EMPLOYMENT LAW BULLETIN

March 2018

Welcome to our March employment law bulletin.

In this issue we feature important cases from the Supreme Court, the Court of Appeal and the Employment Appeal Tribunal.

In *Reilly v Sandwell Metropolitan Borough Council* the Supreme Court has upheld the judgment of an employment tribunal that the decision to dismiss a headteacher who did not tell her school about her close friend's conviction for a child sex offence was fair.

In *Brazel v The Harpur Trust* the EAT has considered the correct calculation of holiday pay for a term time only employee working as a visiting music teacher at a school. It held that a term time only employee should have holiday pay calculated on the basis of the average of the last 12 working weeks' pay rather than on the basis of the customary calculation of 12.07% of pay.

In *Really Easy Car Credit Limited v Thompson* the EAT confirmed that an employer must believe or know that an employee is pregnant at the point when it takes a decision to dismiss if a claim for automatic unfair dismissal because of pregnancy and/or pregnancy discrimination is to succeed.

In *United First Partners Research v Carreras* the Court of Appeal agreed with the EAT that an expectation of working long hours can be a provision, criterion or practice for the purposes of a reasonable adjustments claim under disability discrimination law.

In *Carewatch Care Services Ltd v Henry* the EAT considered the law on service provision change TUPE transfers. A service provision change TUPE transfer occurs when activities carried out by one provider are taken over by a new provider as long as there was, immediately before the change, an organised grouping of employees, the principal purpose of which was to carry out the relevant activities for the client. When one provider is replaced by another provider the position is quite simple. But the position can be more complex where a single provider is replaced by multiple providers. In principle, TUPE may still apply, but not where, following the change, the services are fragmented and randomly allocated amongst new providers. The EAT remitted this case for rehearing by another employment tribunal as the relevant employment judge had not properly considered the issue of fragmentation.

Finally, may I remind you of our forthcoming events:

- **Redundancy Handling: A practical guide**
  Breakfast Seminar, Leeds, 17th April 2018
  For more information or to book

- **Save the date for the Annual Employment Law Update for Charities 2018**
  A full day conference, Leeds, 26th June 2018
  For more information or to book

In conjunction with ACAS

- **Simplifying TUPE in a day: Understand the rules and avoid the pitfalls**
  A full day conference, Leeds, 11th May 2018
  For more information or to book

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Improved rights for fathers will help tackle the gender pay gap

The Women and Equalities Select Committee has published a report recommending reforms to legislation to improve fathers' rights to paid time off and flexible working.

The report recommends that paternity pay becomes a day one right for fathers with an increase in statutory paternity pay to 90% of (capped) earnings. It highlights the cumbersome nature of shared parental leave and recommends a right for fathers to take 12 weeks off during the first year after birth on statutory paternity pay (with an initial period of 4 weeks paid at 90% of earnings). It proposes that fathers should be paid for time taken to attend antenatal appointments. It also asks that paternity be considered as an additional protected characteristic under the Equality Act.

The Select Committee noted that outdated cultural assumptions about gender roles persist in society and that changes are needed to the legal framework to help to create equality both at home and in the workplace. The report makes a link between poor protection for fathers under employment law and the gender pay gap. A working culture in which fathers are able (financially and practically) to take a more active role in childcare is likely, it is suggested, to lead to greater equality between men and women.

Decision to dismiss headteacher who failed to disclose her relationship with a convicted sex offender was fair

In *Reilly v Sandwell Metropolitan Borough Council*, the Supreme Court has upheld the Judgment of an employment tribunal that the decision to dismiss a headteacher who did not tell her school about her close friend's conviction for a child sex offence was fair.

