WRIGLEYS
— SOLICITORS —

**JULY** 2016

# Employment Law BULLETIN

## Welcome to our July employment law bulletin.

In *Holmes v Qinetiq* the EAT has made it clear that the ACAS Code of Practice on disciplinary and grievance procedures does not apply to ill health dismissals.

Also, in *Phoenix House Ltd v Stockman and another*, the EAT has confirmed that the ACAS Code of Practice on disciplinary and grievance procedures does not apply to a dismissal the reason for which was a breakdown in working relationships. The ACAS Code does not apply to dismissals for "some other substantial reason".

In *Taiwo v Olaigbe and another; Onu v Akwiwu and another* the Supreme Court has held that mistreatment of individuals because of their immigration status was not discrimination on ground of their race or nationality. Immigration status had been part of the reason for the individuals' mistreatment; but immigration status is not to be equated with nationality.

In *Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust* the Court of Appeal has held that students undertaking a work placement can now bring discrimination claims against the organisation hosting the placement.

In *R(R) v Chief Constable of Greater Manchester Police* the Court of Appeal has held that disclosure, under a Disclosure and Barring Service (DBS) check of a rape acquittal, was not a breach of a teacher's human rights. Disclosure of an acquittal did not, said the Court of Appeal, contradict the effect of that acquittal, and the difficult balance between protecting vulnerable people and interfering with the an individual's right to respect for privacy had been correctly balanced.

Under section 111A of the Employment Rights Act 1996 pre-termination discussions are "protected" and may not be brought up in proceedings for unfair dismissal. In *Faithorn Farrell Timms LLP v Bailey* the EAT held that, also, the fact that pre-termination negotiations under section 111A have taken place is inadmissible, as well as the details of those negotiations.

In *Bougnaoui and another v Micropole SA* Advocate General Sharpston considered that dismissal of an employee working in France for refusing to remove her Islamic headscarf was directly discriminatory. This sharply contrasts with the view of Advocate General Kokott in *Achbita v G4S Secure Solutions NV*.

Neither of these opinions bind the Chamber of the European Court which will, ultimately, hear the cases. The ruling of the Court in these two cases is eagerly awaited.

In the Court of Appeal Asda was unsuccessful in an attempt to stay the 7,000 equal pay claims it is currently fighting in the employment tribunal. Its application would have effectively compelled the claimants to pursue High Court proceedings if they wished to continue their claims. The Court of Appeal ruled that the employment tribunal judge was right to reject Asda's application. It would have been prejudicial to the claimants. They would have to start proceedings again with additional stress, court fees, limitation issues, and the risk of costs if they lost. The claims will proceed in the employment tribunal.

## May I also remind you of our forthcoming events:

Click any event title for further details.

**Settlement Agreements: The Law and Best Practice**

- Breakfast Seminar, 2nd August 2016

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

## Contents



Wherever you see the BAILII logo simply click on it to view more detail about a case

## 1. Recent employment-related Government announcements following the EU Referendum

There is considerable uncertainty about the effect which leaving the European Union will have on employment law and workers' rights in the UK. Two recent Government announcements suggest that no dramatic changes will be made in the medium term.

The Cabinet Office published a statement on 11 July 2016 stating: "When we do leave the EU, we fully expect that the legal status of EU nationals living in the UK, and that of UK nationals in EU member states, will be properly protected." However, the new Secretary of State for exiting the EU, David Davies on 17 July 2016 stated that: "We may have to say that the right to indefinite leave to remain protection only applies before a certain date." His comments were made in response to concerns that a large number of people from the EU would move to the UK just before the Brexit deadline.

David Davies published a post on the Conservative Home website on 14 July 2016 which made clear that he wished to halt the amount of new EU regulation which could impact on businesses. However, he explicitly stated that he was not referring to employment regulation. He commented that: "Britain has a relatively flexible workforce, and so long as the employment law environment stays reasonably stable it should not be a problem for business." He also implied that it would be unnecessary and wrong to reward working class people who voted to leave by cutting their employment rights.

The appointment of a new Prime Minister and cabinet following the vote to leave may have implications for employers. Two days before her appointment, Theresa May announced that she wished to see worker representatives on company boards and that she was concerned about the "unhealthy and growing gap between what these companies pay their workers and what they pay their bosses".

## 2: Should the Asda equal pay claims in the employment tribunal be stayed, in effect compelling the claimants to pursue High Court proceedings?

