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— SOLICITORS —

MARCH 2017

Employment Law BULLETIN

Welcome to our March employment law bulletin.

The European Court of Justice has handed down its decisions in two key cases, *Achbita v G4S Secure Solutions NV* and *Bougnaoui v Micropole SA*, concerning employers' dress codes and in particular, in these cases, the wearing of a Muslim headscarf. The Court of Justice has held that a neutral dress code introduced by the employer was not directly discriminatory although the employer should be aware that this might give rise to indirect discrimination under the European Equal Treatment Framework Directive. On the other hand a French company's dismissal of a Muslim employee for refusing to remove her headscarf after a customer complaint was direct discrimination on the ground of religion or belief.

The EAT has decided two cases on TUPE, on the subject of service provision change, in *Tees Esk & Wear Valleys NHS Foundation Trust v Harland* and on the scope of the economic, technical or organisational reason for dismissal, in *Osborne v Capita Business Services Limited*.

In *Dunkley and others v Kostal UK Limited* an employment tribunal has considered the arcane, but important, provisions of section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992, which seek to prevent an employer making inducements to individual workers to agree terms outside existing collective bargaining arrangements with a trade union. In this particular case it was held that the employer's approach to individual employees amounted to an inducement contrary to the Act.

In *Fidessa Plc v Lancaster* the EAT considered an employment tribunal's decisions on claims for unfair dismissal, direct and indirect discrimination, harassment and detriment because of part time worker status. The case usefully clarifies the position and the protection for part time workers' rights.

In *Chidzoy v British Broadcasting Corporation* an employment tribunal struck out a claim because the claimant was found to have discussed her case with a journalist during a break in cross-examination. This conduct prejudiced a fair tria of the matter.

In *The Chief Constable of Kent Constabulary Police v Bowler* the EAT held that it is wrong automatically to infer from an incompetent handling of the employee's grievance that this gave rise to an inference of unlawful discrimination. There was no obvious link in that case between incompetent handling of the grievance and a stereotypical view of a person on ground of race. There must, said the EAT, be evidence from which a tribunal can properly infer that a stereotypical assumption was made and that the assumption operated on the mind of the putative discriminator, consciously or subconsciously, when treating the complainant in the way alleged. Mrs Justice Simler remarked: "it is a sad fact that people often treat others unreasonably, irrespective of race, sex or other protected characteristics".

May I also remind you of our forthcoming events:

Click any event title for further details.

Unfair Dismissal Update

- Breakfast Seminar, Leeds, 25th April 2017

Employment Law Update for Charities

- Full Day Conference, Leeds, 15th June 2017

In conjunction with ACAS

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

- Full day conference, Leeds, 4th May 2017

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1: Neutral dress code was not directly discriminatory but may be indirect discrimination on the ground of religion or belief

In ***Achbita v G4S Secure Solutions NV***, the ECJ held that a "neutral" dress code banning the wearing of a Muslim headscarf while on duty was not directly discriminatory but could be indirect discrimination under the European Equal Treatment Framework Directive.

Ms Achbita worked as a receptionist for G4S Security Solutions in Belgium. The company had a neutral dress code which stated that employees could not wear any religious, political or philosophical symbols while at work. Ms Achbita, who is a practising Muslim, wore a headscarf to work and was dismissed. She brought a discrimination claim in the Belgian Labour Court.

At first instance and on appeal, the courts determined that there had been no direct or indirect discrimination. The Belgian Supreme Court referred a question to the ECJ asking whether the dress code was direct discrimination. We reported on the Advocate General's opinion on this question. She was of the opinion that the headscarf ban did not amount to direct discrimination because, under the policy, people of all religions or beliefs were being treated in the same way.

The ECJ agreed with the Advocate General that the headscarf ban was not direct discrimination on the ground of religion. This was on the basis that the employee was treated no differently from any other employee.

The ECJ also took the view, however, that the ban could constitute indirect discrimination. It considered the employer's right to conduct a business in the way it chooses under the European Charter of Fundamental Rights and stated that a policy of political, philosophical and religious neutrality in customer-facing roles must be considered a legitimate aim when considering whether the discriminatory impact of the ban is justified. The ECJ stated that it would be for the national court to determine whether the means of achieving the legitimate aim were appropriate and necessary in the circumstances, including the constraints within which the employer is operating. The ECJ also commented that the employer should have considered whether the employee could have been moved to a non-customer facing role rather than dismissing her.

