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Employment Law BULLETIN

Welcome to our November employment law bulletin.

This month we cover cases on alleged misconduct outside the workplace, two cases on disability discrimination, and the Court of Appeal ruling in *Crystal Palace FC Limited v Kavanagh* on whether an administrator of an insolvent company could dismiss fairly in order to keep the company trading, even if, ultimately, the business was up for sale.

This month's client briefing sets out the rules on sickness related dismissals.

May I also remind you of our forthcoming events:

Click any event title for further details.

What's New in Employment Law?
Highlights of 2013 plus your 2014 HR Planner
· Breakfast Seminar, 3rd December 2013

Managing Difficult Employees
· HR Workshop, 7th January 2014

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1: New ACAS Guide on handling small-scale redundancies

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Following certain changes to the rules on collective redundancy consultation earlier in 2013, ACAS produced a new, very helpful, advisory booklet: *How to Manage Collective Redundancies*.

Now ACAS has produced a guide on *Handling Smaller Scale Redundancies*. It includes the background to the law on redundancy, taking steps towards implementing small-scale redundancies, useful tools such as selection criteria advice and some real life situation examples.

2: Living wage increased

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The London living wage, a voluntary rate not binding on employers, has been increased to £8.80 from £8.55. The UK living wage, applicable outside London, has been increased to £7.65 from £7.45. The new rates are higher than the current national minimum wage, which is £6.31 an hour for over-21s. It is reported that over 30,000 low paid workers will receive a pay rise of up to £400 a year following this increase.

3: John McCririck loses age discrimination case against Channel 4

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An employment tribunal has held that Channel 4's decision to remove John McCririck, as a presenter of Channel 4 racing was not direct discrimination on the ground of his age. The decision was made because of his image and presentation style.

The case is to be contrasted with *O'Reilly v British Broadcasting Corporation* (ET/2200423/10) where an employment tribunal held that the decision to remove Miriam O'Reilly from the BBC's Countryfile programme *was* direct age discrimination. The tribunal found that Ms O'Reilly's age was a factor in the BBC's decision to terminate her contract. Although the BBC's wish to appeal to a prime time audience, including younger viewers, was found to be a legitimate aim, the tribunal held, in that case, that it was not proportionate to remove older presenters to pander to the assumed prejudice of such viewers.

In *McCririck* the tribunal held that Channel 4's aim in this case was to attract a wider audience to horse racing. It decided that this was a legitimate aim for a broadcaster providing horse racing coverage on television. And in this case it considered Channel 4's actions *were* a proportionate means of achieving that legitimate aim.

The tribunal concluded its judgment by saying:

"Mr McCririck was dismissed because of his persona emanating from his appearance from celebrity television shows and the associated press articles, resulting from them together with his appearances as a broadcaster on Channel 4 racing where, as he accepted, his style of dress, attitudes, opinions and tic tac gestures were not in keeping with the new aims, and his opinions seen as arrogant and confrontational."

4: Dismissal of an employee charged with assaulting his partner was unfair but not unlawful discrimination

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In *CJD v Royal Bank of Scotland* the Court of Session considered a case where an employee was charged with assaulting his partner (who was a co-worker) at her home. CJD worked for the Royal Bank of Scotland. He was in a relationship with LC, another employee of the bank, and shared her flat. An altercation ensued, with some degree of physical contact. CJD also kicked the door of the flat and was then arrested by the police and charged with assault and breach of the peace. LC was not arrested.

The Bank interviewed CJD. He argued that he had reacted to his partner in self-defence. The Bank instituted disciplinary proceedings to consider whether CJD's actions amounted to gross misconduct under the Bank's disciplinary policy which applied to conduct both inside and outside the workplace. CJD repeated his view that he had acted in self-defence. In fact the employer accepted this but considered that, technically, there was an "assault". Therefore, on that ground, he was dismissed by reason of gross misconduct.

