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EMPLOYMENT LAW BULLETIN

MAY 2019

Welcome to the May edition of our employment law bulletin.

This month's case reports consider helpful guidance arising from decisions in the High Court and EAT.

In *Antuzis v DJ Houghton Catching Services Ltd*, the High Court considered whether the directors of a limited company could be personally liable for the company's breaches of an employment contract.

In *Frudd & Another v The Partington Group Limited*, the EAT returned to the issue of time spent on call and whether this should be considered 'time work' for the purposes of the National Minimum Wage.

In *Baldeh v Churches Housing Association of Dudley & District Limited,* the EAT considered whether an employer had knowledge of an employee's disability when it was only raised at the dismissal appeal.

And in *Base Childrenswear Ltd v Otshudi*, the EAT confirmed that a serious one-off incident of discrimination can lead to an injury to feelings award in the middle Vento band.

In our **Question of the Month** slot, we look at frequent, interesting and topical questions we are asked by our clients. May's question of the month is: Can we pay a tax free lump sum on termination of employment?

Finally, may I remind you of our forthcoming events:

- **Employment Law Update for Charities**
  A full day conference - Hilton City, Leeds. 18 June 2019
  For more information or to book

- **Employment Breakfast Briefing: Managing Sickness Absence**
  Morning seminar - Radisson Blu, Leeds. 6 August 2019
  For more information or to book

- **Employment Breakfast Briefing: Dealing with Employee Grievances**
  Morning seminar - Radisson Blu, Leeds. 1 October 2019
  For more information or to book

- **Annual Charity Governance**
  A full day conference - Hilton City, Leeds. 10 October 2019
  For more information or to book

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Can the directors of a limited company be personally liable for the company's breaches of an employment contract?

Yes sometimes…

Existing liability

It has already been decided by the courts that directors of a company can be held responsible for the wrong doing or "torts" of their company if they actively directed them. This means they have to answer for an act or omission carried out in the name of the company but under the control of the director(s) which causes injury or harm to another and which can be actioned through the courts. Up until now the law has been unclear on the personal liability of directors when the unlawful act undertaken in the name of the company is a breach of contract rather than a negligent act.

However a recent case has confirmed that in certain circumstances directors will be personally liable for a breach of contract as well as negligent acts.

The case: Antuzis v DJ Houghton Catching Services Ltd

The case was brought by three employees who alleged they were ill-treated in their employment by DJ Houghton Catching Services Ltd. They were employed to travel around farms and catch chickens for slaughter. They stated their employer failed to pay them correctly for all hours worked, pay the national minimum wage or pay holiday pay. They worked unreasonably long hours and frequently had their pay withheld for a variety of unlawful reasons or for no reason at all. In short they alleged they were exploited on a grand scale.

The court accepted the evidence of the employees and the question to be considered was whether the director and company secretary of DJ Houghton Catching Services Ltd were personally liable for the numerous breaches of the employees' contracts of employment by the employing company. This question is of greater important when a company is insolvent or has few assets and an employee may wish to pursue the directors for compensation.

Do you need a written contract to breach?

The employees did not have written contracts of employment however this did not mean a contract did not exist between them and the company. Where there is no written contract the terms are usually made up of verbal agreements or promises made in other documents, such as an offer letter, together with implied terms which cover statutory rights such as national minimum wage, holiday pay, hours of work and notice pay. It will also include implied terms like the mutual duty of trust and confidence.

Liability for breach of contract

After hearing of the evidence the judge concluded the director and company secretary were jointly and severally liable for inducing a breach of contract. He found they knew exactly what they were doing when they operated their business on a model which relied upon exploiting its workers to obtain an economic advantage for themselves. He was unimpressed with the directors' version of events and concluded there was "no iota of credible evidence that either director possessed an honest belief that what they were doing would not involve a breach of contractual obligations towards the employees". In his view they clearly realised that the way they operated the business would cause the company to breach its contractual obligations towards its employees and that was enough to make them liable for the losses stemming from the breaches such as wages and holiday pay owed.

