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EMPLOYMENT LAW BULLETIN

May 2018

Welcome to our May employment law bulletin.

Time limits for employment tribunal unfair dismissal claims are normally strict, and it is often difficult to persuade an employment tribunal that it was not reasonably practicable to submit a claim in time. But in *DHL Supply Chain Limited v Fazackerley*, an employment tribunal excused the late filing of a claim by an employee when ACAS advised the individual to wait until the exhaustion of internal appeal procedures before submitting a claim, without reminding the individual that he should keep an eye on the three month time limit for making a claim. By the time the appeal was completed, it was too late. But in these circumstances, the EAT held that it was not reasonably practicable to present the claim in time and so it could proceed.

In *Kaur v Leeds Teaching Hospitals NHS Trust* the Court of Appeal has reviewed the so-called "last straw" principle in constructive dismissal claims. The Court confirmed that a "last straw" act on the part of the employer which is not in itself a fundamental breach of contract, can, in some circumstances, revive an employee's right to resign even where considerable time has gone by and the employee might have affirmed the contract by continuing to work for the employer.

In *Mbubaegbu v Homerton University Hospital NHS Foundation Trust*, the EAT held that a dismissal for a series of individual acts was fair as the decision was within the band of reasonable responses available to a reasonable employer, even though none of the employee's acts, on its own, amounted to gross misconduct.

In *Dynasystems for Trade & General Consulting Limited and others v Moseley*, the EAT looked at the reality of the employment relationship in deciding whether the employer named in the employment contract was the real employer. The Jordanian company named on the employment contract and which paid the salary of the employee was not the employer in law, the employment contract did not reflect the intentions of the parties or the reality of the situation and the Claimant was in practice employed by another, UK based, company.

In *Mostyn v S and P Casuals Ltd* the EAT has confirmed that a significant pay cut would be a repudiatory breach of contract grounding a constructive dismissal even if the employer has good reasons to cut pay. This will be a breach of an express term of the employee's contract and also, possibly, a breach of the implied duty of trust and confidence.

In *City of York v Grosset*, the Court of Appeal has ruled that a dismissal was discriminatory even though the employer did not at the time know about the link between the disability and the misconduct.

Continuing the "gig economy" line of cases, the EAT has, in *Addison Lee Ltd v Gascoigne* upheld the decision of an employment tribunal that a cycle courier was a worker and so entitled to paid annual leave.

Finally, may I remind you of our forthcoming events:

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

- **Recent Developments in Whistle-blowing Protection**
  Breakfast Seminar, 7th August 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, Hull 20th June 2018
  For more information or to book

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BAILII

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Was it reasonably practicable for an employee to present a claim for unfair dismissal in time, when erroneous ACAS advice caused the delay?

No, held the EAT in *DHL Supply Chain Limited v Fazackerley*.

The Claimant was dismissed for gross misconduct effective from 15th March 2017. He took advice from ACAS via its helpline. The advice was to appeal and to exhaust the internal appeal process. But through no-one's fault the appeal hearing did not take place until 22nd June 2017. Shortly after that date, the Claimant took advice and commenced proceedings by lodging an ET1 on 19th July 2017. By then it was out of time.

The advice given by ACAS might not have been erroneous in the broad sense in that it is good advice to exhaust internal appeal procedures (which are normally dealt with speedily). However, as an unqualified statement, without regard to limitation periods, it was wrong. Employment Judge held that it was therefore not reasonably practicable in those circumstances for the claim to have been brought within the statutory period.

The EAT agreed. The EAT pointed out that a different judge might (legitimately) have taken a different view. But the Employment Judge had engaged with the relevant legal authorities. So to disturb the Employment Judge's decision, it would have to be shown it was perverse. And perversity involves a high hurdle which had "not nearly been reached" in the present case.

Of course, it is well established that if an employee engages a solicitor and fails to meet the time limit because of the solicitor's negligence, this will (almost always) defeat an attempt to argue that it was not reasonably practicable to make a timely complaint. The position is different where the advice is from a government agency (such as, back in the day, Department of Employment officers) or even a CAB adviser where an holistic view may be taken.

In the present case, it was not reasonably practicable under the circumstances to present the claim in time. Once the Claimant realised his rights, he took further advice and lodged his claim promptly. Therefore the claim could proceed.

Disciplinary process was not a "last straw" entitling the employee to resign and claim constructive dismissal

In *Kaur v Leeds Teaching Hospitals NHS Trust*, the Court of Appeal reviewed the so-called "last straw" principle in constructive dismissal claims.

The "last straw" doctrine applies where a claimant resigns in response to a series of breaches of contract or a course of conduct by their employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence.

In this case, the Court of Appeal confirmed that a "last straw" act which is not a fundamental breach of contract in itself, can, in some circumstances, revive an employee's right to resign even where considerable time has gone by and the employee might have affirmed the contract by continuing to work for the employer.

