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EMPLOYMENT LAW BULLETIN

January 2018

Welcome to our January employment law bulletin.

In *Crawford v Network Rail Infrastructure Ltd* the EAT has held that an employer is not entitled to meet the 20 minute rest break requirement (or the equivalent period for compensatory rest) for workers under the Working Time Regulations by aggregating breaks of a shorter duration.

In *Royal Surrey County NHS Foundation Trust v Drzymala* the EAT has held that the employer does not escape examination of the fairness of a decision not to renew a fixed-term contract by simply complying with the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 in every case. Where an employer fails to renew a fixed term contract this is a dismissal which must be judged in the normal way, on the facts of the case obliging an employer to supply a permissible reason for dismissal and the employment tribunal must apply the test of fairness under section 98(4) of the Employment Rights Act 1996.

In *Chief Constable of Norfolk v Coffey* the EAT upheld the decision of an employment tribunal that a job applicant was discriminated against on the basis of an employer's perception that she had a progressive condition meeting the definition of disability in the Equality Act.

In *Parsons v Airplus International Limited* the EAT has clarified that disclosures made entirely out of self-interest will not qualify for whistleblowing protection.

In L*ópez Ribalda and others v Spain* the European Court of Human Rights has decided that the European Convention on Human Rights Article 8 right to respect for private life had been compromised when a supermarket installed covert cameras to detect suspected workplace theft.

In *Cosmeceuticals Ltd v Parkin* the EAT has held that for the purposes of an unfair dismissal claim the effective date of termination of employment is the date on which the employer communicated to the employee that she could not continue in her role. If this was an unilateral cancelation of the employment contract the effective date of termination occurred then and the limitation period for putting in a claim ran from that point.

Finally, may I remind you of our forthcoming events:

- **Annual TUPE Update**
  Breakfast Seminar, Leeds, 6th February 2018
  For more information or to book

In conjunction with ACAS

- **Simplifying TUPE in a day: Understand the rules and avoid the pitfalls**
  A full day conference, Newcastle upon Tyne, 21st February 2018
  For more information or to book

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

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Minimum Rest Breaks and the Working Time Regulations

Is an employer entitled to meet the 20 minute rest break requirement for workers under the Working Time Regulations by aggregating breaks of a shorter duration? No, said the EAT in *Crawford v Network Rail Infrastructure Ltd*.

Regulation 12 of the Working Time Regulations 1998 provides for a rest break of not less than 20 minutes if a worker's daily working time is more than 6 hours. Regulation 21(f) provides that a worker in Railway Transport does not enjoy the protection of Regulation 12. Instead, under Regulation 24(a), the worker is entitled to an equivalent period of compensatory rest.

Mr Crawford worked as a relief cover signalman at various signal boxes in the South East. All (save one) boxes were single manned. Although Mr Crawford was not always busy, he was required continuously to monitor and to be on call to do things when trains were going through.

He could in practice, if he wished, take short 5 minute breaks from his workstation which would amount together to well in excess of 20 minutes over the shift as a whole. But on day shifts it was not possible to have a continuous 20 minute break. The employer argued it could aggregate these shorter periods in order to meet the 20 minute break requirement. Indeed, it argued, this was more beneficial, from a health and safety point of view.

Relying on *Hughes v The Corps of Commissionaires Management Ltd* [2011] EWCA Civ 1061 the EAT held that the employer's system was not compliant. In *Hughes* the Court of Appeal (Elias LJ) said that there should be a proper uninterrupted break from work during a rest period and, so far as possible, that break should last at least 20 minutes. Otherwise it would not be an equivalent period of compensatory rest. It was important that, during the rest period, the worker was free from work.

Accordingly, as there was no opportunity on Mr Crawford's shifts for a single continuous break from work of 20 minutes, Network Rail were in breach of their obligations under the Working Time Regulations.

Fixed term contracts and unfair dismissal

Does an employer's compliance with the Fixed-term Employees Regulations mean it will have acted fairly for the purposes of unfair dismissal law when a decision is made not to renew a fixed-term contract?

Not necessarily, said the EAT in *Royal Surrey County NHS Foundation Trust v Drzymala*.

A locum consultant doctor had been employed on a series of fixed term contracts. A permanent vacancy arose before her contract was due to expire. She was interviewed, along with another candidate but not appointed. Subsequently, she was given notice that her fixed-term contract would not be extended. The employer's letter made no mention of a right of appeal or any alternative employment with the Trust.

The Claimant lodged a grievance and was eventually allowed an appeal. An appeal panel concluded that an earlier appeal would have made no substantive difference as to the outcome.

An employment tribunal found that her dismissal was unfair and the employer appealed. It relied in particular on its contention that it had complied with the non-discrimination regime in the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Therefore the employment tribunal was wrong to conclude that the employee was unfairly dismissed.

The EAT rejected this proposition. The general law on unfair dismissal applies to dismissals which arise from a non-renewal of a fixed-term contract. The question of fairness of a dismissal depends in the normal way on the facts of the case and the application of the fairness test in Section 98(4) of the ERA 1996.

