WRIGLEYS
— SOLICITORS —

JANUARY 2016

Employment Law BULLETIN

Welcome to our January employment law bulletin.

And Happy New Year to all our readers.

Apart from the latest employment news we cover some interesting case law developments.

In *Ham v The Governing Body of Beardwood Humanities College* the EAT overturned an employment tribunal decision in which the employment judge suggested, that, as a matter of principle, it could never be right for a reasonable employer to aggregate individual acts of misconduct to justify a more serious finding of gross misconduct. The correct question, said the EAT was whether it was reasonable to dismiss in the circumstances, applying the words of section 98(4) of the Employment Rights Act 1996.

The European Court of Human Rights decision in *Bărbulescu v Romania* has attracted huge attention in the tabloid press. The ECHR held that there was no breach of article 8 of the European Convention on European Rights (the right to privacy) when an employer monitored an employee's work related messenger account and the transcript of this account was used in domestic proceedings concerning the dismissal of the employee. The account in question was only supposed to be used for work purposes and it was not unreasonable, said the Court for an employer to verify that employees were completing professional tasks during working hours. The case however, contrary to popular speculation, does not establish new ground. Much will still depend on the facts of the case and will hinge on whether employers have a clear policy on internet use with reference to potential monitoring by the employer.

In *Farnan v Sunderland Association Football Club Ltd* the High Court considered a claim of wrongful dismissal by a senior employee in the robust world of football management. The club sought to justify Mr Farnan's dismissal on the basis of 28 different allegations, not all of which were sustained. Some involved serious confidentiality breaches however, and this was a serious breach of the employment contract entitling the employer to dismiss without notice.

In *The Advocate General for Scotland v Barton* the Court of Session (Inner House) has, when construing the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, refused to interpret the legislation by deleting express wording in order to give effect to European law. To do so would 'go against the grain' of the British legislation. This decision is in contrast to the outcome of the holiday pay litigation in *Bear Scotland v Fulton* where the EAT was prepared to read words into the Working Time Regulations 1998 to give effect to the Working Time Directive. The question whether British legislation can be manipulated in this way in order to give effect to European law will reemerge in the second round of litigation in *Bear Scotland v Fulton*, the EAT decision in which is expected shortly.

In *Kelly v Covance Laboratories Ltd* the EAT upheld an employment tribunal ruling that an employer had not been discriminated against or racially harassed by means of an instruction from managers not to use the employee's first (Russian) language at work.

In *Cooper Contracting Limited v Lindsey* the EAT upheld an award made following an employment tribunal finding that the employee had acted reasonably to mitigate his losses by choosing to return to self-employment after his dismissal, rather than seeking a more highly paid position.

In *Aguebor v PCL Whitehall Security Group* the EAT explains the difference between a business transfer under regulation 3(1)(a) of TUPE and a service provision change TUPE transfer under regulation 3(1)(b) of TUPE.

Finally, may I remind you of our forthcoming events:
Click any event title for further details.

TUPE and service provision change
Everything you need to know about outsourcing
- Breakfast Seminar, 2nd February 2016

And in conjunction with ACAS
Understanding TUPE: A practical guide to business transfers and outsourcing
- A full day conference, **Newcastle-upon-Tyne**, 4th February 2016

Dr John McMullen, EDITOR **john.mcmullen@wrigleys.co.uk**

Contents

Wherever you see this logo more detail is available on the BAILII website

1: Employment tribunals in the news

Personnel Today comments that, whilst employment tribunal fees have drastically reduced the number of cases, and typical awards for claimants are generally in four figures, there are still some high awards. The article focuses on twelve six figure employment tribunal awards that employers were ordered to pay in 2015, with a total compensation amounting to £2.5million.

BBC Sport reported that former Chelsea doctor Eva Carneiro attended a preliminary hearing in her constructive dismissal case against Chelsea and former Chelsea boss Jose Mourinho. Reportedly, a date was fixed for the next hearing, but no settlement reached.

Civil Society reported that Michelle Baharier, the Chief Executive of mental health charity CoolTan Arts, has submitted a discrimination claim to an employment tribunal following a disagreement with the charity.