Ms Kaur was a nurse working for Leeds Teaching Hospitals NHS Trust. She was subject to disciplinary proceedings following an altercation with another employee. She received a final written warning. Her appeal against this sanction was dismissed and she resigned the following day.

Ms Kaur brought a claim for constructive unfair dismissal to an employment tribunal. She argued that a series of events, including complaints about her performance, the altercation with another member of staff, the conduct of the disciplinary proceedings and the appeal

proceedings were cumulatively a breach of the implied term of mutual trust and confidence. The handling of the disciplinary and appeal processes was, she claimed, the "last straw" entitling her to resign.

The employment tribunal struck out her claim at a preliminary hearing as having no reasonable prospect of success. The tribunal did not hear any oral evidence but considered documentary evidence of the disciplinary investigation, disciplinary hearing and appeal proceedings. The claimant appealed to the EAT. The appeal was rejected at the sift stage and then dismissed at an oral rule 3(10) hearing.

The Court of Appeal agreed and clarified the questions a tribunal should address when considering a constructive dismissal claim as follows:

1. What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation?
2. Has he or she affirmed the contract since that act?
3. If not, was that act or omission by itself a repudiatory breach of contract?
4. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of mutual trust and confidence?
5. Did the employee resign in response (or partly in response) to that breach?

The Court of Appeal held that the employment judge was entitled to be satisfied that there was no reasonable prospect of the claimant showing that the employer's handling of the disciplinary and appeal processes could form the "last straw" in a cumulative breach. The tribunal found that the processes had been properly handled. The so-called "last straw" act was therefore "innocuous" and could not together with previous acts constitute a repudiatory breach of contract (following *London Borough of Waltham Forest v Omilaju* [2004] EWCA Civ 1493, [2005] ICR 481).

The Court of Appeal clarified that there is no need for any separate consideration of a possible previous affirmation of the contract because the "last straw" can revive the right to resign. It was not relevant to the decision that Ms Kaur had continued to be employed for 15 months following her initial concerns raised under the Dignity at Work Policy.

It is relatively rare for an employment tribunal to strike out a claim where there is a dispute about primary facts. This is because in many cases it is difficult to conclude that there are no reasonable prospects of success without hearing oral evidence. However in this case, the employment judge was satisfied that the disciplinary process had been properly followed and could not be the "last straw" in a series of acts capable of breaching the employment contract.

Employers should be aware that it is possible for an employee to claim that an act or omission by the employer is in effect a dismissal because it is linked to former acts or omissions. For example, a non-compliant grievance or disciplinary appeal process could be the "last straw" grounding a constructive dismissal claim.

Summary dismissal fair because a series of acts undermined employer's trust and confidence in employee

In *Mbubaegbu v Homerton University Hospital NHS Foundation Trust*, the EAT held that a dismissal for a series of acts was fair as it was within the band of reasonable responses, even though none of those acts on its own amounted to gross misconduct. However, the case was remitted to the employment tribunal to reconsider whether the claimant had been wrongfully dismissed.

Mr Mbubaegbu was a consultant orthopaedic surgeon with 15 years' service for his NHS employer. He was clinical audit lead for his department. New rules were brought in to his

department following dysfunctional interpersonal relationships and concerns that clinical audits were not being properly carried out. The consultants were informed that compliance with the new rules would be monitored. Non-compliance was alleged against Mr Mbubaegbu and some of his colleagues. These allegations were investigated and disciplinary action, short of dismissal, was taken against other consultants. Further investigations were carried out and it was decided that disciplinary action should be taken against Mr Mbubaegbu in relation to 17 allegations. He was summarily dismissed.

Mr Mbubaegbu was not suspended from practice during the investigations. At the time of his dismissal, he had been working for a period of 16 months without any further concerns being reported.

Mr Mbubaegbu brought claims of unfair dismissal, wrongful dismissal (for his notice pay) and race discrimination. The employment tribunal dismissed all of his claims. It found by a majority that it was within the band of reasonable responses for the employer summarily to dismiss on the basis that the employer reasonably believed: the employee's behaviour had at times been grossly careless; this had led to increased risks to patients; that the employee had been wilful in his non-compliance; and that he could not be relied upon to change his behaviour in the future. The dissenting member expressed her view that the decision to dismiss was not within the band of reasonable responses because a number of the allegations were trivial and the tribunal had failed to take into account the evidence that the claimant had continued to work for some time without any further reports of non-compliance since he had been notified of the disciplinary process.

The EAT agreed that the dismissal was fair. It clarified that gross misconduct is conduct which undermines the employer's trust and confidence in the employee (*Neary v Dean of Westminster* [1999] IRLR 288). It noted that there is no authority to suggest that there must be one single act which amounts to gross misconduct to justify summary dismissal and that it is possible for a series of acts which demonstrate a pattern of conduct to be sufficiently serious to undermine the relationship of trust and confidence. It made clear that this can be the case even where none of the acts in the series would be gross misconduct on its own.