Dismissals by non-renewal of the fixed-term contract are often potentially fair for "some other substantial reason." But they are not a special case attracting different considerations from those normally considered under Section 98(4).

In this case, the employment tribunal was right to consider that the Claimant had been poorly treated by the employer when it failed to pursue a discussion about alternative roles and to provide the Claimant with a timely right of appeal. The finding of unfair dismissal was therefore upheld.

Rejection of job application on the basis of perceived disability was discriminatory

In *Chief Constable of Norfolk v Coffey*, the EAT upheld the decision of an employment tribunal that a job applicant was discriminated against on the basis of the employer's perception that she had a progressive condition meeting the definition of disability in the Equality Act.

Mrs Coffey was a police constable working for the Wiltshire Constabulary whose hearing was impaired and fell just outside the national police standards. Wiltshire followed relevant guidance and conducted a practical functionality test, which Mrs Coffey passed. She was therefore able to stay in the role without any adjustments.

Mrs Coffey applied for transfer to Norfolk. A hearing test showed no worsening of her hearing loss, but again she fell just short of the national standard for the police. No practical functionality test was conducted. Mrs Coffey's application was rejected due to her hearing loss.

An employment tribunal found that the decision to reject the application was discriminatory because the employer wrongly perceived that Mrs Coffey had a condition which would require it to make adjustments to the role in the future. The Acting Chief Inspector (ACI) gave evidence that, given the cost and resourcing pressures on the police, she could not justify appointing someone who might at a later stage have to be put on restricted duties.

The EAT agreed. It held that the ACI perceived that Mrs Coffey had a disability in that she had a progressive condition (that is a condition which has some effect now and is likely to result in an impairment having a substantial adverse effect in the future). The EAT clarified that there is no need for the employer to know the detail of the legal definition of disability to discriminate on the basis of perceived disability; it is only necessary for the employer to perceive that the person has an impairment with the features set out in the Equality Act.

This is the first case under the Equality Act to consider discrimination on the ground of perceived disability and provides helpful clarification of the tribunals' approach in such cases.

No whistleblowing protection for an employee who raised concerns purely out of self-interest

In *Parsons v Airplus International Limited*, the EAT upheld the decision of an employment tribunal that an employee who raised compliance issues out of pure self-interest was not protected by the whistleblowing legislation.

A worker is entitled to whistleblowing protection against detriment or dismissal if a qualifying disclosure has been made. The disclosure must, in the reasonable belief of the worker, be in the public interest. This includes disclosures which are made partly in a worker's own self-

interest and partly in the public interest (*Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed and another* [2017] EWCA Civ 979).

Ms Parsons was a Legal and Compliance Officer for Airplus International Limited. She became concerned that she would face personal liability should her employer be in breach of its compliance obligations.

Ms Parsons raised concerns that Airplus did not have a current consumer credit licence and did not have a Money Laundering Reporting Officer. In light of the concerns expressed by Ms Parsons, her job title was altered to Analyst for Regulatory Affairs and Contract Management.

Throughout her 6 week period of employment complaints were made about the manner in which Ms Parson raised her concerns. For example, on one occasion she acted aggressively towards the managing director. Her line manager had also expressed concerns about the lack of commercial practicality in her approach. This led to the managing director and her line manager deeming her performance to be unacceptable. As a result, her employment was terminated.

Ms Parsons brought an unfair dismissal claim before an employment tribunal. She claimed that her dismissal was directly linked to the protected disclosures she had made and so she did not require two years' service to bring her claim.

The claim was rejected by the tribunal on the basis that the matters raised by Ms Parsons did not amount to qualifying disclosures, as they were raised solely in her own self-interest. It found that the dismissal of Ms Parson was as a result of her being a "cultural misfit" and it took the view that Ms Parson's conduct could be separated from her disclosures. It was also considered significant that Ms Parson was not dismissed immediately after her disclosures, as she was afforded time by Airplus to alter her behaviour following her job title change.

Ms Parson's appeal was dismissed by the EAT, on the basis that the Court of Appeal's decision in *Chesterton* had been correctly followed by the tribunal. It held that the tribunal had correctly concluded that the disclosures made by Ms Parson were raised only in her own self-interest.

This case clearly indicates that an employee will not be protected where self-interest is the only reason for making a disclosure. However, it is a reminder that employees may be protected in "hybrid" cases where the disclosure was both self-interested and could reasonably be believed by the claimant to be in the public interest. Employers considering the dismissal of an employee who is in a compliance role should note that it is important to demonstrate that the reason for dismissal is distinctly separate to any compliance concerns raised by the employee.

Covert monitoring in employee theft investigation violated employees' privacy rights

In *López Ribalda and others v Spain*, the European Court of Human Rights considered whether the European Convention on Human Rights Article 8 right to respect for private life had been breached when a supermarket installed covert cameras to detect suspected workplace theft.

A Spanish supermarket (MSA) discovered significant discrepancies between stock levels and sales, leading managers to suspect employees were stealing from the store. MSA installed visible cameras aimed at detecting customer theft and covert cameras behind cash desks to detect employee theft. Employees were not informed of the covert surveillance despite Spanish data protection law under which data subjects must be informed of the existence of a system for collecting personal data (including video surveillance).