No, said the Court of Appeal in ***Asda Stores Limited v Brierley.***

There are currently over 7,000 equal pay claims against Asda. The claims allege the work the claimants do is of equal value to their comparators, and yet their comparators are being paid substantially more than they are. The claims are being defended.

Asda made an application, in effect, to stop the claims proceeding in the employment tribunal. It was accepted that the employment tribunal had no power directly to transfer the claim to the High Court. But Asda contended that the ET had the power to stay proceedings indefinitely and, if it exercised that power, the claimants would be compelled to go to the High Court if they wanted to pursue their claims.

The employment tribunal rejected the application, concluding that it had no power to impose a stay for the purpose sought and even if it did it would not be appropriate to exercise that power in the present case. Asda's appeal to the EAT was rejected.

Asda appealed to the Court of Appeal. Asda's case was that, although, in most cases, the ET is well suited to hear an equal value claim, the present litigation was exceptional. It said that this was the most important, complex and financially significant equal pay claim ever pursued in the private sector with ramifications, not only for Asda, but the retail trade generally. It also

submitted that there were very complex points of law which would need to be resolved, and a High Court judge would be better suited to decide them than an employment judge.

The Court of Appeal rejected the appeal. It was true there was power to stay proceedings, even indefinitely; but this should not happen in the present case. It would be prejudicial to employees. They would have to start proceedings again with additional stress, court fees, limitation issues and the risk of costs if they lost. Finally the employment judge had exercised his discretion properly, and had considered all the issues. He was entitled to take the view that an employment tribunal was perfectly capable of handling the claims and it would not be appropriate to transfer them.

Elias LJ expressed the view that the assumption that employment judges would not be up to the task did less than justice to the quality of some outstanding judges who sit in the employment tribunals.

## 3: ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to ill-health dismissals

The ACAS Code of Practice on Disciplinary and Grievance Procedures (the Code) must be followed by employers when dealing with disciplinary matters. If an employment tribunal finds that an employee has been unfairly dismissed, a 25% uplift can be added to the compensation awarded where the employer failed to follow the statutory Code. Where an employee has failed to follow the Code, compensation can be reduced by 25%.

It is clear that the Code applies to misconduct. However, in cases where ill health leads to poor performance, it has not always been clear whether the Code must be followed and the uplift would be available.

In ***Holmes v Qinetiq***, the EAT has made it clear that the Code does not apply to matters where genuine ill health leads to poor performance and where there is no element of culpability on the part of the employee.

Mr Holmes worked as a security guard for Qinetiq. He had extended periods of absence from work because of issues with his back, hips and legs and was eventually dismissed on ill-health grounds. He brought a successful unfair dismissal claim and argued at the remedies hearing that the 25% uplift should be applied to his compensation as Qinetiq had not followed the Code.

The employment tribunal did not apply the uplift on the ground that the Code does not apply to dismissals because of ill health.

The EAT agreed. It stated that the Code will only apply where there is “culpable conduct” which requires correction or punishment. A dismissal process where genuine ill health has made the employee incapable of doing the job will not be covered by the Code. The EAT’s comments suggest that, by contrast, cases where ill health has been faked or exaggerated, or where absence management policies have been breached by the employee would have an element of culpability and would be covered by the Code.

Non-statutory guidance published by ACAS is available in relation to managing employee absence and attendance. It is advisable for employers to refer to this as a guide to what will be considered procedurally fair by a tribunal.

## 4: Was mistreatment because of immigration status discrimination on the ground of race?

No, held the Supreme Court in ***Taiwo v Olaigbe and another; Onu v Akwiwu and another***.

The case concerned two women from Nigeria who worked for different employers on migrant domestic worker visas. They were mistreated and exploited by their employers. They were not paid the National Minimum Wage, they had to work long hours in contravention of the Working Time Regulations, and they were made to live in poor conditions including, in Ms Taiwo's case, verbal and physical abuse. The women eventually left their employers and brought claims in the employment tribunal including direct and indirect discrimination because of race.

An employment tribunal found that Ms Onu had been directly discriminated against because of her status as a vulnerable migrant worker and that this status was linked to her race. On appeal, the EAT disagreed, holding that Ms Onu's migrant status was a background factor for the mistreatment but not the immediate cause of it.

Ms Taiwo's discrimination claims were dismissed at first instance. The EAT agreed that there was no direct discrimination because her immigration status was only a background circumstance and not a reason for the treatment. The EAT also agreed that there was no indirect discrimination because the mistreatment could not be said to be a provision, criterion or practice (PCP).