Readers may remember the Court of Appeal case of *Eweida v British Airways plc* [2010] IRLR 322 and the subsequent European Court of Human Rights (ECtHR) case. The ECtHR held that British Airways' policy which prohibited the wearing of a visible Christian cross had a legitimate aim: upholding a chosen corporate image. However, the ECtHR held that the policy was not objectively justified; the employee's right to manifest her religious belief should have been accorded more weight when considering whether the ban was proportionate.

2: Dismissal after customer complaint about Muslim headscarf was direct discrimination

In contrast to Achbita, in ***Bougnaoui v Micropole SA***, the ECJ held that a French company's dismissal of a Muslim employee for refusing to remove her headscarf after a customer complaint was direct discrimination of the ground of religion or belief.

Ms Bougnaoui was employed as a design engineer for Micropole. Micropole discussed with her from the outset of her employment the possibility that she would not be able to wear her headscarf due to the customer-facing nature of her role. A customer complained to the employer that Ms Bougnaoui had worn her headscarf during a site visit and asked that she should not wear it during site visits in future. Ms Bougnaoui refused to remove her headscarf for site visits and was dismissed.

Ms Bougnaoui claimed she had been discriminated against on the ground of religion but her claim was dismissed at first instance and again on appeal. On appeal to the French Cour de Cassation, questions were referred to the ECJ, asking whether the discriminatory treatment of the employee could be justified as being based on a "genuine and determining occupational requirement" under the European Equal Treatment Framework Directive.

The Advocate General was of the opinion that prohibiting an employee from wearing a religious symbol in these circumstances was direct discrimination on the ground of religion. She stated that the requirement not to wear a headscarf was not a genuine and determining occupational requirement. She commented that the headscarf did not affect the employee's performance and that the ban had been put into effect solely because of a customer's preference. The Advocate General was also of the opinion that the ban was indirect discrimination on the grounds of religion or belief. She commented that the discriminatory impact on the employee was not likely to be proportionate to the legitimate aim of the employer.

The ECJ followed the Advocate General's opinion, finding that the dismissal was direct discrimination on the ground of religion and that the headscarf ban could not be defended as a genuine and determining occupational requirement. The ECJ stated that an occupational requirement must be one that is objectively dictated by the nature of the work or the context in which the work takes place (for example a health and safety requirement). The subjective opinion of a customer of the employer cannot constitute a genuine occupational requirement.

The ECJ distinguished this decision from that in *Achbita*, reported above, as Achbita concerned a universally neutral dress code. In *Bougnaoui*, on the other hand, the preference of one customer had led to the employee's dismissal.

3: TUPE and Service Provision Change: The 'principal purpose' of an 'organised grouping of employees'

In order for there to be a service provision change TUPE transfer within the meaning of TUPE, reg 3(1)(b), there must be, by virtue of reg 3(3)(a)(i), prior to the change of provider, an organised grouping of employees, the principal purpose of which is to carry out the activities concerned on behalf of the client. The approach to be adopted to the determination of 'principal purpose' was the issue in ***Tees Esk & Wear Valleys NHS Foundation Trust v Harland***.

In this case, the claimant employees were employed by the Trust as part of an organised grouping of employees assembled to look after CE, an individual in the care of the Trust. CE's condition later improved to the extent that the care he needed reduced from a seven to one team to one to one care. The rest of the team, however, continued to maintain its identity as a grouping, albeit that its members were by now working for other service users, also under the Trust's care, at the same location. Then the contract to provide care for CE was taken over by Danshell Healthcare Limited. The Trust argued that TUPE applied, and that all the original employees assigned to the team organised to care for CE should transfer to Danshell. Danshell disagreed (as did the claimant employees concerned, who wished to remain NHS employees). But Danshell "reluctantly" agreed to employ some employees whom the Trust was refusing to treat as still in its employment. This amounted to three employees whom Danshell regarded as sufficient to care for CE, but not the entire team of eleven, as contended for by the Trust. The dispute about the status of the remaining employees and the identity of their employer arrived at the employment tribunal.