Ms Reilly was a primary school headteacher. She had a long term close relationship with Mr Selwood, who was convicted of making indecent images of children by downloading the images. She did not cohabit with Mr Selwood, nor was she in a romantic or sexual relationship with him, but she jointly owned a house with him. Following his conviction, she decided that she was not under a duty to disclose her relationship to the school. Later the school governors found out about the conviction. Ms Reilly was suspended, subjected to a disciplinary procedure and summarily dismissed. This was on the basis that she had committed gross misconduct by breaching an implied term of her employment contract under which she had a duty to disclose such a relationship.

Ms Reilly brought an unfair dismissal claim in the employment tribunal. The employment tribunal found that the reason for dismissal was not unfair although there were serious procedural errors in the appeal. However, the tribunal found that Ms Reilly would have been very likely to have been dismissed even if the procedure had been fair and that she contributed to her dismissal by not disclosing the relationship. Her compensation was therefore reduced by 100%.

This decision was upheld by the EAT and the Court of Appeal. The Supreme Court also agreed. Although Ms Reilly was not under a statutory duty to disclose because she was not living in the same household as Mr Selwood, she had breached her employment contract by failing to disclose information which was relevant to her safeguarding duties.

It was found that the headteacher was under a contractual obligation to advise, assist and inform the governing body in its safeguarding responsibilities and to be accountable to the governing body for the maintenance of pupil safety. It was also relevant that the disciplinary rules in the contract of employment identified as misconduct a failure to report something which it was her duty to report. The Supreme Court held that her relationship posed a potential

risk to children and it was not for the headteacher unilaterally to assess the risks to the children in the school. She should have disclosed the facts in order that the governors could assess the risk and decide on the best steps to take in the circumstances. The decision to dismiss was therefore within the band of reasonable responses. It was relevant that she did not show any insight into her duty to report this matter during the disciplinary process. The school was therefore reasonable in deciding it was inappropriate for her to continue in her role as headteacher.

It is interesting to note that the Supreme Court in this judgment made some comments which question the application of the *Burchell* test to the question of whether a dismissal was reasonable or unreasonable. This test, which hails from *British Home Stores v Burchell* (1978) IRLR 379, states that a dismissal for misconduct will only be fair if at the time of the dismissal the employer believed the employee to be guilty of misconduct, and it had reasonable grounds for believing in that guilt. The employer must have carried out as much investigation as is reasonable in the circumstances at the time of forming its belief. The judgment explicitly states, however, that the law remains as the point was not argued in this case.

Although not raised in the tribunal, the Supreme Court noted that the Childcare (Disqualification) Regulations 2009 (the Regulations) indicate that there can be an indirect risk to children where childcare providers associate with someone who has committed offences against children. The Regulations require certain childcare providers and those who manage childcare providers to be registered in order to provide childcare. Those who have committed sexual offences and offences against children are disqualified from working with children in an early years setting or out of normal school hours in a later years setting (below the age of 8). Headteachers who manage such childcare provision must comply with the Regulations. Disqualification by association occurs when someone working in a relevant setting lives in the same household with someone who is disqualified. Staff who are disqualified by association have a duty to disclose this information. It is possible to apply to OFSTED to waive disqualification.

This case raises difficult questions for those working with children. It suggests that particularly those in senior positions should err on the side of caution and disclose relationships with convicted sex offenders even where they are not under a statutory duty to do so. The Supreme Court commented that Ms Reilly would have been unlikely to be dismissed if she had disclosed her relationship. However such a disclosure is likely to trigger a very difficult assessment for the governing body. Governors and trustees should give careful thought to the risks involved before suspending and/or dismissing the employee. They should take into account in their decision-making the nature of the risk, the attitude of the employee and their preparedness to work with the governors to reduce any risk to children.

EAT decides that term time only workers should not have holiday pay capped at 12.07% of earnings

In *Brazel v The Harpur Trust*, the EAT considered the correct calculation of holiday pay for a term time only employee. It held that a term time only employee should have holiday pay calculated on the basis of the average of last 12 working weeks' pay rather than on the basis of the customary 12.07% of pay.

