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— SOLICITORS —

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Employment Law BULLETIN

Welcome to our September employment law bulletin.

In *Francis v Pertemps Recruitment* the EAT has given an example of the difference between dismissal and a mutually agreed termination. In *Commissioners for Her Majesty's Revenue and Customs v Whitely* the EAT has given guidance on possible approaches to reasonable adjustments to a sickness absence policy in order to comply with the disability discrimination provisions of the Equality Act 2010. In *Cumbria County Council v Bates* the EAT has explained that post-termination conduct by an employee may affect the assessment of a compensatory award for unfair dismissal.

In *Toal v GB Oils Limited* the EAT has confirmed the right to have a chosen representative for a disciplinary or grievance hearing is an absolute one, but the remedy for breach of that right may be limited. In *Visteon Engineering Services Limited v Oliphant* the EAT upheld an employment tribunal decision in which a "mirrored terms agreement" reached between Ford and trade unions gave employees who TUPE'd to a new employer a contractual entitlement to have their pay terms "mirror" those of Ford employees for an indefinite period.

Finally, this month's client briefing deals with the subject of discrimination and harassment.

May I also remind you of our forthcoming events:

Click any event title for further details.

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

Stress to Well-being Strategies
- HR Workshop, 5th November 2013

and in conjunction with ACAS in the East Midlands:

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: What is the difference between dismissal and mutually agreed termination?

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The EAT has given a good example on the facts in *Francis v Pertemps Recruitment*.

In this case Mr Francis was employed by Pertemps, an agency, which placed him in work with a client whose identity was specified in the contract of employment. Subsequently that client no longer had need for the services of Mr Francis. Pertemps therefore offered Mr Francis the choice either of two weeks notice plus redundancy pay or two weeks notice with the agency looking out for fresh work with a view to him working for a new client.

At first he chose the latter. But then he changed his mind and chose the former. The HR department wrote to him confirming his position was redundant and that he was to treat the letter as "formal notice of redundancy". Furthermore the letter told him that he had a right to appeal "against the decision to terminate your employment". Mr Francis did in fact appeal (although this was unsuccessful).

When Mr Francis claimed unfair dismissal, Pertemps argued that there was no dismissal but that the employment had ended consensually, by mutual agreement.

The employment tribunal accepted this argument but the EAT overturned it. The question of whether there was a dismissal for unfair dismissal purposes depended on whether the contract of employment had been terminated by the employer. All the language used was consistent with termination by the employer. The choices offered to Mr Francis both involved his being given notice. The employer's arguments that "notice" and

"redundancy" were loose terms, not intended to have their formal meaning, and that the right to appeal was "meaningless", were rejected as unrealistic.

The appeal was allowed and a finding that there had been a dismissal was substituted.

2: Post-termination conduct by an employee affected the assessment of his compensatory award for unfair dismissal

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In *Cumbria County Council v Bates* the Claimant was a teacher at Dowdales School. He was dismissed by the School and later found to have been unfairly dismissed. He was awarded £70,925.

When the compensation was assessed by the employment tribunal it was aware that the Claimant was due to appear in the Preston Crown Court to face three charges of sexually touching a 16-year-old former pupil of the School. The employer brought this to the tribunal's attention, arguing that the outcome of the criminal prosecution might be relevant to the question of remedy, because a conviction might affect the Claimant's future employment prospects.

The employment tribunal declined, relying on a case called *Soros v Davison* [1994] ICR 590, which appeared to stand for the proposition that a tribunal should disregard events subsequent to the dismissal in assessing compensation for unfair dismissal. The Council and the governing body of the School appealed. By the time the appeal came on, the Claimant had been found not guilty of three charges of sexual assault but he had been found guilty of a charge of common assault and he was sentenced to 6 weeks imprisonment.

The Employment Appeal Tribunal allowed the employer's appeal and remitted the case to a new tribunal for further consideration. Applying the principles in a more recent Court of Appeal authority, *Scope v Thornett* [2007] IRLR 155, the employment tribunal was entitled to speculate on the Claimant's future employment prospects and therefore might reduce the compensatory award accordingly.