The Court of Session agreed with the employment tribunal that the dismissal was unfair. The dismissing officer had expressly accepted that the employee had acted in self-defence. Therefore, under the test in *British Home Stores Limited v Burchell* [1978] IRLR 379, it could not be said that he actually *believed* in the employee's culpability. Belief in the employee's wrongdoing is a pre-requisite of the *BHS v Burchell* test. In these circumstances the tribunal had been entitled to find that the employer had not established that the reason, or the principal reason for the employee's dismissal was misconduct. Added to this, for various reasons, the employer's investigation was inadequate and unreasonable.

However, the employment tribunal was wrong to find that the dismissal was an act of direct sex discrimination. It was fair for the tribunal to allow the employee to compare his treatment with that of his partner, who had not been disciplined. However, the tribunal was wrong in its approach to the burden of proof. With reference to the employer's inadequate investigation, it had begun with a hypothesis that the employee was dismissed because of a sexist assumption that, in any dispute between a man and a women involving physical contact, the man is likely to be the aggressor. But in fact, its first step should have been to examine the proven facts themselves to see whether or not it could draw an inference that direct discrimination had occurred in the particular case.

5: Employer's knowledge of employees disability and the duty to make reasonable adjustments

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In *Cox v Essex County Fire and Rescue Service*, Mr Cox worked for Essex County Fire and Rescue Service (Essex) as deputy finance director from 19 March 2007. By June 2009, concerns were being raised about Mr Cox's ability to do his job. Mr Cox attributed these issues to depression brought on by a severe concussion sustained in a workplace accident the previous September. Mr Cox was referred to Essex's occupational health (OH) department, which advised that he was unlikely to have a disability as defined by the Disability Discrimination Act 1995 (the 1995 Act), the legislation then applicable.

By September 2009, Essex was receiving complaints that Mr Cox had been behaving in an aggressive and inappropriate manner towards colleagues, and he was suspended on 8 September pending an investigation. On 18 September 2009, he sent his manager an email in which he diagnosed himself as suffering from bipolar disorder, and indicated that he had seen a psychiatrist who had suggested this was the case. A report of the meeting between Mr Cox and the psychiatrist noted:

"*Diagnosis:? Bipolar Affective Disorder.* […]

The picture described by Mr Cox and his wife does seem to suggest that he might have experienced a hypomanic episode which seems to be gradually settling down."

Following this, Mr Cox was again referred to the OH department. In the referral, Mr Cox's manager asked the doctor a number of questions relating to Mr Cox's performance and condition, including whether Mr Cox had a disability as defined by the 1995 Act, and, if so, what adjustments should be considered.

In its response the OH department indicated that it was requesting, with Mr Cox's consent, a report from Mr Cox's GP and psychiatrist because it was not clear whether the asserted bipolar disorder was an "active diagnosis". Mr Cox, however, subsequently withdrew his consent to these disclosures. Essex obtained further medical reports, one of which indicated that Mr Cox no longer displayed the more severe symptoms associated with bipolar disorder, though less severe symptoms were still present.

In February 2010, following a series of disciplinary hearings, Mr Cox was summarily dismissed on the ground of serious misconduct. Mr Cox brought claims for wrongful dismissal, unfair dismissal and disability discrimination.

Asked to decide whether Essex had discriminated against Mr Cox by failing to make

reasonable adjustments for his disability as required by section 4A(1) of the 1995 Act, the Employment Tribunal ruled that it had not, because, at the material time, Essex did not know and could not reasonably have been expected to know that Mr Cox had a disability. Under section 4A(3)(b) of the 1995 Act this relieved Essex of the duty to make reasonable adjustments. (Equivalent provisions to section 4A(1) and 4A(3)(b) can now be found in Section 20 and Schedule 8 Part 3 of the Equality Act 2010). The Tribunal considered that Essex had done all that could reasonably be expected of it to find out whether Mr Cox had a disability. Essex had asked the right questions, but Mr Cox had declined to disclose certain medical information, and there had been "*no definitive diagnosis of the claimant being bipolar*".