2: New rights and remedies for employees and workers on zero hours contracts

The Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 came into force on 11th January 2016. These regulations give further protections to both employees and workers on zero hours contract whose employers attempt to prevent them from working under any other contract or arrangement.

Since May 2015, exclusivity clauses in zero hours contracts have been unenforceable. However, those working under such contracts have, until this month, had no redress where they suffer a detriment or are dismissed because they have worked for another employer in breach of an exclusivity clause, or a purported exclusivity clause.

Employees who work under zero hours contracts now have the right not to be unfairly dismissed if the reason, or principal reason, is that the employee has failed to comply with an exclusivity clause. This right is not subject to any qualifying period of employment.

Workers who work under zero hours contracts now have the right not to be subjected to any detriment by, or as a result of any act, or deliberate failure to act, done by an employer for the reason that the worker has failed to comply with an exclusivity clause.

Both employees and workers can bring claims under these regulations in the Employment Tribunal within three months of the date of the act or failure to act complained of (or the date of the last in a series of such acts).

The tribunal can order a declaration of the rights of the employee or the employer and can order that compensation be paid to the claimant. The limits for compensation are the same as those for the basic award and the compensatory award in unfair dismissal.

3: Can a reasonable employer 'gross up' individual allegations of misconduct to make them, together, constitute gross misconduct and fairly dismiss on that ground?

Provided the employer's decision falls within the "band of reasonable responses" said the EAT in ***Ham v The Governing Body of Beardwood Humanities College***.

In this case the claimant had been employed by Beardwood Humanities College as Head and then subsequently Director, of Science from September 1994 to May 2011. After a disciplinary hearing in her absence the claimant was summarily dismissed on account of various conduct issues. None of these were regarded, in isolation, as amounting to gross misconduct. For example there was an incident about safeguarding in relation to pupils' access to a laboratory and a series of complaints about consistently failing to attend a meeting and behaving rudely and intransigently.

The claimant appealed against her dismissal but this was unsuccessful. The claimant claimed unfair dismissal. The employment tribunal found that the claimant's dismissal was unfair on the basis that the College had purported to aggregate individual acts of misconduct to justify a finding of gross misconduct. In its opinion: "it is not right for a reasonable employer to 'gross up' individual allegations of misconduct to make them together constitute gross misconduct…".

The employment tribunal also felt the decision was unfair given that the claimant - who had 17 years of service - would have been made redundant in any event on 30th August 2012, when the School was due to close.

The employer appealed. The EAT allowed the employer's challenge to the employment tribunal's decision. First, the question for the employment tribunal should not have been whether the allegations constituted 'gross misconduct' but whether it was reasonable to dismiss applying section 98(4) of the Employment Rights Act 1996. Secondly, the employment tribunal had taken into account a wholly irrelevant factor, namely that the claimant's employment was due to end by reason of redundancy on the closure of the School.

On remission of the case to the same employment tribunal for a rehearing on the reasonableness issue the employment tribunal reminded itself of the band of reasonable responses test and concluded that the decision to dismiss the claimant was within the band of reasonable responses, albeit at the extreme end.

4: European Court of Human Rights (ECHR) rules employer's monitoring of employee's internet messenger account was not a breach of Article 8 of the Convention

In ***Bărbulescu v Romania***, the ECHR considered whether a breach of Article 8 had taken place when an employer monitored an employee's work-related messenger account and the transcript of this account was used in domestic proceedings concerning the dismissal of the employee.

Article 8 of the European Convention on Human Rights states that everyone has the right to respect for his private and family life, his home and his correspondence. It also states that there shall be no interference by a public authority with the exercise of this right, unless that interference is in accordance with the law and is necessary in a democratic society.

Mr Bărbulescu worked as an engineer in charge of sales for a private company in Romania. At his employer's request, he created a Yahoo Messenger account for responding to clients' enquiries. The employer monitored this account for a period of two weeks and then informed

the employee of this monitoring, stating that he had used the account for personal purposes in contravention of the company's internal regulations. A transcript of the account showed a number of personal messages to Mr Bărbulescu's fiancée and brother. Some of these messages referred to very personal issues, such as the employee's sexual health. The employer dismissed Mr Bărbulescu for the breach of company regulations.

