

Employment Law BULLETIN

Welcome to our June employment law bulletin.

This month we have some really interesting cases to discuss.

In *ICAP Management Services Limited v Berry* the High Court had to consider whether a TUPE transfer entitled a senior executive to object to it (as allowed for by Reg 4(7) of the TUPE Regulations), thus releasing him early from his period of garden leave, enabling him to join a competitor. The High Court held there, on the facts, that there was no TUPE transfer because the takeover concerned was a share sale, which is not covered by TUPE. There was therefore nothing to object to and the High Court upheld the employer's application to hold the executive to his garden leave.

In *Beatt v Croydon Health Services NHS Trust* the Court of Appeal held that an employee's dismissal because he made protected disclosures was automatically unfair. The employer's belief at the time of dismissal that the disclosures were not protected was not a relevant consideration for the tribunal.

In *Charlesworth v Dransfield Engineering Services Limited* the EAT upheld an employment tribunal's finding that the dismissal of an employee by reason of redundancy was not, in the circumstances, discrimination arising from his disability.

In *Ali v Capita Customer Management Limited* an employment tribunal has upheld a male employee's direct sex discrimination claim made on the basis that he was offered only statutory shared parental pay whereas female colleagues on maternity leave would have been paid enhanced maternity pay.

In the referral to the European Court in *King v The Sash Window Workshop* the Advocate General has given his opinion that workers should be paid on termination of employment for any accrued untaken leave where they have been disincentivised from taking it because they would not have been paid at the time.

In *Hartley v King Edward VI College* the Supreme Court has determined that a day's pay should be calculated as 1/365th of salary (rather than 1/260th) when deducting pay for teachers' strike days. Applying the Apportionment Act 1870 this was the right conclusion given the nature of the teacher's contract concerned.

May I also remind you of our forthcoming events:

Click any event title for further details.

Disability Discrimination: avoiding the pitfalls

- Breakfast Seminar, Leeds, 1st August 2017

In conjunction with ACAS

Understanding TUPE: A practical guide to business transfers and outsourcing

- Full day conference, Leeds, 17th July 2017

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

- Full day conference, Hull, 9th August 2017

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

1: TUPE and Garden Leave



A senior executive was placed on garden leave. Were the circumstances such that a TUPE transfer enabled him to object to it and terminate his garden leave?

No, held the High Court in [*ICAP Management Services Ltd v Berry*](#).

Mr Berry worked for ICAP Management Services Ltd, which was a service company for the ICAP Global Banking Business. He gave notice to leave in order to join a competitor, BGB Services (Holdings) Limited. ICAP put him on garden leave.

During the garden leave ICAP was the subject of a share sale acquisition by Tullett Prebon plc. Mr Berry notified ICAP that he considered there was a TUPE transfer and purported to object to it under Reg 4(7) of TUPE. That would, by virtue of Reg 4(8), have terminated his contract (and his garden leave) forthwith, releasing him to take up his new employment earlier than would otherwise have been the case. ICAP sued to enforce the garden leave.

The High Court rejected Mr Berry's arguments. TUPE requires a change of employer. A share sale does not involve a change of employer. This was not the kind of exceptional case envisaged in *Millam v Print Factory (London) 1991 Ltd* [2007] EWCA Civ 322 where, after a share sale, there had been a de facto TUPE transfer because of the supreme control exercised by the new owner. Here it was business as usual. The operating and service companies carried on in the same way as before the share sale. There was therefore no TUPE transfer, and nothing to object to. ICAP succeeded in its application for an injunction to enforce the garden leave.

For TUPE aficionados there is (at paras 24-102) an excellent discussion of some key legal issues in the law on transfer of undertakings, including "the concept of the employer", the legal requirement of change of employer, and the indicia of a TUPE transfer.

2: Whistleblowing and automatic unfair dismissal



In [*Beatt v Croydon Health Services NHS Trust*](#), the Court of Appeal has held that an employee's dismissal because he made protected disclosures was automatically unfair. The decision makes clear that an employer's belief at the time of the dismissal that the disclosures are not protected is not a relevant consideration for the tribunal.