Five employees were caught stealing or helping others to steal on the cameras and were dismissed for gross misconduct. The Spanish courts upheld the decisions to dismiss and held that the use of covert surveillance was justified in the circumstances.

The ECHR held that the Spanish courts had failed to strike the right balance between the employees' privacy rights, the interests of the employer in protecting its property and public interest in the proper administration of justice. The court made clear that covert video surveillance of an employee at work is an intrusion into the employee's private life, even where surveillance takes place in public areas, because the employee is obliged to report for work and cannot avoid being filmed. Any such intrusion should only be carried out when necessary in a proportionate and limited way.

The court noted the previous ECHR case of *Köpke v Germany* (Application no. 420/07), another case concerning a supermarket worker who was dismissed for theft on the basis of covert video evidence. In *Köpke*, the ECHR found that the German courts had correctly determined that the worker's privacy rights were not breached. Significantly, in *Köpke*, the supermarket had particular suspicions about certain workers, positioned the cameras to record those workers and had the cameras in place only for a limited period (2 weeks). By contrast, in *López Ribalda*, the supermarket had no suspicions of particular staff, recorded all staff at all working hours and had set no time limit on the surveillance.

The ECHR ordered Spain to pay compensation of €4,000 to each employee plus costs and expenses.

Where an employer is considering covert video surveillance, the ICO guidance should be followed (see Part 3 of the Employment Practices Code of Practice) and consideration given to data protection law. The employer should first consider if there is a less intrusive way of effectively handing the problem, for example, by warning employees that surveillance will be taking place.

The ICO guidance states that covert monitoring of employees should only be carried out in exceptional circumstances, such as a particular investigation of suspected crime where a transparent approach would not solve the issue. The ECHR case law suggests that covert monitoring which is time-limited and focused on investigating particular employees will be less likely to be in breach of Article 8 privacy rights.

Effective date of termination was date on which employee was told she could not continue in her role

In *Cosmeceuticals Ltd v Parkin*, the EAT held that an unfair dismissal claim was presented out of time as the statutory "effective date of termination" (EDT) was the date on which the employer communicated to the employee that she could not continue in her role.

Ms Parkin was employed as Managing Director (a role just below board level) by Cosmeceuticals Ltd. She went through difficult family circumstances and began to work from home one day a week. The employer expressed its concerns to Ms Parkin that she was not sufficiently "visible" at the office and about her performance in the role. It was agreed that she would take a two-month paid sabbatical to focus on her family issues.

When Ms Parkin returned to work on 1 September 2015, she had a meeting with Mr Sullivan, the chairman of the board. Mr Sullivan reiterated his performance concerns and told her that she could not return to her role as Managing Director. He made a "clumsy attempt" to suggest alternative roles for Ms Parkin at a lower level. Following failed settlement attempts, Mr Sullivan wrote to Ms Parkin to give notice of termination of employment, expiring on 23 October.

Ms Parkin brought a claim of unfair dismissal within three months of 23 October 2015 (but not within three months of 1 September 2015). The tribunal found that her dismissal was unfair.

On appeal, the EAT held that the tribunal had misinterpreted the EDT rules, that the EDT was in fact 1 September 2015, and determined that the claim had been brought out of time. It remitted

the case to the same tribunal to determine whether it was reasonably practicable for the claimant to bring the claim within three months of the EDT and if not, whether she had lodged the claim within a reasonable period thereafter.

The EAT noted that the EDT is a statutory concept: where termination is with notice, the EDT is the date on which that notice expires; where termination is without notice, the EDT is the date on which termination "takes effect". It also noted that case law suggests that summary dismissal takes effect when the contract is "so broken that no further full performance of its terms will occur" (*Robert Cort & Son Ltd v Charman* [1981] IRLR 437). Once termination has taken effect, it is not open to the parties to agree a different EDT.

The EAT made clear that dismissal can be by words or conduct. It noted case law where summary dismissal had been implied by conduct, for example removing an employee from payroll or removing a teacher from his post and offering him different terms as in (*Hogg v Dover College* [1990] ICR 39). But the EAT noted that the essential question is whether dismissal has been *communicated to the employee*. In both the above examples, the employee was aware of the conduct and so dismissal had been communicated.

The EAT noted that the tribunal in this case had found that Mr Sullivan had clearly communicated to Ms Parkin on 1 September 2015 that her role as Managing Director was at an end. Ms Parkin was therefore summarily dismissed on 1 September 2015, and this was the EDT.

Aside from the technical time limit issues, this case is a reminder that summary dismissal can be implied by an employer's conduct or by the unilateral imposition of a fundamental change in the terms and conditions of employment (including for example pay, hours or role/status). Such conduct could found an unfair dismissal claim, or might alternatively be a repudiatory breach of contract entitling the employee to treat themselves as dismissed (founding a constructive dismissal claim). Employers should take a considered approach when taking action on performance or other concerns and ensure that a fair process is followed.

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

www.wrigleys.co.uk