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— SOLICITORS —

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Employment Law BULLETIN

Welcome to our August employment law bulletin.

This month, in *Stuart v London City Airport*, we note an important decision on unfair dismissal in the Court of Appeal concerning the standard of investigation required of a reasonable employer in a case of suspected theft. *Newbury v Sun Microsystems* is a reminder that failure to use the magic words "subject to contract" in negotiations may well mean there is an immediate binding contract if an unequivocal offer is made and accepted by letter.

How should judges sitting alone approach unfair dismissal cases? In *Mitchell v St Joseph's School* His Honour Judge McMullen QC considers that whilst the chemistry of tribunal decision making will be different, the law is the same, and compares the role of a judge sitting alone as being akin to a judicial review of the employer's procedure and decision. *Monk v Cann Hall Primary School* is a case where unfortunate treatment of an employee on notice of redundancy gave rise to a potential claim for personal injury. Finally, this month's client briefing discusses guidance for employers on using the right pool for selection for redundancy.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

Performance Management
· HR Workshop, 3rd September 2013

Discipline and Dismissal: Law and Practice
· Breakfast Seminar, 15th October 2013

and in conjunction with ACAS in the East Midlands:

Understanding TUPE: A Practical Guide to Business Transfers and Outsourcing
· A Full Day Conference, 16th October 2013

Click on any of the headings below to read more

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

1: Employee fairly dismissed on suspicion of theft even though acquitted in a criminal trial

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In *Stuart v London City Airport Limited* the Court of Appeal overturned a decision of the EAT and restored the tribunal's decision that an employee had not been unfairly dismissed for theft. The tribunal's decision was not perverse, since it had asked the right questions and come to a considered conclusion about the issues presented before it. Although the employee in question had, following dismissal, been found not guilty of theft in a criminal court, the employment tribunal was entitled to find that the employer had acted reasonably in dismissing him following a reasonable investigation. It had formed a reasonable view of the employee's credibility and they did not need to interview further witnesses or review CCTV footage.

In this case Stuart was a ground services agent at London City Airport. He had a good working record until his dismissal for allegedly attempting to steal goods from a duty free shop. Stuart had picked up a number of items in the duty free shop. Whilst in the queue to pay he was beckoned over to a seating area outside the shop by a colleague and went to speak to her, still holding the items. He was approached by a police officer and accused of stealing the items from the shop. Stuart argued he had no intention of stealing the items and that he felt he was still in the general shop area. He was subsequently suspended pending an investigation into alleged gross misconduct. Statements were made to the effect that at the time of the alleged theft the store manager had been informed that Stuart was hiding items under his coat. It was when Stuart left the shop with the duty free items that the shop manager alerted security and the police became involved. The investigating officer felt that the shop was clearly demarcated and concluded that Stuart had left the boundaries of the shop without paying for the items. But the investigating officer did not replay CCTV footage or interview other employees who had witnessed the incident.

Stuart was dismissed for dishonest conduct and breach of trust. The EAT allowed the appeal but the Court of Appeal restored the decision of the employment tribunal. The

employment tribunal had directed itself correctly. An important finding was that the employer was entitled to conclude that Stuart had concealed the items whilst in the duty free shop, and, after inspecting the area, was entitled to consider that Stuart could not possibly have been under impression that he was still in the duty free department since the demarcations were so clear. The Court of Appeal held that this finding had the important consequence of showing that Stuart had advanced an untruthful defence.

The case is noteworthy for the point that, in this case, as the employer had inspected the site were the alleged theft happened and concluded that the employee's main argument was dishonest, it was reasonable for them not to consider CCTV footage in relation to the alleged concealment of goods whilst the employee was in the shop. It had formed a reasonable view itself as to Stuart's credibility and so they did not have to go any further than that.

Of course the fact that Stuart was ultimately acquitted in the criminal court makes no difference from an unfair dismissal point of view. For a conduct dismissal to be fair a tribunal just has to be satisfied that at the time of the dismissal the employer believed the employee to be guilty of misconduct, that it had reasonable grounds for believing that the employee was guilty of that misconduct and that at the time it held that belief, it had carried out as much investigation as was reasonable. This is judged by the civil standard of the balance of probabilities, and not by the criminal standard of beyond reasonable doubt.

2: Failure to use the words “subject to contract” meant there was an immediate binding settlement

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In *Newbury v Sun Microsystems* the High Court held that a letter from an employer to an employee containing a settlement sum, and a subsequent letter of acceptance from that employee, amounted to a binding settlement agreement. If the employer had wanted negotiations to continue (about, for example, settlement agreement wording) they should have used the words “subject to contract”.