The EAT considered that there was a change in service provision (the care for CE). It also accepted that there was an organised grouping of employees assembled to provide that service. But by the time of the change in provision the principal purpose of that grouping had been diluted to the extent that it was now no longer the provision of care to CE. There was therefore no service provision change TUPE transfer and the claimant employees remained at all times employed by the Trust.

The EAT agreed. The correct question to ask was: “what did the organised grouping have as its principal purpose immediately before the service provision change?”. Allowing for the fact that the purpose may change over time, the ET came to the conclusion that the purpose had indeed changed at the point before the change in service provision. According to the EAT, the principal purpose need not be the “sole” purpose. But since the “dominant” purpose of the grouping was overall the care of other service users, the care for CE was now merely a “subsidiary” purpose of the grouping. The ET was entitled to make this finding on the facts (*bailii.org*).

4: TUPE and the scope of the economic, technical or organisational reason for dismissal

Under TUPE, Reg 7(1), a dismissal is automatically unfair if the sole or principal reason for the dismissal is the transfer. This does not apply were the sole or principal reason is an economic technical or organisational (ETO) reason entailing changes in the workforce (TUPE, Reg 7(2)). “Changes in the workforce” means a change in the number or job functions of the workforce (see *Berriman v Delabole Slate Ltd* [1985] ICR 546; *Manchester College v Hazel* [2014] ICR 989).

The scope of the ETO reason was recently considered in the recent case of *Osborne v Capita Business Services Limited* UKEAT/0048/16/RN. In this case the London Borough of Barnet decided to outsource a number of its services including pensions, customer services, human resources and human resources services, benefits and support and control. Thereby it hoped it could make considerable savings. The chosen service provider was Capita. It was believed that the savings would be economic, arising from economies of scale because Capita was in a position to share the operations of Barnet with others. They would be technological, in that automation, different processes and customer self-service would enable savings to be made, and organisational, not least in that the existing skilled management of Capita would be operating and the infrastructure would be more efficient.

This was a service provision change under regulation 3(1)(b) of TUPE. It is material to the outcome of the case that the transfer took place before changes made to the TUPE Regulations 2006 by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014. A significant change was the introduction of regulation 7(3A) effective from 31st January 2014 and which provides that a change of location is deemed to be a change in the workforce for the purposes of the ETO reason definition. Prior to this change, case law had established that a change in location of itself could not be a “change in the workforce”(see *Tapere v The South London and Maudsley NHS Trust* [2009] IRLR 972; *Musse v Centre West London Buses Ltd* [2012] IRLR 360), rendering change of location dismissals automatically unfair.

During the course of 9 months following the transfer the lead claimants in this case found, for various reasons, that they no longer had the same job as they had with Barnet and they ceased to be employed by Capita. These claimants brought claims for unfair dismissal. The employment tribunal decided that the reasons for the dismissals were the splitting of the job functions and the relocation of the place of performance of those functions to various towns and cities. The dismissals, said the employment tribunal, were for ETO reasons which entailed changes in the workforce. They were not therefore, according to the employment tribunal automatically unfair.

The claimants appealed. The EAT held that, although at the time this transfer took place, the law was that a mere relocation would not amount to an ETO reason entailing a change in the workforce, the employment tribunal had found that the job functions were split and that this was therefore capable of being an ETO reason which entailed changes in the workforce, since it entailed changes in the job functions of the workforce.

However, the appeal was allowed in one case, where the relevant employee had not had a material change of function but had been dismissed primarily because the location of the worker changed and she would not accept it. Under the law as it was at the time of the transfer this was not a dismissal for an ETO reason entailing changes in the workforce since, prior to the introduction of regulation 7A of TUPE a change in location could not be a change in the workforce.

Langstaff J finally took the opportunity to restate the law as laid down by the Court of Appeal in *Berriman v Delabole Slate Limited* [1985] ICR 546 and *Manchester College v Hazel* [2014] ICR 989. This was that the employment tribunal should begin by identifying the reason for dismissal and then decide whether the reason for the dismissal in that individual case was one that entailed changes in the workforce.

5: Employer's attempt to bypass trade union negotiations was unlawful inducement

In *Dunkley and others v Kostal UK Ltd* (ET/1800677/2016), an employment tribunal held that an employer was in breach of the statutory rules preventing inducements to individual workers to agree terms outside a collective bargaining arrangement with a trade union. It attempted to bypass trade union negotiations by making a direct offer of new terms to trade union members, thereby infringing section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992.