Dr Beatt was a consultant cardiologist working at Croydon University Hospital. Working relationships within the cardiology department were described as "dysfunctional". Following the death of a patient in 2011, Dr Beatt made a number of disclosures to his employer about patient safety, understaffing and staff inexperience. The NHS Trust began disciplinary proceedings against Dr Beatt, alleging that some of his disclosures were part of his campaign against a colleague and that his complaints were designed to obstruct the safe and effective running of the department. Dr Beatt was dismissed for gross misconduct.

An employment tribunal found that Dr Beatt had made protected disclosures; that the principal reason for the dismissal was the fact that he had made these disclosures; and it concluded that he had been automatically unfairly dismissed. It should be noted that some of Dr Beatt's disclosures were made before the change in the whistleblowing legislation. Before 25 June 2013, there was a requirement for a disclosure to be made in good faith for it to qualify for protection. Since that date, a disclosure will be protected if the employee reasonably believes it is made in the public interest and that the information provided tends to show one of six failings set out in the legislation. There is no longer any requirement for the disclosure to be made in good faith.

The employer appealed on the ground that the reason for the dismissal was conduct rather than the disclosures. The EAT allowed the appeal.

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The Court of Appeal, however, did not agree with the EAT and restored the judgment of the employment tribunal. It made clear that a tribunal should seek to answer two questions in such a case: was the making of the disclosure the reason, or principal reason, for the dismissal; and was the disclosure a protected disclosure?

When considering whether the disclosure was the reason for the dismissal, the tribunal must identify the set of facts known to the employer and/or the beliefs held by the employer which cause the employer to dismiss. It is not relevant to this consideration that the employer believed that the disclosures would not qualify as protected disclosures under the whistleblowing legislation.

When considering whether the disclosure is protected, the tribunal will consider whether the employee reasonably believed that the disclosure was made in the public interest and that the information tended to show one of the six specified failings, for example, that someone's health and safety is or is likely to be endangered. In this consideration, the reasonable beliefs of the employee are relevant, whereas the beliefs of the employer are not.

The Court of Appeal judgment provides a salutary warning that employers should not assume that a tribunal will share their view that an employee is "difficult". Although there may be some cases in which an employee is dismissed because of the manner in which disclosures are made, rather than because of the act of making the disclosures, LJ Underhill commented that: "employers should proceed to the dismissal of a whistleblower only where they are as confident as they can reasonably be that the disclosures in question are not protected".

3: Redundancy dismissal following disability-related sickness absence was not discrimination arising from disability.



In *Charlesworth v Dransfield Engineering Services Ltd*, the EAT upheld a tribunal's finding that the dismissal by reason of redundancy of an employee who suffered from cancer was not discrimination arising from disability.

Mr Charlesworth worked as a branch manager for Dransfield Engineering Services Ltd (DES). DES sought to improve profitability by saving costs from 2012 onwards. Following a diagnosis of renal cancer in Summer 2014, Mr Charlesworth was off work sick for a period of three months. During that time, DES found that it could operate without covering Mr Charlesworth's role and proposed a restructure. On his return to work, Mr Charlesworth was consulted about his potential redundancy and finally dismissed. He brought claims in an employment tribunal of unfair dismissal, direct disability discrimination and discrimination arising from disability (a claim under section 15 Equality Act 2010). In his Section 15 claim, he argued that his disability-related sickness absence was a cause of or influence on his dismissal (even though not a significant influence or effective cause) and that this was enough to make out the claim.

The tribunal dismissed all of Mr Charlesworth's claims. The EAT agreed. The EAT noted the case of *Hall v Chief Constable of West Yorkshire Police* UKEAT/0057/15 which suggested that a section 15 claim requires only a loose connection between the employee's disability and the unfavourable treatment. The EAT made clear, however, that it is not enough for the "something arising" (here the sickness absence) to be the mere context of the unfavourable treatment but that it must rather be "an influence or cause that does in fact operate on the mind of a putative discriminator whether consciously or subconsciously to a significant extent and so amounts to an effective cause".