3: EAT sets out possible approaches to reasonable adjustments to sickness absence policies

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In *Commissioners for Her Majesty's Revenue and Customs v Whiteley* the EAT held that a tribunal erred in finding that HMRC, in issuing a warning to an asthmatic employee under its sickness policy, breached the duty to make reasonable adjustments for disabled employees under the Equality Act 2010. The tribunal's decision was wrong because it had incorrectly construed expert evidence as stating that asthma sufferers are more susceptible than others to viral respiratory infections and chest infections. The EAT remitted the case to a fresh tribunal for this point to be considered again.

The Equality Act 2010 imposes a duty on employers to make reasonable adjustments for disabled employees. Disabled employees are more likely than others to have significant sickness absence. Therefore a strict application of sickness absence policies is likely to place disabled employees at a substantial disadvantage and so this gives rise to the duty

to make reasonable adjustments.

In this case, Mrs Whiteley suffered from asthma. From January 2005 to September 2010 she had 54 days sickness absence, 41 of which were due to "acute upper respiratory tract infection".

From January to October 2010 she took 15 days sickness absence, 14 of which were because of viral infections and a chest infection. Taking account of Mrs Whiteley's disability it reduced the day's absence to be taken into account from 15 to 12. However, this was still a length of absence which would normally trigger a warning and HMRC issued Mrs Whiteley with a warning.

The medical report stated:

"People with asthma frequently find that common viral infections (e.g. the common cold, flu etc.) make their asthma worse. Between April and October 2010 Mrs Whiteley required three courses of antibiotics and two short courses of steroids for asthma exacerbations. This is not an uncommon pattern. It is generally quoted that we all suffer about 6 to 8 viral illnesses each year and although some of these will be mild and easily manageable, a few could be expected to course exacerbations requiring further treatment and a few days away from work. An absence of a few days occurring three or four times over a year would be typical"

The tribunal therefore concluded that Mrs Whiteley's asthma made her more susceptible to viral infections and held that HMRC should have found that *all* absences due to such infections were directly related to her asthma and discounted them when applying its sickness policy.

The EAT held that his was not a permissible reading of the evidence. The expert was not saying that an asthma sufferer will suffer such infections more frequently than a person who does not have asthma. Rather, he was saying that the infections would exacerbate the effects of asthma, which might well lead to sickness absence. Given this error, the tribunal's conclusion needed to be reconsidered.

The EAT went on to state that there are "at least two" possible approaches that employers might adopt when seeking to make allowances for sickness absences caused by the interaction between an employee's disability and "other common ailments".

- To consider the periods of absence in detail and (if necessary, with expert evidence) to assess precisely the level of absence that is attributable to disability
- Having considered the proper information, to consider what level of absence would someone with a particular disability reasonably be expected to have over the course of an average year due to that disability?

In the EAT's opinion in this case, if the tribunal had simply acknowledged the medical evidence that the periods of absence of a few days of three or four times a year were to be expected for an asthma sufferer, and applied this to the 15 days absence under consideration, this would have been a permissible approach.

4: A "mirrored terms agreement" with transferor applied indefinitely to transferring employees

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In *Visteon Engineering Services Ltd v Oliphant* the EAT upheld an employment tribunal decision in which a "mirrored terms agreement" reached between Ford and trade unions gave transferring employees a contractual entitlement to have their pay terms "mirror" those of Ford employees for an indefinite period.

A "mirrored terms agreement" was entered into between Ford Motor Co Limited and the Ford European Works Council with regard to the potential sale of part of its business. The agreement provided that employees would be entitled to Ford terms and conditions for the duration of their employment. The agreement also provided that Ford employees who transferred would continue to be represented by the existing Ford procedure and bargaining arrangements for 6 years after legal separation after which, the transferee would establish local and national representation and bargaining arrangements for itself.