Mrs Brazel worked under a term time only zero hours contract as a visiting music teacher at a school. She worked between 32 and 35 weeks per year. Her contract entitled her to 5.6 weeks' paid annual leave. She was required to take all her leave during school holidays. Her holiday pay was "rolled up" (that is, she was paid an element of holiday pay in each pay packet) and it was calculated as 12.07% of her pay.

She brought a claim for unlawful deductions from wages, arguing that her holiday pay should be calculated under the week's pay provisions set out in the Employment Rights Act 1996. This states that a week's pay for workers with variable hours should be calculated on the basis of average pay over the preceding 12 weeks. This calculation should ignore any weeks during

which the worker receives no pay. In the case of a term time worker this would mean holiday pay is based on the average pay over the last 12 working weeks and excluding any school holiday weeks. This results in a higher rate of pay when compared to a full-time worker. If Mrs Brazel worked only 32 weeks in a year, the tribunal calculated that she should have been paid holiday pay at a rate of 17.5% of annual earnings.

Employers commonly use a calculation of 12.07% of hours worked to work out *holiday leave entitlement* and it is a common shortcut also to use this calculation for *holiday pay*. The calculation is based on a standard working year of 52 minus 5.6 weeks (46.6 weeks): 5.6 divided by 46.6 is 12.07%.

The employment tribunal dismissed the claimant's claim. However the EAT did not agree and made clear that there is no requirement to pro-rate the statutory minimum holiday for part time workers in order to ensure that full-time workers are not less favourably treated. Legislative protection works the other way around to protect part time workers from being less favourably treated than full-time workers.

Employers who engage seasonal or term time only workers should consider whether the way they calculate holiday pay should be reassessed in the light of this judgement. In the case of a term time worker who works 32 weeks per year, the holiday pay calculation should be 5.6 divided by 32 weeks (17.5% of pay).

Employers are reminded that paying rolled up holiday pay is unlawful according to the ECHR. To give some protection against claims, employers paying holiday pay in this way should ensure that holiday pay amounts are clearly set out in the payslip and that workers are able to take their holiday leave.

Decision to dismiss an employee when the employer does not know about her pregnancy will not be unfair or discriminatory on the ground of pregnancy

In *Really Easy Car Credit Limited v Thompson*, the EAT confirmed that an employer must believe or know that the employee is pregnant at the point when it takes a decision to dismiss, if a claim for automatic unfair dismissal because of pregnancy and/or pregnancy discrimination is to succeed.

Really Easy Car Credit Limited (RECC) employed Miss Thompson as a telesales operator, as part of its second-hand car sales business. On 3 August 2016, RECC decided to dismiss Miss Thompson, citing her emotional volatility and lack of work ethic as the reasons for her dismissal. The dismissal occurred during Miss Thompson's probationary period. Importantly, RECC did not immediately inform Miss Thompson of the decision to terminate her employment.

On 4 August 2016, Miss Thompson informed RECC that she was pregnant. The following day, RECC produced a dismissal letter to Miss Thompson, which was backdated to 3 August 2016.

Miss Thompson brought an automatic unfair dismissal and pregnancy discrimination claim, arguing that she was only dismissed because she had informed RECC of her pregnancy and that the letter had been falsely backdated. The tribunal held that the decision to dismiss was unrelated to Miss Thompson's pregnancy but that, after learning of the pregnancy, RECC should have noted that her conduct and emotional volatility could have been related to her pregnancy and revisited its decision to dismiss.

The EAT did not agree. It stated that it was necessary to establish if the pregnancy had been the reason for her dismissal for both the unfair dismissal and discrimination claim. On the facts, RECC made the decision to terminate Miss Thompson's employment on 3 August 2016, a time before the company had belief in or knowledge of, her pregnancy. The tribunal had appeared to suggest that RECC should have reviewed their decision once Miss Thompson's pregnancy

came to light. The EAT made clear that no such obligation exists. It commented that there is no prohibition against less favourable treatment because of something arising from pregnancy (as there is in the case of disability discrimination).