The Court of Appeal considered these two cases together. It upheld the EAT decisions that neither direct nor indirect discrimination had occurred. The Court of Appeal held that immigration status had been part of the reason for the mistreatment but that immigration status is not to be equated with nationality.

The Supreme Court agreed. It made clear that immigration status is not a protected characteristic under the Equality Act 2010. It stated that immigration status is a function of nationality but is not the same as nationality. The fact that the women were Nigerian was not the reason for the mistreatment. The women were vulnerable because they had visas which were to some extent dependent on staying with their current employers. This was not because of their Nigerian nationality, it was because of the particular kind of visas they were working under.

The Supreme Court also agreed that there was no PCP which would have been applied to all workers. The women were mistreated because of their vulnerable immigration status but workers without this status would not have been mistreated in the same way.

Employers should be aware that the protected characteristic of race extends to colour, nationality and citizenship, ethnic or national origins, native language and caste.

## 5: Students on training placements can bring discrimination claims against a placement provider in the employment tribunal

In ***Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust***, the Court of Appeal held that students undertaking a work placement can now bring discrimination claims against the organisation hosting the placement.

Until now, there has been a gap in the law for students undertaking vocational training. Students could bring claims in the County Court against the higher or further education institution at which they are a student but they could not bring a claim against the placement provider.

This case concerned a student at Birmingham City University who began a work placement at the NHS Trust. Her placement was terminated by the NHS Trust because she was unable to work the required shifts due to her childcare responsibilities.

She brought an indirect sex discrimination claim in an employment tribunal. The claim was dismissed because the tribunal had no jurisdiction to hear it.

On appeal to the Court of Appeal, the judge decided that there was a gap in the law and that it could not have been the intention of Parliament to bar students from bringing a claim against the placement host organisation in these circumstances. The judge held that the Equality Act 2010 (the Act) should be interpreted as far as possible in the light of European discrimination directives by reading words into the Act to allow for such a claim.

This decision will affect many organisations offering training placements to students. For example, schools which offer teacher training student placements should be aware that a student on placement can now bring discrimination claims against the school in the employment tribunal.

## 6: The fact that a "protected conversation" about termination of employment has taken place is not admissible in a claim for unfair dismissal

In ***Faithorn Farrell Timms LLP v Bailey***, the EAT held that the fact that pre-termination negotiations under section 111A of the Employment Rights Act 1996 have taken place is inadmissible as well as the details of those negotiations.

Under section 111A, employers can have confidential discussions about terminating an employee's employment. These discussions will usually be inadmissible in any proceedings for unfair dismissal (except for automatically unfair dismissal claims, such as those involving whistleblowing). Until this case, it has been clear that the details of such discussions are inadmissible, but it has been unclear whether the mere fact that a protected conversation has taken place is admissible.

Common law without prejudice privilege may apply where there is a pre-existing dispute and the discussions are a genuine attempt to resolve that dispute. Where without prejudice privilege applies, the detail of discussions will not be admissible in court or tribunal proceedings, but the existence of those discussion is admissible.

This case concerned a Mrs Bailey who worked part time as a secretary to a firm of surveyors. The employer began pre-termination negotiations with Mrs Bailey in December 2014. There followed a period during which settlement was discussed and Mrs Bailey raised a grievance.

Mrs Bailey resigned and brought a claim for constructive unfair dismissal and sex discrimination in May 2015. In correspondence, both parties made references to the fact that pre-termination negotiations had taken place. Mrs Bailey also referred to these negotiations in her particulars of claim.

At a preliminary hearing an employment tribunal held that section 111A protected the details of any offer made from being disclosed but it did not render the fact that discussions had taken place inadmissible.

On appeal, the EAT disagreed. It made clear that section 111A goes further than common law without prejudice privilege in straight-forward unfair dismissal proceedings. The EAT stated that the mere fact of a protected conversation was not admissible in relation to unfair dismissal claims. It also commented that section 111A protection extends to the employer's internal discussions between managers and HR officers.

The EAT stated that evidence about pre-termination negotiations should be admitted by the tribunal when it relates to claims other than unfair dismissal but then disregarded by the tribunal in relation to the unfair dismissal claim. It also held that section 111A privilege (unlike without prejudice privilege which can be waived if all parties agree) cannot be waived in any circumstances.

## 7: Does the ACAS Code apply to a dismissal because of a breakdown in the working relationship?

No, ruled the EAT in ***Phoenix House Ltd v Stockman and another***.