It was held that these terms were incorporated into the employment contracts of the transferring employees when the business was spun out into Visteon UK Limited. The business was subsequently transferred to Visteon Engineering Services Limited. A new collective agreement was entered into between Visteon and UNITE. Visteon then declined to follow the Ford pay agreement.

It was held that there was no basis for reading into the mirrored terms of agreement which gave employees the entitlement to mirrored terms "for the duration of their employment" a limitation of 6 years (which was the time within which new bargaining structures for transferred employees would have to be established and after which transferred employees would not be covered by Ford collective bargaining agreements).

The pay terms of transferring employees including "mirroring" were not within the scope of the new bargaining arrangements established between Visteon and UNITE. The contractual mirroring term could have been varied or replaced by that agreement but as at the time of the hearing no such agreement had been reached.

5: The right to be accompanied

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In *Toal v GB Oils Ltd* the EAT confirmed that the right to have a chosen representative within the parameters of section 10 of the Employment Relations Act 1999 is absolute. However the remedy is compensation (and not a penalty). Therefore the remedy was to recompense for any loss or detriment.

In this case two employees including Mr Toal raised grievances with their employer, GB Oils Ltd. They made it clear they wished to be accompanied by Mr Lean, an official of UNITE. Both were union members. Mr Lean was certified as a representative. But GB Oils refused the request. In the end employees were accompanied by a fellow worker and, on appeal, by a different certified union official. The individuals brought claims for breach of section 10 of the Employment Relations Act 1999.

The EAT considered that the employees' rights had been breached and that they had an absolute right as to choice of representative provided that this was a person specified in the section (and a trade union representative is one of those persons specified). But compensation should be minimal as the employees could not prove they had suffered loss.

Whilst coming out strongly in terms of the right of the employee to choose a companied of a specified category the decision shows the weakness of the statutory right as far as a remedy is concerned.

6: Dismissal for gross misconduct is not automatically fair

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In *Brito-Babapulle v Ealing Hospital NHS Trust* the claimant was employed as a consultant haematologist at Ealing Hospital. She was allowed, under her contract, to have sessions with private patients. She suffered from intermittent ill health and was off work from the hospital between 13 March and 8 June 2009. The hospital believed that she had continued to see private patients during her absence, despite having been notified twice, in 2007, that as certified sick she should not do so.

The disciplinary panel found that the allegation of working in private practice whilst certified sick from the NHS and receiving sick pay was well founded and this amounted to gross misconduct. She was summarily dismissed and brought an unfair dismissal claim.

The employment tribunal found for the employer. It held that the hospital had undertaken a reasonable investigation and genuinely believed on reasonable grounds that Ms Brito-Babapulle was guilty of gross misconduct. The tribunal then went on, boldly to say that once gross misconduct is found the dismissal must *always* fall within the range of reasonable responses.

Ms Brito-Babapulle appealed arguing that the tribunal had erred in law in assuming that gross misconduct automatically fell within the range of reasonable responses. In doing so the tribunal had failed to give any consideration to mitigating factors such as the length of her exemplary service and the consequences of dismissal from the NHS for her future career. The EAT reversed the employment tribunal and remitted it to another tribunal for consideration. The tribunal had gone wrong in law. Jumping from a finding of gross misconduct to the proposition that dismissal must inevitably fall within the range of reasonable responses gave no room for considering mitigation.

The conclusion to be drawn from this case it that even where the facts are very serious and may amount to gross misconduct it is always important that the employer considers any mitigation put forward by the employee including the other circumstances of the case before deciding for the appropriate sanction, which could well be, but not necessarily, dismissal.

7: Discrimination and harassment: client briefing

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This client briefing sets out the different types of discrimination that can occur within the workplace and highlights practical steps an organisation can take to help avoid breaching discrimination law.

Why is it important to know about discrimination laws?

Discrimination law is designed to:

- Ensure equality of opportunity at work
- Protect employees' dignity
- Ensure that complaints can be raised without fear of reprisal

What are the penalties for failing to comply with discrimination laws?