Mr Cox appealed, contending that the Tribunal had erred in failing to find that Essex had actual knowledge of his disability at the date of dismissal. The EAT dismissed the appeal, noting in the process Underhill P's finding in *Wilcox v Birmingham Citizens Advice Bureau Services Ltd* UKEAT/0293/10, that "it would be wrong to find actual or constructive knowledge on the part of the Respondent before such time as it should reasonably have obtained authoritative medical advice." The Tribunal had properly directed itself to the statutory test contained in section 4A(3) of the 1995 Act, and the Tribunal's finding that there had been "no definitive diagnosis of the claimant being bipolar" was a correct statement of the factual position.

In the absence of Mr Cox's consent to disclosures by his GP and psychiatrist, all Essex had to go on was Mr Cox's own self analysis and assertion he was displaying symptoms typical of bipolar disorder; while the available medical evidence queried whether he might be bipolar. The reasoning and conclusions of the Tribunal were, therefore, legitimate.

6: Frustration of contract and the duty to make reasonable adjustments for a disabled employee

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This is one of the questions the EAT was asked to decide in the case of *Warner v Armfield Retail & Leisure Ltd*.

The common law doctrine of frustration provides that parties cease to be bound by a contract in circumstances where an event not provided for in the contract, and beyond the control of either party, renders an obligation under the contract impossible of performance or means that the performance would be of a nature radically different from that provided for in the contract.

Armfield Retail & Leisure Ltd (Armfield) specialised in the refurbishment of retail outlets and public houses. Mr Warner was employed as a site manager. His role required a high level of mobility and he undertook carpentry when required. In February 2010, Mr Warner suffered a severe stroke, and it was agreed between the parties that from that time onwards he was a disabled person. Although there was no contractual obligation to pay sick pay, the employer paid the employee full pay until the end of May. In September 2010, Mr Warner moved away from the locality of Armfield's office, and told Armfield that if he were able to return to work he would stay with family near its office. After this there was no contact between Mr Warner and Armfield until January 2011 when Armfield wrote to Mr Warner sending him a cheque for accrued holiday pay and his P45, and confirming the end of his employment, explaining subsequently that the reason for termination of the employment was capability on medical grounds. No capability procedure or enquiry was

carried out by Armfield prior to the termination. Mr Warner brought claims for unfair dismissal, breach of contract and disability discrimination.

At the hearing, Armfield argued for the purposes of the unfair dismissal and breach of contract claims that the employment contract had been frustrated. Armfield accepted, however, that for the purposes of his disability discrimination claim, Mr Warner had been dismissed. The Employment Tribunal accepted the frustration argument. With regard to the disability discrimination claim, it held that Armfield was not in breach of its duty to make reasonable adjustments, and that Mr Warner's dismissal had not been discriminatory.

Mr Warner appealed, arguing that the doctrine of frustration could not apply in circumstances where the duty to make reasonable adjustments had arisen. It was also contended that the Tribunal had not fully addressed Mr Warner's discrimination claim because it had failed to consider his submission that Armfield's failure to carry out a capability procedure prior to the dismissal was discriminatory.

The EAT dismissed the appeal in relation to the finding of frustration, pointing out that it was established law that the doctrine of frustration could apply to employment contracts, even those terminable on short notice. This being the case, it would be "*unjust and illogical*" to exclude contracts rendered impossible to perform by reason of disability. Instead, the effect of the disability of an employee was to add to the factors already identified in the authorities a further factor to be considered before a contract could be found to have been frustrated. This factor was whether the employer was in breach of its duty to make reasonable adjustments. The Tribunal had correctly identified and applied this test, and its finding on the facts that Armfield had not breached the duty could not be impugned. The appeal in relation to the capability procedure submission was upheld, and the EAT remitted this question back to the Tribunal for consideration.

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7: The dismissal of employees by an administrator of an insolvent company was for an economic, technical or organisational reason entailing changes in the workforce even if the business was for sale

In *Crystal Palace FC Limited v Kavanagh*, the Court of Appeal reinstated a tribunal's decision that employees of an insolvent football club, dismissed by the club's administrator shortly before the business was sold, were not automatically unfairly dismissed under TUPE. The tribunal had been entitled to conclude that the dismissals, although connected with the subsequent TUPE transfer, were carried out for an "economic, technical or organisational (ETO) reasons entailing changes in the workforce" within the meaning of regulation 7 of TUPE.

