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Employment Law BULLETIN

Welcome to our February employment law bulletin.

In this issue we cover a number of legal developments of considerable note. First, the High Court has rejected the application by UNISON to challenge the employment tribunal fee regime. However, UNISON intends to appeal to the Court of Appeal and segments of the judgment suggest that a further review might be possible as time goes on.

We note the demise of the equality questionnaire in employment discrimination claims and describe the ACAS guidance on asking and responding to questions about discrimination which has taken its place.

The Woolworths case on collective redundancy consultation has been referred to the European court and we finally cover a number of interesting cases in the EAT.

This month's client briefing is on the subject of whistleblowing.

May I also remind you of our forthcoming events:
Click any event title for further details.

Handling Disciplinary Cases
- HR Workshop, 4th March 2014

Settlement Agreements and the Law
- Breakfast Seminar, 1st April 2014

and in conjunction with ACAS in the North East:

Understanding TUPE: A practical guide to business transfers and outsourcing
- Full Day Conference, 11th April 2014

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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: ACAS Early Conciliation

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As reported in our January bulletin, mandatory ACAS Early Conciliation will be requiring claimants to contact ACAS before they can lodge a claim in the employment tribunal. Regulations have now been made, bringing the new law into force on 6 April 2014, and setting out an outline of the procedure to be followed before a claim can be taken to the employment tribunal.

2: Employment Tribunal fees challenge fails

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The introduction of fees in employment tribunals last July was a controversial move, and the union UNISON made a judicial review application challenging their legality. The High Court has now ruled in *R (on the application of UNISON) v Lord Chancellor* that the fees are not unlawful. However, the judgment leaves open the possibility of further challenge in the future as further evidence arises of the impact of the fees in practice. The fees were challenged on four principal grounds:

1.The requirement to pay fees 'will make it virtually impossible, or excessively difficult, to exercise rights conferred by EU law'.

After analysis of the effects of the fees on a number of hypothetical claimants, the court concluded the fees were likely to be 'expensive' but not 'excessive'. However, the

decision could not be made on the basis of purely hypothetical statistics and some time must be allowed to show the effects of the regime in practice. Since the Lord Chancellor stated in court the claim was premature, he could not object to a subsequent challenge on the basis that it is brought too late.

2.The requirement to pay the fees violates the 'principle of equivalence' as it means that the procedures for the enforcement of EU rights are less favourable than those for domestic actions.

The court considered that, compared with County Court actions, there was no breach of equivalence, as, in the employment tribunals, there is not the 'disincentive' of the usual County Court costs orders, and there will be a free alternative dispute resolution service (ACAS early conciliation) not available in the County Court.

3.The decision to introduce fees was in breach of the Public Sector Equality Duty.

The court noted that considerable consultation and impact assessments had been carried out prior to the decision to introduce fees. While UNISON may disagree with the conclusions, they could not argue that the duty had not been considered.

4.The effect of the fees order is indirectly discriminatory and unlawful, as discrimination/equal pay claims are 'Type B' claims attracting higher fees.

Again, however, the argument was based on hypothetical and general statistics. It was likely that there would be a disparate impact, but on the statistics presented, it was impossible to determine the extent of that impact – which was vital in considering the possibility of objective justification. The Lord Chancellor has undertaken to keep the impact of the fees regime under review, and if 'his optimism as to the fairness of this regime proves unfounded', he would be under a duty to take remedial measures. A subsequent challenge based on better statistics could be made if he failed to do so, but 'there is no rule that forbids the introduction of a fee regime'.

UNISON has stated that it intends to appeal to the Court of Appeal.

3: 'Woolworths case' on collective redundancy provisions referred to European Court of Justice

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Under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRe(C)A), employers must collectively consult with employees if they intend to make more than 20 employees 'at one establishment' redundant within a period of 90 days.

