his dismissal procedurally unfair. Mr Jennings had had the opportunity to make representations throughout the rest of the four-stage process but had failed to do so.

The employment tribunal also dismissed Mr Jennings' argument that his dismissal was substantively unfair. Although Occupational Health had recommended a phased return to work, the tribunal noted that occupational health reports are often "positive and optimistic" and that Mr Jennings himself had been doubtful about his ability to return to work as early as the report suggested. Despite having the opportunity to do so, Mr Jennings had not made any suggestions about his return to work.

In relation to the claim that the Trust had failed to make reasonable adjustments, the tribunal confirmed a diagnosis of a paranoid personality disorder and major depression (rather than PTSD, as previously diagnosed) and held that this was a disability in accordance with the 1995 Act. The Trust argued that it had not been aware of the true nature of Mr Jennings' condition, but the tribunal held that the Trust had imputed knowledge of the disability. Nevertheless, Mr Jennings' claim failed.

The tribunal identified the short-term absence policy and the fact that it did not permit unplanned intermittent absences without sanctions that would ultimately lead to dismissal as the provision, criterion or practice required as a condition of s4A(1) of the 1995 Act. However, the tribunal held that the adjustments suggested by Mr Jennings, which would have effectively exempted him from the short-term absence policy, would not have been reasonable.

The EAT upheld the tribunal's decisions in relation to both of the unfair dismissal and failure to make reasonable adjustment claims.

The case highlights the importance of employees engaging with dismissal procedures as Mr Jennings' failure to make representations was a key factor in the tribunal finding that his dismissal was fair. In addition, the case clarifies that where the employer has enough information about an employee's mental impairment to be able to determine that it is long lasting and has a substantial effect on the employee's day-to-day activities, it does not matter that the precise diagnosis was initially mistaken. Finally, the case reinforces that employers are only required to make *reasonable* adjustments for disabled employees.

6: The Parental Leave (EU Directive) Regulations 2013

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The Parental Leave (EU Directive) Regulations 2013 ("the Regulations"), which implement the Council Directive 2010/18/EU on parental leave, will come into force on 8 March 2013. The Regulations will amend both the Employment Rights Act 1996 and the Maternity and Parental Leave etc. Regulations 1999 by extending the right to request flexible working to agency workers returning to work after parental leave and by increasing the maximum entitlement to parental leave from 13 weeks to 18 weeks per child.

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