Mr Bărbulescu brought first instance proceedings in the County Court at which his complaint was dismissed. He subsequently brought appeal proceedings. The Court of Appeal upheld the ruling of the County Court. The employee took his case to the ECHR.

The key question for the ECHR was whether the employee should reasonably have expected his communications over the internet to be monitored by the employer. The judgment makes clear that an employee will have a reasonable expectation of privacy where no warning has been issued concerning monitoring. In this case, the company's regulations stated that it was "strictly forbidden…to use computers…for personal use". There was, however, no internet surveillance policy at the company.

In finding that the employee should have reasonably expected his internet use to be monitored, the court took into account: the existence of a prohibition on personal use of computers; the fact that another employee had been dismissed for personal use of the company's internet, telephone and photocopiers; and the (disputed) fact that a notice had been issued to all employees warning them that their activity was under surveillance just prior to the surveillance of Mr Bărbulescu.

The ECHR found that Article 8 was applicable in this case because the content of Mr Bărbulescu's messages had been accessed by the employer and the transcript of those messages was used as evidence in the domestic court. However, the court found that Article 8 had not been breached by the domestic courts as the details of private messages and the identity of other parties had not been mentioned in the judgments. It also found that the employer's actions were legitimate as the messages had been accessed on the assumption that they would be work-related. The court stated that it is not unreasonable for an employer to verify that employees are completing their professional tasks during working hours.

Notwithstanding this decision, however, it is advisable for employers to have a clear policy on internet use, including reference to any potential monitoring, and for employees to be asked to sign the policy to indicate their consent.

5: Summary dismissal for confidentiality breaches was not wrongful dismissal

In ***Farnan v Sunderland Association Football Club Ltd***, the High Court determined that an employee and director of Sunderland AFC had not been wrongfully dismissed when his contract was terminated without notice following confidentiality breaches.

Mr Farnan was employed by Sunderland AFC (Sunderland) in the role of International and National Marketing Director and he was also a statutory director of the company. During Mr Farnan's period of employment (from August 2011 to May 2013), Sunderland went through considerable problems, including financial difficulties related to sponsorship, potential relegation, and the media storm following the replacement of its manager (Martin O'Neill) with the allegedly far right wing Paulo Di Canio.

Mr Farnan began to feel ostracised by the CEO, Ms Byrne, and considered that his time with Sunderland was coming to an end. He took a number of actions in order to protect his position in the event of a claim against Sunderland and to seek future employment outside the club, including sending documents to his wife's email account. Mr Farnan was summarily dismissed and brought a claim for wrongful dismissal in the High Court as well as claims in the Employment Tribunal.

In the High Court, Mrs Justice Whipple found that Mr Farnan's actions constituted gross misconduct as they were serious breaches of confidentiality and clearly breached Mr Farnan's service agreement and Sunderland's contractual confidentiality policy.

The judge determined that the following actions were serious breaches of contract. Mr Farnan forwarded a significant number of company documents to his wife's personal email account in an attempt to "bank" them should he bring a claim against Sunderland or require evidence to justify his position or bonus. He sent an internal presentation prepared during his employment to two business contacts in an attempt to seek future employment. He engaged in an "off the record" telephone conversation with a journalist, in breach of Sunderland's policy for communicating with the media, which was subsequently reported by Bloomberg. He sent an email containing confidential information regarding a sponsorship deal with Bidvest to Nissan South Africa.

A number of incidents of alleged misconduct were found by the judge to be too trivial to constitute gross misconduct or acceptable in the circumstances. Interestingly, the fact that Mr Farnan sent an e-Christmas card showing ten topless women from his work email account was not found - to be gross misconduct as it was sent in the context of a work team where such emails, if not encouraged, were tolerated. The act of forwarding company documents to a personal email was found to be acceptable where the purpose of this was for administrative support (e.g. to be printed out at home), rather than to create a bank of evidence for a potential employment tribunal claim. The act of sending an email containing confidential information to an ex-director (in this case David Miliband MP) was also found to be acceptable in context as the information was relevant to Mr Miliband's past and continuing interest in the football club.