Liability will not always be present

Not all directors will be liable for a breach of contract perpetrated by the employing company. As a general principle, a director will not be personally liable for inducing a breach of contract by their company if they act in good faith and within the scope of their authority. To determine whether a director's actions are in good faith the focus is on the directors' conduct and intention in relation to their duties towards the company - not towards a third party (in this case the employees). However the case does suggest that a breach of contract with a statutory element (such as failing to pay national minimum wage) may indicate a failure of the director to comply with its duties towards a company. Company law also imposes certain duties on directors, among them a duty to promote the success of the company and to exercise reasonable care, skill and diligence in their role which was clearly lacking in this case.

When will time spent on call be considered 'time work' for the purposes of the National Minimum Wage?

A recent case considered a warden and receptionist being on call overnight at a caravan site

Case law has been grappling for some time with the complex issue of determining when a worker who is "on call" or on a sleep-in shift is undertaking 'time work' for the purposes of calculating the National Minimum Wage. This is particularly complex in situations where workers live on site and/or may be sleeping for all or part of the "on call" period.

Case details: Frudd & Another v The Partington Group Limited

Mr and Mrs Frudd worked as a warden/ receptionist team between 2008 and 2015 for a caravan site owned by the Partington Group. They were provided with a caravan on the site in which they were expected to live. They worked shifts and for two or three nights a week were expected to be on call from the end of their shift until 8am the next day to deal with late arrivals and emergencies at the site. The contract of employment specified that they would receive special payment for emergency call-outs after 10pm, but otherwise did not provide for any on call pay.

The Frudds claimed that the totality of their on call shift counted as 'time work' and that they were entitled to the NMW for the whole of these shifts.

The law

The National Minimum Wage Regulations 1999 and 2015 (the 'Regulations') draw a distinction

between time spent working and time where the employee is 'available for work' but not working. A worker is entitled to be paid for both, but will not be paid for time when they are 'available to work' if the time is spent at home or the worker is not 'awake for the purposes of working'.

In *Royal Mencap Society v Tomlinson-Blake (2018)* the Court of Appeal specifically dealt with sleep-in carers and clarified that carers who are expected to be able to sleep for most of the shift will only be performing time work when they are actually called upon during the night. Previous case law suggested that such carers were actually working rather than merely available for work and should be paid for the full sleep-in shift. For further details, see our case report on this decision in the September 2018 edition of our Employment law bulletin.

The decision in Mencap is specific to sleep-in arrangements and did not address in detail the issue of actual work or availability to work in other on call scenarios. However, the Mencap decision did point out that there would be situations where workers who lived on site (such as caretakers) would be required to be on call outside of normal working hours and that they would not be performing time work during periods when they were expected to be able to sleep.

The decision

The EAT agreed with the decision of the employment tribunal, which drew distinctions between certain parts of the Frudds' shift. The tribunal and EAT decided that, due to the Frudds' presence on site and the nature of their duties up until 10pm, they were in fact working during this time. However, in the tribunal's and EAT's view, the contract and working arrangements were sufficiently clear that the Frudds were not expected to be awake for the purposes of working from 10pm onwards. They were required to respond to emergencies between 10pm and 7am, but the contract already provided for these callouts to be paid. This amounted to the Frudds being 'available to work' only.

Wrigleys comment

This case is a useful example of the application of the Court of Appeal's decision in Mencap outside of the context of sleep-in carers. In particular, it highlights that it does not matter if a worker is actually awake or asleep at any particular time for NMW purposes. What matters is whether the working arrangement is one where the worker is expected to be able to sleep during their shift. If so, they are likely to be viewed as 'available to work' and only time spent actually working will count: the worker won't be paid for any time they are expected to be asleep and they are not, in fact, working.

When deciding on whether the arrangement is one where the worker is expected to be able to sleep, tribunals will consider the requirements set out in the contract but will also consider what actually happens in practice, taking evidence on how frequently the worker is disturbed during the night.

The Supreme Court is due to hear an appeal to the Mencap case sometime in 2019, which has the potential to shift the current understanding of this complex area of law once again.

What should an employer do if an employee presents evidence of a disability at an appeal against their dismissal?