In this case Mr Newbury bought a claim for commission from Sun Microsystems (Sun). Sun counter-claimed for recovery of an alleged over-payment. Sun’s solicitors wrote to Mr Newbury’s solicitors offering a settlement sum and stating that the terms of the offer reflected Sun’s “final position”. Mr Newbury’s solicitors responded with a letter which accepted the terms of the offer of payment of the settlement sum. That letter was marked “without prejudice save as to costs”, but not “subject to contract”.

The High Court held that the exchange of letters was a binding agreement between the parties.

First, the letter from Sun’s solicitors was an offer of settlement and set out the terms of the offer clearly and it was available for acceptance by a specific time. That was a clear indication the letter was intended to be a binding offer capable of acceptance with legal consequences to follow.

Secondly, Sun’s solicitor’s letter referred to “such settlement to be recorded in a suitably worded agreement”. But that did not mean that the terms were yet to be negotiated and agreed. All it meant was that the terms would be committed to writing as an authentic

record.

Thirdly, and most importantly, the letter was not expressed as being "subject to contract". If these words had been used then it would have been clear that the terms had not been agreed and would not be binding until a formal contract was agreed. The fact that Sun did not use these words indicated that the letter constituted the offer that was capable of acceptance in that form.

This case demonstrates that not using the words "subject to contract" can lead to a binding agreement if the terms offered are clear and unequivocal. Of course this will not be a binding settlement agreement for the purposes of employment legislation. But it would be a binding contract as far as common law claims outside the jurisdiction of the employment tribunal.

When making an offer then, if it is intended that there will be a compromise agreement to follow, the words "subject to contract" must always be used when making the offer.

3: How should judges sitting alone approach unfair dismissal cases?

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His Honour Judge McMullen QC (sitting alone in the EAT) considered this question in *Mitchell v St Josephs School*.

In this case, the school bursar had failed to disclose the parlous state of the school's finances to the Board of Governors.

The EAT agreed with the employment tribunal that his dismissal was within the band of reasonable responses and therefore fair. Nor could the position be saved by the fact that the bursar had disclosed the state of affairs to two members of the Board. Applying the company law on attribution in *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500 and *Orr v Milton Keynes Council* [2011] ICR 704, this did not mean the Board itself had knowledge of the finances.

In the appeal it was suggested that the Employment Judge had nonetheless adopted a subjective approach as to whether the dismissal was fair. The Judge's language, in using the first person singular, had laid himself open to this suggestion.

In the end it was considered, however, that the Judge directed himself correctly on the authorities and applied the law to the facts accordingly.

HHJ McMullen noted the transition from the "industrial jury" to judges sitting alone in unfair dismissal cases. But, he said the law is the same. In applying it, he suggested the role of a judge sitting alone is akin to a judicial review of the employer's procedure and decision.

4: Court of Appeal considers claim for damages for personal injury arising from the manner in which a teacher was barred from her workplace while working her notice

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In *Monk v Cann Hall Primary School* Mrs Monk was employed as an administrative assistant at Cann Hall Primary School and was made redundant with effect from 31 August 2008. However at a meeting of the School Governors during the evening of 9 July 2008 it was decided that Mrs Monk should be denied access to the premises immediately (although the case report does not explain exactly why). At around 8.30am the next day the Chairman of the Governors went to the School and asked her to leave immediately. She was required to clear her desk and handover her passkeys before being publicly escorted from the premises by the Governor who saw her to her car and watched her leave. Mrs Monk was not told why she was being excluded in this summary manner apart from the Governor saying that it was "in the best interests of the school".

Mrs Monk claimed that she felt humiliated at being treated in front of teachers, children and parents in such a way that suggested she had committed an act of gross misconduct (which she had not). She then suffered a recognised form of psychiatric injury (although Mrs Monk was yet to prove that it was due to the circumstances of her exclusion from the school).

Mrs Monk had made a claim in the employment tribunal for unfair dismissal. This was settled but she then began proceedings claiming damages for personal injury.

The claim stalled at a preliminary stage as the employer argued that under the House of Lords' decision in *Johnson v Unisys* [2003] 1AC 518 an employee is not, under employment law, entitled to recover damages for loss caused by the manner of her dismissal. This is, in employment law terms, the so-called *Johnson* "exclusion area". However, where an employee acquires a common law action against their employer *before* they were actually or constructively dismissed, that action exists independently of and remains unimpaired by their subsequent dismissal.