High compensation payments

There is no limit on the amount of compensation that can be awarded. In a recent case, an employee of an NHS Trust was awarded £4.5million for race and sex discrimination.

Expensive litigation

Litigation can involve significant management time and legal costs which are not usually recoverable.

Damaging publicity

Allegations of discrimination or harassment are likely to create bad publicity for a business. It is better to avoid giving rise to a claim than to manage a crisis after a claim has been made.

Negative impact on staff moral

Discrimination and harassment issues can be highly emotive and the process may have a negative impact on staff moral.

What areas of working life are covered?

Discrimination law covers all areas of employment, including:

- Job adverts and the recruitment process
- Conduct during employment
- Work social events
- Job references

What types of discrimination are prohibited?

Organisations must not discriminate against employees on the basis of:

- Sex (for example an organisation must not offer a male candidate a more attractive healthcare package than a female candidate for the same post)
- Gender reassignment
- Being pregnant or on maternity leave (for example an organisation should not delay the promotion of a female employee because she is on maternity leave)
- Being married or in a civil partnership
- Race (including ethnic or national origin, nationality and colour). For example, it could be unlawful to refuse to promote an employee on the basis that English is not their first language
- Disability (for example, a business cannot dismiss a disabled employee simply for taking substantial periods of sick leave if they are off work because of their disability)
- Sexual orientation (for example if an organisation invites employees' partners to a

social function, the invitation should be extended to same-sex partners)
- Religion or belief (for example, it may be unlawful to prohibit headwear at work, as this may discriminate against Sikhs who wear turbans for religious reasons)
- Age (for example, choosing not to interview a candidate because their application suggests they are nearing retirement age is discriminatory)

Protection from harassment

Harassment is any unwanted conduct that has the purpose or effect of:

- Violating a persons dignity
- Creating a hostile, degrading, humiliating or offence environment

It is discriminatory if it is related to any of the characteristics listed above. For example it is important to make sure more junior staff are not belittled or humiliated due to their lack of experience

Protection from victimisation

A business must not discipline an employee who either:

- Brings a discrimination claim against the organisation
- Gives evidence on behalf of a colleague in an employment tribunal

What are the main defences to a discrimination claim?

Justification

In limited circumstances an employee's treatment may not be discriminatory if it can be objectively justified. For example, a requirement to have excellent written English skills may indirectly discriminate against non-British job applicants, unless the organisation can show that the aims of the job in question cannot reasonably be met without that requirement.

Occupational requirements

It may be lawful to discriminate if having a particular characteristic is an occupational requirement. For example, a catholic school may require its religious education teacher to be a catholic.

The law requires the organisation not to discriminate

There are some instances in which an organisation may be required by law to do something discriminatory. For example in immigration legislation they require the organisation to refuse to employ a non-EU job applicant on the grounds of their nationality, even if they are the best qualified person for the job.

Practical steps to take to help avoiding breaching discrimination law

- Provide staff with employment handbooks (including policies on equal opportunities and harassment)
- Setting out what constitutes acceptable behaviour and what does not
- Provide training on equal opportunities and harassment. This may help managers:
    - Avoid inappropriate questions at interviews and

    - Recognise and deal with harassment at an early stage
- Set up clear procedures for staff to:
    - Raise concerns and complaints and
    - Deal with complaints
- Ensure discriminatory behaviour by staff is not tolerated and is dealt with through proper disciplinary measures
- Review employment contracts, policies and employee share schemes to ensure they comply with the law
- Make reasonable adjustments where this will alleviate difficulties suffered by disabled employees in the workplace (for example by installing wheelchair ramps)
- Where possible, accommodate workers' different cultures and religious beliefs (for example requests for time off to pray should be allowed, unless a refusal can be justified)
- Try to accommodate requests for family friendly hours by employees with childcare or other family commitments, unless a refusal can be justified
- Undertake equal opportunities monitoring, but do not use the forms as part of recruitment or other decision making

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