A recent case highlights the difficulties employers face when new evidence comes to light at appeal

A few weeks ago we published an article about the best use of probationary periods and the risks of claims arising from this early stage of employment. Discrimination claims can be brought without any minimum length of service. However, in the early days of an employment relationship, an employer may not be aware of the employee's protected characteristic. In the following case, the employer only found out about a probationer's disability during a dismissal appeal.

Case details: *Baldeh v Churches Housing Association of Dudley & District Limited*

Mrs Baldeh worked for CHADD as a support worker. She was dismissed at the end of a six-month probationary period in June 2015 on the basis of poor performance and behavioural issues. Mrs Baldeh appealed the decision and explained at the appeal hearing that she experienced depressive episodes that affected her short-term memory and that could make her act aggressively towards others as a result.

Mrs Baldeh's appeal was not upheld. She brought a tribunal claim against CHADD alleging, amongst other things, her dismissal was the result of unfavourable treatment arising as a consequence of her disability under s.15 of the Equality Act 2010 ('EqA').

The law

Section 15 EqA provides an employer facing such a claim with two main defences:

(i) the employer did not know or could not reasonably have been expected to know (i.e. 'actual' or 'constructive' knowledge) that the employee had the disability; or

(ii) the employer can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

The decision

The tribunal dismissed all of Mrs Baldeh's claims but the EAT found a number of errors with the tribunal's reasoning relating to the issue of s.15 EqA disability discrimination.

First, the tribunal found that CHADD did not have actual or constructive knowledge of Mrs Baldeh's disability at the time the decision was made to dismiss her. The EAT found this was wrong: at the time of the appeal decision confirming dismissal, the employer did have actual knowledge of her disability.

Second, the EAT held that the tribunal had wrongly focused on the fact that there were other reasons why Mrs Baldeh had been dismissed apart from those arising from her disability. The key question according to the EAT was whether something arising from her disability had a material influence on the dismissal.

Third, the EAT noted that the tribunal had identified legitimate aims for CHADD. These were 'maintaining standards required of individuals working with vulnerable people' and of 'maintaining a workforce where staff can work amicably in a pressured environment'. However, the tribunal had completely overlooked whether the action taken was proportionate, failing to weigh up the impact on the claimant of losing her job against the needs of the employer.

The EAT ordered that the case be sent back to a fresh tribunal.

Wrigleys comment

There are some useful lessons to be learned in this case, particularly in relation to employers taking appropriate action where disability issues arise at the later stage of a process.

If evidence of disability is presented at appeal after a decision to dismiss has been taken and the employer had no knowledge of the disability prior to dismissal, the employer cannot ignore the new information. It is advisable for the employer to carry out further investigation of the employee's mental or physical condition, seeking information from a medical professional or occupational health advisor and asking particularly whether any disability relates to the reasons for the dismissal. This information should be taken into account when making the appeal decision.

Serious one-off incident of discrimination was correctly placed in the middle Vento band

EAT decision confirms that the key question is 'what effect does the discrimination have on the individual?'

Where an individual suffers discrimination they are able to claim damages for injury to feelings. Injury to feelings awards are made in line with the 'Vento bands' which are currently as follows:

1. The lower band for less serious cases, such as where the discriminatory act is an isolated or one-off occurrence (between £900 - £8,800);
2. The middle band for serious cases which do not merit an award in the highest band (between £8,800 - 26,300); and
3. The top band for the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race (between £26,300 - £44,000). Only the most exceptional cases can exceed this band.

Case details: *Base Childrenswear Ltd v Otshudi*

Miss Otshudi worked for Base Childrenswear Limited ('Base Ltd') as an in-house photographer for three months in 2016. In May 2016 Base Ltd's managing director ('MD') told Miss Otshudi she was being made redundant. Miss Otshudi challenged this, asking if the real reason was due to her race (she had allegedly suffered racial harassment from colleagues since starting the job). The MD and two other managers surrounded Miss Otshudi and she began to cry. The MD then challenged her to say that this was a discrimination case and told her to collect her belongings and leave immediately.