Under an agreed framework for collective bargaining, any changes to terms and conditions by Kostal had to be negotiated with the union and formal pay negotiations involving the union had to take place each year. In 2015, Kostal proposed a number of unfavourable changes to terms and conditions in exchange for a 2% pay rise and a Christmas bonus. These changes were rejected in a ballot in early December 2015.

Kostal then sent letters to individual employees offering the new terms and pointing out that the Christmas bonus would not be paid if the employee did not agree to the changes by 18 December. The letter made clear how many employees had accepted the changes and gave the names of some trade union representatives and members who had accepted.

The employment tribunal found that the letter to individual employees amounted to a "prohibited result" under section 145B. This was because union members' terms of employment, following the employer's direct offers to individuals, would no longer be determined by a collective agreement, and because the sole or main purpose in making the offers was to bypass further negotiations with the union.

This is a first instance decision which does not set a precedent. However, this is the first case to be decided on the issue of what will constitute a "prohibited result" since section 145B was added to the Act and so it provides useful guidance. Employers should be aware that the compensation which can be awarded in such cases is considerable. The current mandatory award for an unlawful offer to each employee is £3,830.

6: Dismissal of employee who moved from full time to part time working after maternity leave was unfair

In ***Fidessa Plc v Lancaster***, the EAT considered an employment tribunal's decisions on claims for unfair dismissal, direct and indirect sex discrimination, harassment and detriment because of part-time worker status.

Ms Lancaster was employer as a “ConOps” software engineer by Fidessa Plc. Following a period of just less than 12 months’ maternity leave, she took a period of annual leave and then, in May 2013, she returned to work part time (working from 9am to 5pm four days a week). It was agreed that she would be able to leave work at 5pm in order to collect her child from nursery.

In July 2014, Ms Lancaster informed her line manager that she was pregnant. When her line manager informed her manager, Mr Tumber, of this, he was reported to say: “Oh f***, she’s pregnant”. A month after this, Mr Tumber insisted that Ms Lancaster completed computer system deletions, which had to be carried out in the office after 5pm on some days.

In a reorganisation of the department, it was decided that two manager roles should be combined and that the ConOps engineer role most closely aligned to Ms Lancaster’s role would have an emphasis on carrying out these deletions. Ms Lancaster did not apply for this role, partly because she was concerned that she would have to work at the office after 5pm on a regular basis. She was dismissed by reason of redundancy.

The employment tribunal found that Mr Tumber’s comment about the claimant’s pregnancy was direct sex discrimination and harassment relating to sex. It found that Ms Lancaster has been treated less favourably because of her part time status when the employer went back on its agreement to allow her to leave the office at 5pm. It also found that the requirement for the person in the new ConOps engineer role to work in the office after 5pm was indirectly discriminatory on the ground of sex as it put women at a disadvantage, given that women statistically have greater caring responsibilities than men. The employer should have properly considered alternative ways of working. It determined that Ms Lancaster had been unfairly dismissed.

On appeal, the EAT remitted the harassment claim in relation to Mr Tumber’s comment about the claimant’s pregnancy to the same employment tribunal to consider the subjective impact of the comment on the claimant. When considering whether the unwanted conduct in question is sex harassment, a tribunal must consider whether the conduct had the purpose or effect of violating the claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The tribunal must take into account the subjective perception of the claimant as well as whether it was reasonable for the conduct to have this effect.

The EAT upheld the findings of the tribunal in regard to Ms Lancaster’s other claims, including her claim under the Part Time Workers (Less Favourable Treatment) Regulations 2000.

The EAT judgment provides useful clarification on protections for part time workers. In general, to bring a claim under the Part Time Workers Regulations, part time workers have to have an actual full time colleague with whom terms and conditions can be compared. However, workers who change from full time to part time hours can use their own terms and conditions immediately before the change as a comparator. This is also the case where a worker has a period of absence of less than 12 months and returns to the same job at the same level. The EAT clarified that a worker who takes less than 12 months’ maternity leave followed by a period of annual leave (which takes them over the 12 month limit) would still be able to rely on this legislation. There is no need for the worker physically to return to work after the period of absence and before the period of annual leave in order to retain this protection.