In finding that Mr Farnan had not been wrongfully dismissed and that Sunderland had no obligation to pay him in lieu of notice, Mrs Justice Whipple emphasised the significance of clearly-worded confidentiality obligations in the service agreement and the incorporation into the employment contract of detailed policies which made clear that confidentiality was extremely important to the club.

Even though no wrongful dismissal was found, the Judge criticised Sunderland for attempting to "trump up" the case against Mr Farnan. She stated that it was a pity that Sunderland had chosen to pursue 28 different allegations of misconduct, many of which subsequently fell away. She also criticised the employer for not allowing Mr Farnan sufficient time to prepare for his disciplinary hearing and holding the hearing in his absence during his period of ill health.

6: The Court of Session in Scotland rules that words should not be deleted from domestic legislation in order to interpret it in the light of an EU directive

In ***The Advocate General for Scotland v Barton***, the Court of Session (Inner House) dismissed a claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, stating that deleting the words "full-time" from the domestic legislation would be too radical a change and beyond the limits of the principle in European Court's decision in *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1991] ECR 4135. (This principle of EU law states that domestic legislation should be interpreted "as far as possible" in the light of the wording and purpose of the relevant EU directive.)

Mr Barton worked for four hours a week as a clerk to the General Commissioners of Income Tax for 38 years until 2009. He applied for a pension in relation to this role the year before his retirement. His application was considered under the Taxes Management Act 1970 (the 1970 Act) and was rejected as he did not come within the definition of a "full time clerk". It was customary at this time for part-time clerks who worked at least 70% of full time hours to be deemed to come within the definition of "full time clerk" for the purposes of the 1970 Act.

Mr Barton brought a claim under the PTWR. Under these regulations, a part-time worker has the right not to be treated less favourably by his employer than a comparable full-time worker is treated by the same employer. The right only applies where the less favourable treatment is on the ground that the worker is part-time and where the treatment cannot be objectively justified.

The Employment Tribunal dismissed Mr Barton's claim because his chosen comparator was not a full-time worker within the meaning of the PTWR. Rather, he worked just 70% of full time hours and was a "full-time clerk" only within the meaning of the 1970 Act.

The EAT upheld Mr Barton's appeal, applying the *Marleasing* principle. The EAT ruled that denying a part-time worker access to the possibility of a pension when a full-time worker had such access was discriminatory. It determined that the relevant provision of the 1970 Act should be read as if the words "full-time" and the definition of full-time were omitted.

On appeal to the Inner House of the Court of Session, the judge made clear that the obligation to interpret domestic legislation in a way which gives effect to an identified policy from an EU directive only applies where it is possible to interpret the legislation in that way. Lady Smith, following the House of Lords decision in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, stated that "there is no obligation to import a meaning which is inconsistent with a fundamental feature of the legislation or is incompatible with the "underlying thrust" of the legislation being construed or requires the reading in of words which are inconsistent with the scheme of the legislation". She reiterated the principle that courts should not interpret the legislation so as to "distort" or "go against the grain" of the legislation or so as effectively to make new law. She ruled that the EAT's suggested rewriting of the 1970 Act would distort the legislation as it would undermine the clear intention of Parliament at the time the legislation was passed, which was to limit the payment of pensions to those clerks deemed to work full-time.

This decision contrasts with that of the EAT in the recent holiday pay case, *Bear Scotland v Fulton* and others UKEATS/0047/13/B1, in which words were read in to the Working Time Regulations 1998 (WTR) in the light of the purpose of the Working Time Directive (the Directive). However, it should be noted that the WTR were enacted in order to implement the Directive and that the judge in *Bear Scotland* commented that the intention of Parliament might be presumed in that case to be the full and accurate implementation of the Directive. In *Barton*, the judge made clear that the 1970 Act was not enacted to implement an EU directive, so it is perhaps more likely that interpreting it in the light of EU law would "go against the grain" of the domestic legislation.

7: Instruction not to speak Russian at work was not direct race discrimination

In ***Kelly v Covance Laboratories Ltd***, the EAT upheld an Employment Tribunal ruling that an employee had not been discriminated against or racially harassed by means of an instruction from managers not to use her first language at work.