The phrase 'at one establishment', however, is not found in the relevant part of the EU Directive that TULRe(C)A purports to implement. As reported in our June 2013 and July 2013 Employment Bulletins, the EAT decided in the case of *USDAW v Ethel Austin Ltd and another* UKEAT/0547/12/KN (the 'Woolworths case') that employees working in stores employing fewer than 20 workers were entitled to be consulted collectively before redundancy. The EAT held that the words 'at one establishment' in the collective consultations provisions were incompatible with the underlying EU directive and should be disregarded.

The Court of Appeal has now heard the government's appeal against this decision, and

has decided to refer the case to the European Court of Justice for a ruling. A similar question has already been referred to the ECJ by a Northern Ireland industrial tribunal in relation to a Northern Irish case, but the employees in that case are not presently legally represented, and the answer to the questions posed in that case may not cover all the points necessary to the Woolworths case, so there is a risk that there could be further delays if it only became apparent after the initial ECJ decision that a separate application would be necessary. The Court of Appeal has therefore decided that a separate reference to the ECJ would be worthwhile.

A ruling on the matter from the ECJ could take up to 18 months.

4: ACAS guidance on asking and responding to questions about discrimination

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From 6 April 2014, the provisions in the Equality Act 2010 relating to discrimination questionnaires will be repealed. Employees will no longer have to ask questions in the set form of the discrimination questionnaire, and employers will no longer be subject to adverse inferences for a failure to reply to the questionnaire, nor to the 8-week limit for responses.

An employee may, however, ask their employer questions without the questionnaire. Acas has published guidance setting out best practice in relation to questions and responses, and employers would be well advised to follow this wherever possible.

Instead of the set form of the questionnaire, there are now 6 steps the employee is advised to follow when setting out their questions. The questioner should include:

- their own and the responder's details and the name of any others who may have discriminated against them,
- identify the protected characteristic relevant to the situation (e.g. sex, race),
- describe the treatment which may have been based on discrimination and ask whether the responder agrees with this version of events,
- identify the kind of discrimination involved (e.g. direct or indirect discrimination, harassment, or victimisation),
- state why they think the treatment was discriminatory, and
- ask any additional questions they feel may be relevant.

In turn, the responder does not have to follow the set response form, and is not obliged to answer, but they should reply 'seriously and promptly' wherever possible. There is no obligation to answer questions, but a tribunal "may look at whether a responder has answered questions and how they have answered them as a contributory factor in making their overall decision on the questioner’s discrimination claim."

There are 3 steps for the responder to consider:

- whether they agree or disagree with the questioner's account (following appropriate

investigation if necessary);

- whether they consider the treatment was justified (for example in response to allegations of indirect discrimination, where justification is a possible defence);
- responding to any other questions raised.

If the responder chooses not to answer any questions, they should where possible explain why (for example, where there are issues of confidentiality, because of Data Protection Act issues or in relation to commercially sensitive information).

It is to be noted that if an employee asks questions in good faith under the Acas guidance, they are protected under the Equality Act 2010 from any subsequent victimisation arising from asking such questions.

Similar guidance relates to questions regarding equal pay issues.

5: Is it fair for an employer to dismiss on the recommendation of an external HR consultant?

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Potentially yes, says the EAT in *GM Packaging v Haslem*.

GM was a small employer with just 9 employees. Its managing director became aware of conduct by the claimant (a senior manager), engaging in sexual activity with a member of his staff on company premises after hours.

It delegated an external HR consultant to advise on whether dismissal should take place. Following an investigation the HR consultant recommended dismissal and the managing director accepted this recommendation. When the Claimant appealed, this was also delegated to an HR consultant and the appeal rejected.

The employment tribunal held it was fair and reasonable to delegate matters to an HR consultant but found that the principal reason for dismissal, in the managing director's own mind, was purely the sexual activity on company premises. It considered that this was not gross misconduct and that dismissal was outside the band of reasonable responses.

However, on appeal, the tribunal decision was overturned. First, all constituent parts of the reason of "conduct" were relevant to the reasonableness question and not just the principal act of misconduct. The HR consultant, whose recommendation was relied on, had also taken into account derogatory remarks made by the Claimant about his employer.