The EAT noted that the tribunal accepted that there was a link between the claimant's absence through illness and the fact that he was dismissed. The absence provided the opportunity to - discover that the company could manage without anybody fulfilling the claimant's role. However, the EAT concurred with the tribunal that this was not the same as saying that the claimant was dismissed because of his absence.

The EAT made very clear that each case will turn on its facts. It stated that "there will be many cases where an absence is the cause of a conclusion that the employer is able to manage without a particular employee and in those circumstances is likely to be an effective cause of a decision to dismiss even if not the main cause". But it held that the tribunal was entitled to find in this case that the absence was merely "part of the context and not an effective cause". Given the potential for section 15 claims, employers should be cautious about dismissals following disability-related sickness absence where the absence could be argued to be one of the reasons for the dismissal.

4: Failure to pay enhanced shared parental pay in line with enhanced maternity pay was direct sex discrimination.

In *Ali v Capita Customer Management Ltd* ET/1800990/16, an employment tribunal upheld a male employee's direct sex discrimination claim on the basis that he was offered only statutory shared parental pay while a female colleague on maternity leave would have been paid enhanced maternity pay.

Mr Ali transferred under TUPE from Telefonica to Capita in 2013. Female employees who transferred were entitled during maternity leave to 14 weeks on full pay and 25 weeks' statutory

maternity pay. Male employees who transferred were entitled to 2 weeks' ordinary paternity leave on full pay followed by up to 26 weeks' additional paternity leave with no guaranteed pay.

Mr Ali's wife suffered from post-natal depression after the birth of her daughter and was advised to return to work. Mr Ali took his two weeks' paid leave and explored the option of taking shared parental leave (SPL). His employer informed him that he could take SPL but would only be paid statutory shared parental pay. He brought claims of direct sex discrimination, indirect sex discrimination and victimisation in the Employment Tribunal.

The tribunal found that he had been directly discriminated against. The decision was based on its view that Mr Ali could compare himself with a hypothetical female employee who was on maternity leave after the initial two week compulsory maternity leave.

The tribunal considered the requirement in section 13(6)(b) Equality Act 2010 which states that no account is to be taken of the special treatment afforded to women in connection with pregnancy or childbirth when determining if a man has been sexually discriminated against. It decided that the enhanced maternity pay available to women under the contract after the initial two weeks was not protected as special treatment in connection with pregnancy and childbirth. Rather it was special treatment for caring for a newborn baby, which role is not exclusive to women. In reaching this decision, the tribunal commented that the purpose of the shared parental leave and pay rules is to encourage men to take a greater role in caring for their babies.

This decision contrasts starkly with another employment tribunal decision in *Hextall v Chief Constable of Leicestershire Police* ET/2601223/15 in which it was decided that it was not sex discrimination to offer enhanced maternity pay (to women) but only statutory shared parental pay (to men). In this case, the tribunal determined that the correct comparator for a male claimant was a woman taking SPL rather than a woman taking maternity leave. This was on the basis that both women and men on SPL would be paid only the statutory amount.

The cases of *Ali* and *Hextall* are both expected to be appealed. An EAT decision on this matter will hopefully bring more clarity.

5: CJEU AG considers workers entitled to pay for any accrued leave which the worker was disincentivised to take.



In the referral to the European Court in [*King v The Sash Window Workshop Ltd and another*](#), Advocate General Tanchev has given his opinion that workers should be paid, on termination of employment, for any accrued untaken leave where they have been disincentivised from taking leave because they would not have been paid for it.

Under the Working Time Regulations, a worker can only bring a claim for holiday pay as a claim for unpaid wages after taking the leave. The Court of Appeal (following ECJ case law) held in *NHS Leeds v Larner* [2012] IRLR 825 that workers are entitled to carry forward leave from previous leave years when they have been unable or unwilling to take it because of sick leave. It also held that workers should be paid on termination for leave which has been carried forward in this way (that is because of sick leave). The current case, however, was not concerned with a worker who could not take holiday because of sick leave, but with a worker who had not taken holiday because he would not have been paid for it.