An employer discriminates directly against an employee on the ground of race when it treats that employee less favourably than it treats or would treat others because of race. Race includes colour, nationality and ethnic or national origins.

Previous EAT case law has established that an instruction not to speak in the employee's native tongue in the workplace can constitute direct discrimination on the ground of race. In the 2011 case of *Dziedziak v Future Electronics Ltd* UKEAT/0270/11/ZT, the EAT found that language is an intrinsic part of nationality and so a prohibition on speaking ones native language might be discriminatory.

Mrs Kelly was a Russian national and native Russian speaker who was employed as a contract analyst by Covance Laboratories Ltd (Covance), a company which carries out laboratory tests on animals. Covance became concerned that Mrs Kelly was behaving suspiciously at work and

making mobile phone calls in Russian for long periods in the toilets. Covance was particularly concerned that Mrs Kelly might be an animal-rights activist working undercover (as had occurred previously in the company). Mrs Kelly's line manager instructed her not to use Russian when speaking at work. He made clear that this was so that her conversations could be understood by her managers. Following a complaint from Mrs Kelly, two other foreign-nationals were also instructed not to speak Russian at the laboratory.

Mrs Kelly was then subject to a formal capability procedure and to a disciplinary process which was triggered when her conviction for benefit fraud was discovered by Covance. Mrs Kelly resigned shortly before the disciplinary hearing. Mrs Kelly brought a number of claims in the Employment Tribunal including one for direct race discrimination and race harassment connected to the prohibition on speaking her native language. All of these claims were dismissed at first instance.

The tribunal decisions concerning race discrimination and harassment were appealed. The EAT upheld the decisions of the tribunal. The EAT made clear that Mrs Kelly could show a prima facie case for discrimination following the ruling in *Dziedziak*. In other words, the fact that a prohibition on speaking Russian was issued to Mrs Kelly was enough to shift the burden of proof to the employer to show that the reason for the instruction was not discriminatory.

In upholding the decision of the Employment Tribunal, the EAT took into account the particular circumstances prevailing at Covance. The reasonable concern which this employer had for security in the workplace created a context where a ban on employees speaking a non-English native language was reasonable as it was important for managers to understand the conversations carried out at the laboratory. The fact that such an instruction had been issued to other employees showed that the employer did in fact treat and would have treated other employees in the same way. The employer had succeeded in showing that Mrs Kelly was treated in this way because of the employer's security concerns and not because of her race.

Similarly, the EAT upheld the Employment Tribunal ruling that the instruction to refrain from speaking Russian was not race harassment because it was not related to the employee's nationality, but to the employer's suspicions about her conduct.

Employers should be aware that a prohibition on speaking ones native tongue at work is potentially discriminatory. They should consider whether such a prohibition can be justified for good business reasons. It would be advisable for employers with concerns in this area to have a clear policy for dealing with this issue which is consistently applied to all members of staff.

8: Unfairly dismissed employee acted reasonably to mitigate his losses by choosing self-employed work

In ***Cooper Contracting Limited v Lindsey***, the EAT upheld an award made by an Employment Tribunal, finding that the employee had acted reasonably to mitigate his losses by choosing to return to self-employment after his dismissal rather than seeking a more highly paid employed position.

Mr Lindsey worked as a carpenter for Cooper Contracting Ltd for 21 months, nominally as a self-employed contractor. Prior to this, he had worked as a self-employed tradesman for many years. His contract was terminated and he brought a claim for unfair dismissal.

The Employment Tribunal found that he was an employee, regardless of his status on paper and for tax purposes. It upheld his claim for unfair dismissal. At the remedies hearing, it was decided that the employee had not acted unreasonably by failing to seek employment and by instead returning to work on his own account. In determining what it was just and equitable to award the claimant in all the circumstances, the judge took into account the claimant's choice of more intermittent self-employed work by limiting the amount awarded for future losses to a period of three months from the hearing date.

Mr Justice Langstaff commented in his judgment on common misunderstandings of the way in which a tribunal should approach the duty to mitigate losses and provided a helpful summary of the law in this area, as set out below.