Miss Otshudi quickly appealed her dismissal and submitted a grievance. She tried to engage with Base Ltd via the Acas early conciliation process. Base Ltd did not respond to any of these actions and ultimately Miss Otshudi brought a claim for race discrimination in respect of a series of discriminatory acts throughout her employment with Base Ltd and for her dismissal and subsequent treatment.

The employment tribunal decision

The tribunal determined that only the claim relating to Miss Otshudi's dismissal and subsequent treatment was in time.

At tribunal, Base Ltd admitted they had fired Miss Otshudi under false pretences. At first, they maintained the reason for dismissal was redundancy, but much later on in the tribunal process, Base Ltd stated the real reason was Miss Otshudi was suspected of theft although these allegations had never been put to her. Miss Otshudi was subjected to cross-examination on this point at tribunal, but the theft allegation was not borne out by evidence. The tribunal determined that there were facts from which it could infer discrimination. These included the employer's failure to respond to the grievance and its dishonest approach in at first elaborating on a false redundancy situation in its defence and then subsequently putting forward to the tribunal another unfounded reason for dismissal.

Because Base Ltd could not provide a satisfactory non-discriminatory reason for her dismissal and subsequent treatment, the tribunal was satisfied that these were a result of race discrimination.

As part of its consideration the tribunal noted that Miss Otshudi was good at her job, had spent a considerable amount of time investing in her career and clearly planned to work for Base Ltd for some time. The dismissal had come out of the blue and had a profound impact on her, including a serious depressive episode following her dismissal.

Taking all of the background facts into account, the tribunal determined that Miss Otshudi's dismissal amounted to a serious case of discrimination and made an award for injury to feelings of £16,000 towards the top end of the middle Vento band, amongst other awards for financial loss, personal injury (£3,000) and aggravated damages (£5,000). The tribunal also awarded a 25% uplift as Base Ltd had failed to follow the Acas Code of Practice in its complete lack of response to her post-dismissal grievance.

Relying on the basic Vento band guidance (as set out at the top of this article) Base Ltd appealed this decision on the basis that, although serious, the dismissal was a one-off event and should have been remedied by an award in the lower Vento band.

The EAT decision

The EAT did not uphold the appeal. In considering the circumstances around Miss Otshudi's dismissal, the EAT found that the tribunal was right to consider the event sufficiently serious to fall within the middle Vento band.

The EAT highlighted that the Vento bands were not prescriptive and any injury to feelings award was fact-sensitive. Ultimately, the question for a tribunal considering the seriousness of a discriminatory event must always be 'what was the particular effect on this individual complainant?'

Wrigleys comment

This decision highlights that tribunals will take a fact-specific approach to determining the appropriate Vento band when awarding damages for injury to feelings. In this case, even though there was only found to be a single act of racial discrimination, the circumstances surrounding Miss Otshudi's dismissal and its impact on her made that decision sufficiently serious to warrant it being placed in the middle band.

Base Ltd was clearly put on the back foot here as a result giving a false reason for dismissal. This case further highlights the importance of a providing a clear reason for dismissal which has a basis in fact, including those employees who do not have sufficient service to bring an unfair dismissal claim.

This decision provides a reminder of how important it is for employers to take into account the Acas Code of Practice when dealing with employee grievances. It should be noted that a tribunal can apply a 25% uplift in compensation where an employer has failed to take the Acas Code of Practice into account. This applies before the employee has acquired two years' service. Although the Acas Code of Practice does not explicitly state that it applies to former employees, in this case the tribunal and EAT expected the employer have regard to it even though the grievance was raised following termination of employment.

Question of the month: Can we pay a tax free lump sum on termination of employment?

The answer to this is very likely to be…NO

Settlement agreements can provide a useful way of bringing what might be a difficult employment relationship to an end. They offer peace of mind for the employer, considerably lowering the risk of any employment tribunal or court claims. For the employee, they can offer the incentive of a lump sum payment. In the past, "compensation" or "ex gratia" payments above and beyond any contractual notice pay might have been offered tax free. That is, as a payment in connection with termination coming within the £30,000 tax exemption threshold

under sections 401-416 Income Tax (Earnings and Pensions) Act 2003.