Mr King was a commission-only salesman for The Sash Window Workshop. During a period of 13 years he was not paid salary, holiday pay or sick pay. He was offered an employment contract which included paid holiday but he did not take up the offer. His contract was terminated when he turned 65. He brought claims for age discrimination and holiday pay. He argued that he had been discouraged from taking holiday because any leave taken was unpaid.

The employment tribunal found that he had been discriminated against on the ground of age. On the holiday pay claim, it found that Mr King was entitled to holiday pay for periods of annual leave which had been taken in the current and previous leave years (as a series of unlawful deductions from wages). It also found that Mr King was entitled to pay for accrued untaken holiday from the current leave year and from previous leave years.

The EAT did not agree. It determined that the tribunal had not made the necessary findings of fact to decide that Mr King had been prevented from taking annual leave by reasons beyond his control (as would be the case where a worker was unable to take holiday because he or she was on sick leave). The EAT held that the claimant had not suffered financial loss because in fact he had worked rather than taking holiday. The Court of Appeal referred a number of questions to the ECJ.

The Advocate General was of the opinion that a worker should not have to take unpaid leave before establishing an entitlement to be paid for that leave. He stated that the Working Time Directive gives workers the right to pay for holiday; workers should not have to take the step of taking unpaid leave before they can enforce that right. In his opinion, a worker who has not taken leave because it would have been unpaid is entitled to claim that he or she has been prevented from exercising the right to paid leave and any such leave can be carried over until the worker has the opportunity to exercise the right. A worker who has not had the opportunity to take paid leave throughout his or her employment should be able to carry over the leave for the whole period of employment and should be paid for the untaken leave on termination. In the Advocate General's opinion, a member state should only impose restrictions on the carry-over of annual leave if an employer has provided an adequate facility for workers to exercise their right to take paid annual leave (this might be the case, for example, where paid holiday is available but the worker has been unable to take holiday because of sickness).

If this opinion is followed by the ECJ it could lead to significant awards of arrears where workers have not taken holiday because it is unpaid. The case would be different where leave had been taken but the correct holiday pay had not been paid. In such a case, the two-year backstop on arrears in unlawful deductions from wages claims under the Deduction from Wages (Limitation) Regulations 2014 would apply to UK claims.

6: Supreme Court rules on how much should be deducted from pay during teachers' industrial action.

In *Hartley v King Edward VI College*, the Supreme Court has determined that a day's pay should be calculated as 1/365th of salary (rather than 1/260th) when deducting pay for teachers' strike days.

Teachers working at a sixth form college went on strike for a day. The college deducted one day's pay from their wages, calculated at the daily rate of 1/260th of their annual salary. This was based on the fact that the teachers' working days were specified in their contracts as Monday to Friday and so the daily rate was based on five working days a week (5 x 52 weeks a year = 260 working days in a year).

The teachers accepted that they were not entitled to be paid for the strike day. But they argued that, by virtue of the Apportionment Act 1870, and as their salary accrued day to day at an equal daily rate for every calendar day, the deduction should have been based on 1/365th of salary.

Following an analysis of the relevant contracts of employment, the Supreme Court held that the Apportionment Act did apply, and the sensible approach was to apportion the annual salary on a day to day basis by treating a day's pay as 1/365th of annual salary. This decision was based on findings that salary payments were made every month, even when a teacher was on holiday, and the work carried out by them was, in reality, spread throughout the year. Payment was also not

limited to periods when the teacher was carrying out directed work, but included preparatory work and other duties which involved working in the evenings, at weekends and in the holidays.

The Supreme Court made clear that a critical feature of the case was that the contracts were “annual contracts”. If they had not been, the position would be different, and would depend on the terms of a particular contract. Unfortunately, the Court did not go on to say what is meant by an “annual contract” but the assumption is that it means a permanent, rolling, contract. It was particularly relevant that the teachers were expected to work outside of their contracted hours and days. This suggests that the outcome would not have been the same if they had been employees who worked only contracted hours/days.

Employers should not assume that this decision will apply to the calculation of a day’s pay for all purposes. This will depend on an analysis of the contract in question, including whether the Apportionment Act applies. However, it is possible that this decision could affect other professionals who might be expected to work outside normal contracted hours.

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