In the earlier case of *Spaceright Europe Limited v Baillavoine* [2011] EWCA Civ 1565 the Court of Appeal had held that a dismissal carried out to make a business more attractive to potential purchasers cannot be for an ETO reason under TUPE. In the present case however, the employees' dismissals were designed to ensure that costs were reduced to enable the club to continue to trade. This was an ETO reason that could be distinguished from the administrator's ultimate objective of selling the club as a going concern. The court commented that the application of regulation 7 of TUPE (whether there is an ETO reason) is "an intensely fact-sensitive process". Further, because of the policy of

encourage corporate rescue, case must be taken before characterising dismissals by an administrator as an illegitimate manipulation of the TUPE Regulations.

8: Client Briefing: Sickness related dismissals

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This client briefing sets out the steps the organisation should take when it is considering dismissing an employee for a sickness absence–related reason. Although this can be a fair reason to dismiss an employee, it is important to follow the correct procedure.

Review and retain the correct documentation

- If the organisation has a sickness or absence policy, make sure it is complied with.
- Review the relevant provisions in the employee's contract of employment.
- Keep confidential records of medical certificates, correspondence, telephone calls and meetings.

Conduct an investigation

- Investigate the nature, extent and likely duration of the medical condition causing the absence. Ensure the organisation has the up to date medical evidence that gives a clear prognosis (obtained with the employee's written consent).
- If the absence is stress related, refer the employee to the organisation's stress policy (if one exists) or any counselling services that are on offer. Consider whether dismissal could be avoided by changing the employee's role or duties.
- If the absences are short term and intermittent, the organisation should investigate whether there is an underlying cause (medical or otherwise). If necessary, the organisation should follow a capability or disciplinary procedure, setting out timescales for improvement and giving warnings when appropriate.
- Maintain contact with the employee throughout the investigation, especially when the organisation:
    - receives medical evidence;
    - is considering what adjustments to make or whether an alternative position would be suitable;
    - is contemplating dismissing the employee.

Disability and reasonable adjustments

Consider whether:

- the employee is disabled under the Equality Act 2010 (relying on medical evidence as required).
- any adjustments to the employee's duties or workplace would assist their return to work (or their taking less time off work if their absences are intermittent) and, if so, whether making those adjustments would be reasonable in the circumstances.
- there is another job within the organisation that might be more suitable for the employee.

Review the alternatives to dismissal

Before taking the decision to dismiss the organisation should consider:

- the importance of the employee and the position they occupy in the organisation.
- the impact their continuing absence is having on the organisation.
- the difficulty and cost of continuing to deal with their absence.
- whether the organisation can avoid dismissing the employee (for example, by offering them an alternative position).
- their age, length of service and the circumstances surrounding the employee's absence.
- any action that has previously been taken in relation to other employees in similar circumstances.
- claiming under the terms of any permanent health insurance policy or ill health retirement if the employee has been absent for long term and is unlikely to return in the foreseeable future.
- whether dismissal would have an adverse effect on any PHI entitlement the employee currently receives.
- reviewing the medical evidence to make sure it is up to date.

Make sure the correct procedure is followed

- Once the organisation has decided to dismiss, write to the employee inviting them to a meeting, making it clear that the organisation is contemplating dismissing them.
- Provide enough information about the circumstances the business is taking into account and the possible outcomes to enable the employee to respond meaningfully.
- Hold a meeting with the employee and give them the opportunity to present their case against the dismissal.
- Confirm the decision in writing to the employee. The letter should:
  - provide the reason for dismissal;
  - confirm their last day of employment; and
  - give them the right to appeal the dismissal decision.
- Ensure the employee's contractual and statutory entitlements are met and that they receive their correct pay entitlement, including notice and holiday pay.
- Hold an appeal meeting (if requested by the employee) and confirm the decision to the employee in writing.

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