While the claimant is subject to the common law duty to act reasonably to mitigate loss, the burden is on the respondent to prove that the claimant has acted unreasonably in failing to mitigate his loss. If the respondent does not produce evidence of the unreasonableness of the claimant, the tribunal is under no obligation to find such evidence.

The judgment made clear that there is a difference between not acting reasonably and acting unreasonably. The respondent will not succeed in proving that the claimant has acted unreasonably simply by showing that the claimant has not taken one particular reasonable step. In this case, for example, it may have been a reasonable step for the claimant to seek employment, but that does not mean he acted unreasonably by becoming self-employed. In the circumstances, returning to self-employment could also be judged to be a reasonable step.

Mr Justice Wagstaff reiterated that a tribunal must make an objective assessment of whether the claimant has acted unreasonably in all the circumstances, but that the claimant's views and wishes should be taken into account as one of those circumstances. He also commented that a tribunal should not put the claimant "on trial" when considering his failure to mitigate or otherwise. By the stage of the remedies hearing, the judge pointed out, the claimant has been proved to be the victim of a wrong and the losses are not a consequence of the claimant's fault. It is not, therefore, appropriate for the tribunal to apply too demanding a standard to the claimant at this stage of proceedings.

9: TUPE: the difference between a business transfer and a service provision change

Under TUPE, a business transfer takes place when there is a transfer of an economic entity retaining its identity (reg 3(1)(a)). A service provision change TUPE transfer occurs simply when activities cease to be carried out by one person and, are instead, carried out by another person (reg (3)(1)(b)). Applying these definitions to outsourcing, it is much easier to find a service provision change TUPE transfer than a business transfer as the former merely requires a change in the person carrying out the activities concerned, rather than the transfer of a business. But service provision change has its limitations. One of these is that, for a service provision change, the activities concerned must, following the changeover, continue to be carried out on behalf of the same client (see *Hunter v McCarrick* [2013] ICR 235). If not the service provision rules do not apply. But could there still be a business transfer in those circumstances?

This issue was addressed by the EAT in ***Aguebor v PCL Whitehall Security Group***. In this case the claimant was employed as a security officer by Securiplan Plc at Thames House a large office building on the edge of Maidenhead. There was then a service provision change and the claimant's employment transferred to another security company PCL. PCL's contract for security at Thames House was with the tenant of Thames House, an organisation known as PGS. When the tenancy ended and the lease reverted to the landlord, Standard Life, the latter appointed management agents, MJ Mapp Limited who, in turn, appointed a new security company, Ward Security. Ward declined to take over the claimant's employment under TUPE. The service previously carried out by PCL and which Ward was now providing was for an entirely new client, Mr J Mapp. It asserted there was, for this reason, no service provision change because the client had changed. It relied upon *Hunter v McCarrick*. The employment tribunal agreed there was no service provision change and therefore no transfer to Ward Security.

The parties then sought to persuade the employment tribunal Judge that there might be a business transfer instead. The Employment Judge refused to recognise this possibility saying: “it cannot be a TUPE transfer. It could only be a service provision change”.

On appeal, the EAT overturned that decision and remitted the matter for rehearing before a fresh employment judge. As HHJ Richardson stated:

> “TUPE is designed to protect employees who are caught up in the transfer of the business for which they work. It contains two different gateways into protection. The first gateway is found in regulation 3(1)(a), which applies where there is a transfer of an undertaking or part of an undertaking. The second gateway is found in regulation 3(1)(b) which applies where there is a service provision change. The former is derived from European law, the latter from domestic law; there are fundamental differences between them.”

But said the Judge the two gateways are not mutually exclusive. It remains open to the employer or the employee to rely upon the business transfer gateway if, for technical reasons (as in the present case) the service provision change rules do not apply. However, although the EAT did not decide this point, it might be difficult to establish that there was a transfer of a stable economic entity where the client has changed. This was a point that Elias LJ left open in *Hunter v McCarrick* and it was a matter that the employment tribunal will have to consider on remission.

If you’d like to contact us please email john.mcmullen@wrigleys.co.uk