Secondly, dismissal for sexual activity with a member of staff on the company's premises after hours accompanied by a conversation which revealed a complete lack of respect for the employer was within the band of reasonable responses. The employment tribunal had erred by substituting its own view over that employer as to the reasonableness of the sanction of dismissal.

6: Dismissal for "financial reasons" was, nonetheless by reason of redundancy

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In *TNS UK Ltd v Swainston* the Claimant was employed as a business development director. The employer decided that it could no longer afford to pay for the Claimant's post and that it would in the future cease to provide most of the services provided by the business development services department and performed by the Claimant.

Before the employment tribunal the employer relied upon redundancy as the potentially fair reason for dismissal. But the employment tribunal held that the employed had failed to show there was a genuine redundancy situation.

The decision was overturned on appeal to the EAT. The employment tribunal had applied the wrong test. The rationale behind many redundancies is financial. The key issue is whether the employer's requirement for performance of a business development service carried out by the claimant herself had ceased or diminished or was expected to cease or diminish. This was the case here.

In the circumstances however the dismissal was unfair on procedural grounds. A consultation meeting had lasted just 25 minutes and the claimant was the only person earmarked for redundancy.

7: Collective redundancy consultation

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The Court of Appeal has given judgment concerning the scope of the collective redundancy consultation provisions in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULReCA) in the long-running case of *United States of America v Nolan.* This judgment relates only to one part of the case; the other question, concerning when the consultation must take place, remains to be decided.

The case concerns the closure of a US military base in Hampshire, with the consequent redundancy of the various civilian staff employed there. Arguments were raised in the Employment Tribunal and the EAT regarding both jurisdiction (although it was held the US had waived its state immunity) and the timing of the consultation. The case law, particularly recent EU cases, is very unclear on the question of when consultation should take place – while the business decision (that may result in redundancies) is still being considered, or after the business decision is made and consequent redundancies are probable or inevitable.

The Court of Appeal referred this second issue to the European Court of Justice; however, a further question of jurisdiction arose and the ECJ declined to answer the Court of Appeal's question on the basis that the Directive upon which TULReCA is based excludes consultation rights for employees employed by 'public administrative bodies or by establishments governed by public law (or … equivalent bodies)'. As the employer was a public body, the Directive could not apply and only domestic legislation was in question. The case therefore returned to the Court of Appeal without EU guidance, and this decision relates to the issue of the relation between the Directive and TULReCA.

The US government argued that TULReCA should apply only to the extent that it

implemented the Directive. As the military was a 'public administrative body' or equivalent, it should be excluded from the consultation requirements, as would be the case under the Directive. The Court of Appeal disagreed. TULReCA diverged from the Directive by excluding only 'Crown employees' not all those employed by 'public administrative bodies…', but it was not necessarily the case that Parliament cannot have intended to confer any rights or impose any obligations beyond the strict requirements of the Directive. The change in wording must have been a deliberate drafting decision, and despite the fact it imposed the consultation requirements on more persons than required by the EU Directive, the Court upheld the wording in TULReCA.

The original question regarding the timing of consultation remains to be decided. The Court of Appeal will consider the arguments relating to this aspect of the case following a further hearing.

8: A minor or inadvertent breach did not justify an employer summarily dismissing an employee

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In *Robert Bates Wrekin Landscapes Ltd v Knight* the Claimant, a gardener, had signed an employment contract which gave no fewer than 17 examples of conduct which might justify the employer dismissing without notice or payment in lieu of notice. The company rulebook stated that property was not to be removed from any site without a completed property pass. The employer received a tip-off that something untoward had been seen in Mr Knight's van as he left the site. A bag of bolts was seen on the dashboard of the van. Mr Knight was suspended and called to a disciplinary hearing. His only explanation was that he had simply found the bag of bolts whilst litter picking. He put them to one side and then on the dashboard of his van and simply forgot to hand them in. The employer dismissed Mr Knight summarily.

The employment tribunal believed the evidence of Mr Knight to the effect that this was an inadvertent error. Although the employment contract purported to give the employer the right summarily to dismiss for breach of its security rules, the contract had to be construed in the context of employment law generally and it could not have been intended that non-repudiatory and inadvertent breaches would justify summary termination. Mr Knight successfully claimed damages for breach of contract and compensation for unfair dismissal, although the latter award was reduced on ground of contributory fault.