So the question here is whether Mrs Monk's treatment on 10 July either constituted a dismissal or was too closely related to the dismissal itself to escape the *Johnson* exclusion area. On the other hand, if it was an independent incident occurring *during* the period of her employment then her claim could proceed. The employer had brought an action to strike out Mrs Monk's claim on the basis of *Johnson v Unisys* and the decision is therefore a preliminary one as to whether she had arguable grounds to proceed.

Given that Mrs Monk was paid her salary until 31 August all the evidence pointed to the conclusion that her contract of employment continued until then and what happened to her on 10 July could arguably have been an act independent of dismissal and therefore actionable notwithstanding the *Johnson* "exclusion area". The case was therefore allowed to proceed to a full trial.

This case is a reminder that an employer who treats an employee badly may commit a breach of the duty of trust and confidence and also, if psychiatric injury is sustained, a common law claim for damages for personal injury can arise. If the Claimant can establish that this was nothing to do with dismissal but an act independently of dismissal it could be separately actionable and not excluded by the *Johnson* principle.

5: Redundancy selection pools: client briefing

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This month's client brief highlights the key issues an organisation should consider when identifying the pool of employees from which it intends to make its selection for redundancy.

What is a redundancy situation?

A redundancy can occur where a business decides to close or relocate, or if a business has a diminishing requirement for employees to do work of a particular kind.

Identifying the correct pool

Before selecting an employee for dismissal on the ground of redundancy, the organisation must consider from which pool of employees redundancy selection should be made, otherwise the dismissal is likely to be unfair.

Discretion over the size of the pool

There are no fixed rules about how a redundancy pool should be defined. As long as the organisation can show that its choice of pool was reasonable in the circumstances, it will be difficult for an employee (or an employment tribunal) to challenge the decision.

For example, it is not always unfair to choose a redundancy pool that is the same size as the number of redundancies being made. However a business should only chose this option if there are strong reasons for doing so and the organisation should be wary about overstating the commercial risks of a wider pool.

Considerations for identifying the pool

When considering the choice of pool, the organisation should start by asking two questions:

- Which particular kind of work is disappearing?
- Which employees do the particular kind of work that is disappearing?

If there is a clear link between the kind of work that is disappearing and the group of employees doing that work, then the pool is likely to be easy to identify. The organisation should also consider:

- The extent to which the employees are doing similar work;
- The extent to which employees' jobs are interchangeable; and
- Whether the selection pool was agreed to by the union or employee representatives.

Look at the work that the employees actually do

The organisation should look at the day-to-day activities of the employees and the terms of their contracts. Organisations should concentrate on the reality of the situation, rather than what the employees' contracts say in theory that they may be required to do.

Consider interchangeable skills

Identifying the pool becomes complicated if the organisations employees are multi-skilled and do different types of work or can be required to do different types of work under their

contract of employment. In these cases, the employees are more likely to object to being labelled as redundant, particularly if they can point to other employees with whom they share interchangeable skills.

It may be unreasonable for the organisation to identify one employee as being in a pool simply because they are doing a particular type of work that is disappearing, and ignore another employee doing different work where the first employee could just as easily do that other work.

If an employee has previously done other work (other than the kind of work disappearing), it is likely that their skills are interchangeable with the other employees and so a wider pool may be required.

Where the work is “low-skilled”, these skills are more likely to be regarded as interchangeable.

Where an employee can point to another employee with interchangeable skills who also has less service than them, this may strengthen the argument that the other employee should be included in the pool.

Other sites

Where an organisation carries out similar work at more than one site, it may be unfair for the organisation only to include employees at one site within the pool, even if that site is closing completely. The organisation should therefore consider whether it would be appropriate to include workers from other sites.

“Bumping”

An organisation is entitled to widen the selection criteria for redundancy beyond those employees that are directly affected by the redundancy situation. The organisation can consider “bumping” out of their jobs employees whose roles are not redundant, to be filled by employees whose roles are redundant. There is no obligation on an organisation to consider “bumping”, but the organisation may fall foul of unfair dismissal law if it would have been reasonable to consider it in the circumstances.

Commercial problems with a wide redundancy pool

Organisations may be reluctant to draw up a wide redundancy pool, even if it would be technically correct to do so, because of the impact that it could have on the morale of the organisation's employees. By identifying a narrow pool, or only consulting with those individuals provisionally selected for redundancy, the organisation may be more vulnerable to claims of unfair dismissal. Organisations must decide whether the risks to morale and other costs of widening the pool outweigh the risk (and cost) of claims.

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