New tax rules brought in on 6 April 2018 (but still frequently overlooked or misunderstood) mean that this is frequently not now possible.

The new tax rules on termination payments (from 6 April 2018)

Notice pay or its equivalent is now **always taxed as earnings;** whether as contractual pay in lieu of notice (PILON) or as a non-contractual payment. It is irrelevant how the payment is labelled by the employer. Any rounding up of a payment based on notice pay (as might have been proposed under the old rules) will also have no impact on the application of the new rules.

If the contract includes a right to a PILON

In this case, notice pay under the contract will be subject to deductions (as was previously the case) and the new rules will not apply.

If there is no contractual PILON

The amount which would have been paid for any unworked notice must be calculated (based on actual pay during the last pay period). This is called Post-Employment Notice Pay (PENP). Any PENP within a severance payment will be subject to tax and National Insurance contributions (NICs). It is important to note that the notice period in question is the notice the employee would be entitled to from the employer immediately before termination.

For example

An employee would be entitled to one month's notice from the employer. She earns £2,000 gross per month. A settlement agreement is proposed including a severance payment of £10,000. No notice will be worked. There is no right to pay in lieu of notice in her contract. £2,000 of the payment (pay for the one month notional notice period) will be subject to tax and NICs. The remaining £8,000 will be exempt from tax as a termination payment coming under the £30,000 threshold.

Where some or all notice is worked

If the employee works the full notice period, there will be no "Post-employment Notice Period" and no PENP. In that case, any termination payment is likely to be payable without deductions. Employers should ensure that they have a paper trail showing that notice was given and worked.

However, there are risks for both the employer and the employee in giving notice unilaterally. If the employer gives notice, this is effectively a dismissal and could give rise to an unfair

dismissal claim if the settlement agreement is not ultimately agreed. If the employee gives notice, this is a resignation. The risk for the employee is that the employer might accept this without going on to agree any settlement terms. To protect both parties, it is therefore advisable for the settlement agreement itself to record that notice has been given on the date of the agreement. You should be aware that HMRC may seek documentary evidence to support the employer's tax treatment of any severance payment.

Where some but not all the notice period is worked, this will reduce the impact of the new rules. Deductions should be made only on the equivalent of pay for the unworked notice period.

Employees on reduced pay

PENP is based on the amount the employee earned as basic pay in the last pay period before termination. Broadly, where pay is reduced, this is the figure which is used for the calculation. If an employee were to be on half pay, for example due to sickness absence or contractual maternity pay, in the last month before termination, the calculation would be based on half pay for the notice period and so deductions would be lower. If pay has reduced to nil, the PENP calculation will also be nil.

There is some uncertainty as to whether Statutory Sick Pay or Statutory Maternity Pay should be included in the PENP calculation. HMRC guidance indicates that these payments should be included as part of basic pay, but commentators have suggested that this may not reflect the meaning of the tax legislation. As a very new area of the law, such uncertainties have yet to be tested in the tax tribunal or courts.

ACAS settlements and tribunal awards

The new tax rules extend beyond settlement agreement payments to any "relevant termination award". This will include payments made during and after the early conciliation process through an Acas COT3 agreement and awards ordered by a tribunal where these are in connection with the termination of employment.

Even where the employee was dismissed for gross misconduct and so was arguably not entitled to notice pay on termination, the new rules will still apply to any settlement payment or award relating to the termination.

Redundancy Pay

The main exception to the new rules is that the amount due to a redundant employee as statutory redundancy pay (SRP) can be paid tax free.

Contractual enhancements to SRP are not exempt however. This means that tax and NICs will have to be deducted from any amount over SRP where it is PENP.

Further guidance

This is a technical area of the law. We recommend that employers take tax and legal advice on specific cases. It is also possible to refer a particular arrangement to HMRC for advance clearance where there is doubt about the application of the new rules. HMRC guidance on the new rules can be accessed here.

Please see our specific guidance on severance payments for **academy trusts** Severance payments and the academy trust: what you need to know - PART 1 and PART 2.

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