The EAT also noted that it could not be inferred with certainty that Miss Thompson's emotional instability was directly related to her pregnancy.

The EAT remitted the case to a different tribunal, in order to determine if any significant events occurred between 4 and 5 August 2016 which would show the reason for dismissal was in fact the pregnancy (in which case the employee may be successful in her claim).

Expectation to work long hours can be a PCP in a reasonable adjustments claim

In *United First Partners Research v Carreras*, the Court of Appeal agreed with the EAT that an expectation of working long hours can be a provision, criterion or practice (PCP) for the purposes of a reasonable adjustments claim under disability discrimination law (see the June 2016 edition of this Bulletin for details of the EAT decision in this case).

Mr Carreras worked for a brokerage firm as an analyst. After a bicycle accident he suffered various symptoms amounting to a disability and his working time fell from 12 hours a day to around 11 hours a day. His employer asked that he work longer hours. In February 2014, Mr Carreras objected to working late and was told that he could resign if he did not want to work the hours. He resigned and brought claims for constructive unfair dismissal and disability discrimination, including a failure to make reasonable adjustments.
The Employment Tribunal found he was disabled for the purposes of the Equality Act but dismissed his reasonable adjustments claim on the basis that the claimant had not shown there to be a requirement to work long hours sufficient to be a PCP.

The EAT and Court of Appeal held that the term "required" had been interpreted too narrowly by the employment tribunal. The claim by Mr Carreras had been wrongly rejected by the tribunal on the basis that he was not "coerced" into working late but simply expected to work late. The Court of Appeal agreed with the EAT that an expectation to work late was sufficient to be a PCP.

Employers should be aware that a PCP need not be a written policy or provision. In some cases, unwritten rules and expectations which put a disabled employee at a substantial disadvantage when compared with a non-disabled employee will be sufficient to trigger the duty to make reasonable adjustments.

Employee with "pre-cancerous" melanoma was disabled

In *Lofty v Hamis*, the EAT has substituted a finding of disability in a case where the employee had skin cancer described by medical professionals as "pre-cancerous".

Mrs Lofty was a café assistant working for Mr Hamis. She had a number of absences from work. Some of these were linked to treatment for her skin condition. She was later dismissed from work because of her absences and she brought claims for unfair dismissal and discrimination arising from disability.

The tribunal upheld her unfair dismissal complaint on the basis that her dismissal was procedurally unfair. However, it dismissed her disability discrimination claim on the basis that

she did not at any time actually have cancer and so was not disabled for the purposes of the Equality Act.

The EAT disagreed. It held that the tribunal had failed to engage with the evidence presented to it. This evidence showed that Mrs Lofty did have cancer cells in the skin on her face. In some of the medical reports, her condition was described as "pre-cancerous", but this referred to the fact that the cancer had not yet invaded the deeper layers of the skin.

Employers should be aware that people who are diagnosed with cancer, HIV or multiple sclerosis are deemed disabled and are protected by the legislation from the point at which they are diagnosed, whether they are suffering from any symptoms or not.

TUPE and service provision change: fragmentation

A service provision change TUPE transfer occurs when activities carried out by one provider are taken over by a new provider as long as there was, immediately before the change, an organised grouping of employees, the principal purpose of which was to carry out the relevant activities for the client.

When one provider is replaced by another provider the position is quite simple. But the position can be more complex where a single provider is replaced by multiple providers. In principle, TUPE may still apply, but not where, following the change, the services are fragmented and randomly allocated among new providers.

This was the subject matter of the recent EAT decision in *Carewatch Care Services Ltd v Henry*.