7: Employment tribunal claim struck out after claimant discussed her case with a journalist during a break in cross-examination

In ***Chidzoy v British Broadcasting Corporation*** (ET/3400341/16), an employment tribunal struck out a claim because the claimant was found to have discussed her case with a journalist during a break in her cross-examination.

Ms Chidzoy worked as a journalist for the BBC. She brought a claim in the employment tribunal which was scheduled for an 11 day hearing. During her third day of cross-examination and while under oath, the claimant took a comfort break. As is always the case when a break takes place during witness evidence, she was warned that she must not discuss her evidence or the case with anyone during the adjournment.

During the break, the claimant was seen talking to a journalist. The BBC made an application to strike out the claim under the Employment Tribunal Rules. This application was on the basis that Ms Chidzoy's conduct had been scandalous or unreasonable and that it was no longer possible to have a fair trial.

The employment tribunal found that the claimant had acted unreasonably by discussing her case with the journalist. Witnesses to the conversation had heard reference to a "Rottweiler". This was significant as shortly before the adjournment evidence had focused on the claimant being termed "Sally Shitsu" and whether this was akin to a journalist being termed a "Rottweiler" or "terrier". The tribunal noted that the claimant was legally represented and that she had been warned on at least six occasions not to discuss the case during adjournments. The tribunal found that it was no longer possible to conduct a fair trial as the claimant's conduct had irreparably damaged the tribunal's trust in her. On this basis, the tribunal decided to strike out the claimant's claim. It did not consider that a rehearing would be proportionate in the circumstances.

Witnesses in the employment tribunal should be aware of the importance of not speaking to anyone about the case during a break in witness evidence. Practically, it is important to ensure that witnesses do not mix with others involved in the case or speak to third parties about the case before witness evidence is concluded.

8: EAT considers what is necessary to prove a prima facie case of race discrimination and victimisation

In ***The Chief Constable of Kent Constabulary Police v Bowler***, the EAT held that the employment tribunal had made errors of law by determining that the claimant had proved a prima facie case of race discrimination and victimisation without sufficient evidential findings to support such a case.

Mr Bowler is a long-serving police officer. He brought a grievance complaining that his attempts to obtain promotion had been thwarted by his managers because of his race. His internal grievance and subsequent appeal were dismissed. Mr Bowler brought claims in the Employment Tribunal of direct discrimination and victimisation, alleging that he had been treated less favourably because of his race and subjected to detriments because he had raised a grievance which included allegations of race discrimination. The tribunal upheld two out of six of the claimant's allegations of race discrimination and all but one of the claimant's eight allegations of victimisation.

In the appeal by Kent Police, the EAT upheld some of the tribunal's findings, but found that others could not stand and remitted these to the same tribunal.

In discrimination claims, the burden of proof is initially on the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination against the claimant. If the claimant succeeds in doing this, the burden of proof will switch to the respondent to show that the treatment of the claimant was not discriminatory.

When considering the tribunal's approach to this, the EAT held that the tribunal was wrong to infer from the investigating officer's lackadaisical and incompetent handling of the claimant's grievance

that he held a stereotyped view of the claimant as over-sensitive about being treated badly because of his race. It commented that, without evidence to show otherwise, there was no obvious link between incompetent handling of a grievance and having such a stereotyped view. It stated that "tribunals are not entitled to rely on unproven assertions of stereotyping. There must be evidence from which a tribunal can properly infer that a stereotypical assumption was made and that the assumption operated on the mind of the putative discriminator consciously or subconsciously when treating a complainant in the way alleged."

The EAT also held that the tribunal had erred in its approach to the victimisation claims. It made clear that victimisation cannot occur if the alleged discriminator does not know that the claimant has done a protected act (for example complaining about race discrimination in a grievance). In this case, the tribunal did not find evidence that a line manager of the claimant accused of victimisation knew about the race discrimination allegations in the grievance. In the light of this, the EAT found that the tribunal did not make evidential findings sufficient to prove a prima facie case of victimisation and to switch the burden of proof.

This case highlights the fact that it is not enough for a claimant to show that he or she has been unreasonably, inadequately or unjustifiably treated to make out a prima facie case of discrimination since, as Mrs Justice Simler commented, "it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristics".

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