Client Briefing: Whistleblowing

This client briefing outlines the protection given to whistleblowers at work under UK law.

What protection does the law give to whistleblowers?

There is no financial cap on compensation in whistleblowing claims, and no requirement for a minimum period of service. Two levels of protection exist for whistleblowers:

- **Unfair dismissal**
    - Dismissing an employee will be automatically unfair if the reason, or the main reason, is that they have made a "protected disclosure".

- **Unlawful detriment**
    - Workers are protected from being subject to any detriment on the grounds they have made a "protected disclosure". A detriment includes:
        - Threats;
        - Disciplinary action;
        - Loss of work or pay; or
        - Damage to career prospects

Who is a worker?

The definition of a "worker" is wide, and includes:

- Agency workers
- Freelance workers
- Seconded workers
- Trainees

When is a disclosure protected?

The information disclosed, in the reasonable belief of the worker, tends to show that one of the following has taken place, is taking place or is likely to take place:

- A criminal offence
- Breach of any legal obligation
- Miscarriage of justice
- Danger to the health and safety of the individual
- Damage to the environment
- The deliberate concealing of information about any of the above

Internal disclosures

If the whistleblower is acting in good faith, a disclosure to an organisation will be a protected disclosure.

External disclosures

- **Responsible third parties**
    - If a worker believes that a third party (for example a client or supplier) is responsible for the wrongdoing, they can report to that third party in good faith, without informing the organisation.
- **Prescribed persons**
    - There are a number of organisations that a worker can make a disclosure to in good faith, provided they believe the information is substantially true and

concerns a matter within that persons area of responsibilities. They include:
  - HM Revenue and Customs;
  - The Office of Fair Trading; and
  - The Health and Safety Executive

- **Legal advisers**
  - Workers are entitled to disclose matters to their legal adviser while obtaining advice.
- **Wider disclosures**
  - Disclosure to anyone else is only protected if the worker believes the information is substantially true and acts in good faith and not for gain. Unless the latter is "exceptionally serious", they must have already disclosed it to the organisation or a prescribed person, or believe that, if they do, evidence would be destroyed or they would suffer reprisals.

Why is protection of whistleblowers important?

Internal risk control

Organisations have an interest in uncovering wrongdoing or dangerous practices within their organisation. An organisation is likely to want to manage what information (if any) is spread to the outside world. Encouraging the reporting of these types of issues through internal channels may help avoid:

- Serious accidents
- Fraud
- Regulatory breaches

Avoiding litigation

Whistleblowing cases can involve significant management time and legal costs, which are not usually recoverable.

Reputational damage and staff morale

An external disclosure of suspected malpractice, especially to the media, can lead to negative publicity for the organisation and damage staff morale. Any claim by a whistleblower who believes they have suffered reprisals is likely to have a similar effect.

Avoiding criminal liability

An organisation will be guilty of failing to prevent bribery if a person associated with it (for example an employee) bribes another person with the intention of obtaining or retaining business or a business advantage. An organisation will have a defence if it can show that the organisation had "adequate procedures" in place to prevent bribery. The government has published guidance indicating that this would include having effective whistleblowing procedures in place that encourage the reporting of bribery.

Practical steps to help reduce organisational risk

- Implement a whistleblowing policy that enables staff to confidentially report concerns about:
- Illegal;
- Unethical; or
- Otherwise unacceptable conduct.
- Ensure that it enables the worker to bypass the level of management where the problem exists.
- Publicise the policy internally and train any managers on it. Make clear that victimisation of a whistleblower will lead to disciplinary action.
- Investigate disclosures promptly and keep the whistleblower informed of progress where possible. A lack of contact with the whistleblower may lead them to make an external disclosure.
- Do not rely on confidentiality clauses to protect external disclosures as they are unenforceable if the disclosure is protected. Taking action against a whistleblower for breach of confidence may amount to an unlawful detriment.

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