Ms Stockman was a financial accountant working for a charity, Phoenix House. Her role was removed during a restructure and she was appointed to a more junior role. She raised a grievance about the way the finance director had treated her during the recruitment process and confronted him about this while he was in a meeting with someone else.

The charity began a disciplinary process and conducted both the grievance and disciplinary hearings in Ms Stockman's absence during a period of sick leave. She was given a written warning lasting for 12 months. There followed an appeal by Ms Stockman and an unsuccessful attempt at mediation. In a meeting, Ms Stockman stated that she wished to return to work. The employer, however, stated that she would be dismissed for some other substantial reason as the working relationship had broken down irretrievably.

Ms Stockman brought claims for unfair dismissal, victimisation and whistleblowing. An employment tribunal found that she had been unfairly dismissed because the dismissal procedure was unfair and did not comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code). The employer had started from the position that the working relationship had broken down and required the employee to prove that it had not and Ms Stockman had not been allowed to put her case. The tribunal found that the employer's decision that the working relationship had irretrievably broken down was outside the band of reasonable responses.

The EAT upheld the finding of unfair dismissal but held that the Code did not apply in this situation. Disagreeing with the decision of the EAT in *Hussain v Jurys Inns Group Ltd* (UKEAT/0283/15/JOJ), a case concerning a dismissal following a loss of mutual trust and confidence, the Employment Judge stated that the Code does not expressly apply to dismissals for some other substantial reason. He stated that some elements of the ACAS Code are capable of being and should be applied where there is a breakdown in the working relationship. However, he made clear that it would not be right for employers to be subject to the sanction of the 25% uplift in compensation where the ACAS Code has not been complied with in dismissals for some other substantial reason.

Employers should be aware that case law indicates it is difficult successfully to defend an unfair dismissal claim in cases where there is a personality clash, loss of trust and confidence or a breakdown in the working relationship. The judgment in this case reminds employers that they should consider in such cases whether the relationship has broken down to the extent that the employee cannot be reintegrated into the workplace without unacceptable disruption. In this case, the fact that it would have been possible for the employee to work without regularly coming into contact with the other person involved indicated that she could have been successfully reintegrated.

## 8: Advocate General considers dismissal for wearing an Islamic headscarf was direct discrimination

In our June edition of this bulletin we reported on Advocate General Kokott's opinion in *Achbita v G4S Secure Solutions NV.* The opinion stated that an employer's ban on employees wearing any visible sign of their political, philosophical or religious beliefs was justifiable and its dismissal of a female muslim receptionist for refusing to remove her Islamic headscarf was not directly discriminatory.

Advocate General Sharpston has now handed down a contrasting opinion in ***Bougnaoui and another v Micropole SA***, a case on similar facts.

Ms Bougnaoui was a design engineer working for a private French company. She was informed when recruited that she would not be able to wear her hijab at all times as she was required to meet customers. The company received a complaint that Ms Bougnaoui had worn her hijab on a site visit. When challenged about this by her employer, Ms Bougnaoui refused to remove her hijab and was dismissed.

Ms Bougnaoui's claim to the French labour court was unsuccessful, as was her first appeal. At the second appeal, the court referred questions to the ECJ as to whether the employer's actions could be justified as based on a genuine occupational requirement.

The Advocate General stated that the dismissal was direct discrimination under the Equal Treatment Framework Directive (the Directive). While the dismissal was not because of Ms Bougnaoui's religion, it was less favourable treatment because of a manifestation of that religion. A comparator design engineer who had not chosen to wear a religious symbol would not have been dismissed. The Advocate General did not accept that the ban on wearing a religious headscarf could be a genuine and determining occupational requirement in these circumstances. She commented that this exception should only be available in limited circumstances, for example when health and safety rules require employees not to wear particular clothing. In this case, the Advocate General considered that the decision had been made for commercial reasons only (to please customers) and she stated that direct discrimination could not be justified on the ground of commercial loss.

The opinion also states that the ban may be indirect discrimination under the Directive and not justifiable as a proportionate means of achieving a legitimate aim. Advocate General Sharpston commented that it may at times be proportionate for an employer to ban clothing which covers the eyes given that western society values face to face communication with customers. However, she did not consider a ban on a hijab (which shows the face) proportionate simply because some customers objected.

This case and the case of *Achbita v G4S* are expected to be decided by the ECJ before the end of the year.

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

Wrigleys Solicitors LLP, 19 Cookridge Street, Leeds LS2 3AG. Telephone 0113 244 6100 Fax 0113 244 6101 