Sevacare ended its contract with the London Borough of Haringey to provide care for Borough Residents. London Care, Carewatch and other care providers took over. The 17 claimants in the case were employed by Sevacare as Homecare Support Assistants providing care to adults in their homes. The care provided by Sevacare was under contracted packages of care to 168 service users. Care to the service users was delivered by care workers who were employed on zero hours' contracts. They were asked to take delivery of specified care for a service user, allocated to those service users and placed on the rota maintained by Sevacare. Workers were commonly allocated to particular service users to ensure continuity of care, trust and efficiency of care delivery. Sevacare adopted a regionalised approach so that wherever possible carers worked within one zone and were allocated clients within that zone. Sevacare's work in Haringey was almost exclusively made up of servicing clients funded by the Council, although there were a small number of private clients who engaged Sevacare on a private basis. Sevacare rarely allocated business to the Haringey team of carers outside Haringey Borough. Sevacare gave notice to terminate to terminate the arrangement. The clients were reallocated to other providers largely on the basis of postcodes. Due diligence was undertaken to establish which carers were allocated to which clients according to the rotas that had been prepared for a six week period prior to the handover. In some cases all of the carers went to the same provider but in other cases there was a split between one or more providers. The Employment Judge concluded there had been a TUPE transfer.

London Care and Carewatch advanced three main grounds of appeal: (1) the EJ should have found that the relevant activity was so fragmented as to preclude any finding of a service provision change, (2) the EJ erred in concluding that the activities were carried out pre-transfer by an organised grouping of employees which had as its principal purpose the carrying out of the activities concerned on behalf of the client and (3) the EJ erred in concluding that each claimant was assigned to such an organised grouping.

The EAT found that there was merit in the first two grounds of appeal. First, the EJ should have considered the possibility of fragmentation, which would negative the possibility of a service provision change. The EJ's finding was that the activity transferred was "the provision of adult homecare to individual service users in accordance with care plans". But according to the EAT:

> "That being so the EJ should have considered whether there was fragmentation of the activity amongst the new providers. There is no evidence that one contractor took on the majority of the work; and in relation to a number of employees it is difficult to establish where the employment should transfer given that various service users went to different contractors. Whilst the Sevacare work generally was organised on a regional basis, post termination the Council-funded work was divided on the basis of both capacity and postcode. It does not appear from the judgment that proper consideration was given to these various factors when the EJ considered fragmentation which, as is agreed, should have been at the stage when she determined whether or not the relevant activities carried out by the original contractor were fundamentally the same post-transfer."

Nor was the EJ right on the subject of whether there was an organised grouping of employees in Sevacare's employment. The EJ considered that there was an organised grouping because the principal purpose of the activity was delivering care to service users for whom the Council was responsible. But the fundamental flaw in this approach was that the EJ had confined her consideration to the purpose of such a grouping without first considering whether any grouping existed in the first place and, if so whether it had intentionally been formed.

Because of these two flaws it was unnecessary to consider the issue of assignment, but the EAT did say as a matter of principle that:

> "…when considering whether there was an organised grouping of employees the question is whether "before the change there existed an organised grouping of employees whose principal purpose was the carrying out of the activities for the client"…it follows that the assignment must be to an organised grouping of employees that exists before the change."

The case was remitted to another employment tribunal for these issues properly to be considered.

The case in particular reminds us there may be a problem in finding a service provision change where an outgoing provider's work is randomly allocated amongst a panel of new or existing providers. In this regard the case reminds us of the EAT's decision in *Clearsprings Management Limited v Ankers* UKEAT/0054/08. This case involved the National Asylum Seekers Service, the function of which was to provide accommodation for asylum seekers. Contracts were awarded to contractors to provide this service. In the North West there were four such service providers, including Clearsprings. On the expiry of the contracts the service was re-let. Three contractors (but not Clearsprings) were appointed. The asylum seekers looked after by Clearsprings were randomly allocated to the incoming contractors. The EAT held that the service was so fragmented on its random reallocation amongst multiple providers that the service provision rules were not engaged.

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