However, the EAT held that the tribunal had not properly considered the wrongful dismissal claim and remitted this claim to the same employment tribunal. The EAT highlighted that the tests for unfair and wrongful dismissal are different. For unfair dismissal, the tribunal must consider whether the decision to dismiss was within the band of reasonable responses of a reasonable employer. For wrongful dismissal, the tribunal must make its own decision on whether the employee committed a fundamental breach of contract.

The EAT also had to consider the implications of a General Medical Council decision that no regulatory action should be taken against Mr Mbubaegbu. The claimant had asked the tribunal to reconsider its judgment on the basis of the GMC's decision. The tribunal rejected this application.

The EAT upheld the employment tribunal's decision. It pointed out that the tribunal and the GMC had to consider different legal questions and stated that it would only be in rare cases where reconsideration would be appropriate following the decision of a professional regulator.

EAT considers whether employer named in contract was the real employer

In *Dynasystems for Trade & General Consulting Ltd and others v Moseley*, the EAT upheld a decision that an employee had in reality never been employed by the Jordanian company named in his employment contract and that he had been employed from the outset by an associated UK company.

Mr Moseley was an electrician. He signed an employment contract in which the Jordanian company was named as his employer and worked for four years until he was dismissed. During that time he did no work out of the Jordanian office (which in fact was not a functioning office) and was located at all times in London. He was line managed by a director of the UK company. His salary had been negotiated with his line manager but was paid by the Jordanian company. Soon after he commenced work, the UK company provided him with a letter to assist him with a passport application which stated that he was employed by the UK company.

Mr Moseley brought claims for unfair and wrongful dismissal which named three group company respondents. The employment tribunal had to determine which of the respondents was the true employer. It found that the employment contract did not reflect the intentions of the parties or the reality of the situation from the outset. The employment judge rejected the argument that Mr Moseley had been instructed to work for an associated company in accordance with provisions in the employment contract. She found that Mr Moseley had in reality only ever been instructed by the officers and employees of the UK company.

The EAT agreed. It made clear that this case was focused on identifying the parties to the original contract and that case law on agency workers who claimed to be employed by the end user was not relevant to this question. The EAT held that the tribunal had been entitled to consider events some four years after the employment contract was entered into to determine what was initially agreed. The EAT noted that there was a "seamless stream of events" all of which demonstrated that at no stage was the Jordanian company the employer and at no stage did the associated companies behave as if it were.

Appeal cases which consider the true identity of an employer in these circumstances are rare. As the EAT implied, where group companies are involved, there may be little practical point in appealing the determination of a tribunal. This judgment is useful, however, as it makes clear that the tribunal will approach this question on the principals of *Autoclenz v Belcher and others* [2011] UKSC 41. That is, where a written term of the employment contract (here the name of the employer) does not reflect the true nature of the agreement between the parties, that written term can be disregarded. The tribunal will then go on to consider all relevant evidence, including the written terms, the parties' expectations and intentions and how the parties conducted themselves in practice.

Significant pay cut will be a repudiatory breach grounding a constructive claim, even if employer had good reasons to cut pay

In *Mostyn v S and P Casuals Ltd*, the EAT held that an employer can never have reasonable or proper cause for breaching a core express term of the employment contract or breaching the implied term of trust and confidence by imposing a significant unilateral pay cut on the employee.

Mr Mostyn had worked as a salesman for S and P Casuals (S and P) for nearly 11 years. When Mr Mostyn started his employment with S and P his salary was £65,000. However, in 2010, he had reluctantly agreed to a pay cut to £45,000. During this time, Mr Mostyn was said to have maintained good sales figures. However by 2014, Mr Mostyn's sales had fallen dramatically. Like all staff, Mr Mostyn was sent monthly emails which showed that his sales figures were down.

In October and November 2015, all staff had individual meetings where they were told that S and P needed to save money. Whilst no further action was taken at this point, Mr Mostyn was later sent a letter inviting him to attend a meeting to discuss his performance, which said that a possible outcome of this meeting was that his pay would be cut.

During the meeting, Mr Mostyn presented several arguments for why his sales had declined, including that there was an issue with the standard of supplies. The meeting was not followed

up. A couple of weeks later, Mr Mostyn received an email in error in which one of his colleagues told another that Mr Mostyn "is costing us on a daily basis. Get it done tomorrow…". Mr Mostyn wrote to S and P the next day complaining about the 'disciplinary meeting' he had had with S and P, stating that he could not consider the salary reduction offered by S and P from £45,000 to £25,000. In his letter he said that he considered that his employment contract had been breached. S and P treated this letter as a grievance which was investigated but not upheld. The employer confirmed that Mr Mostyn's pay would be cut as planned.

Mr Mostyn resigned on 31 March 2018 with immediate effect. Mr Mostyn said that the salary reduction was so significant that he considered that the express term of his contract dealing with salary had been breached and that S and P's behaviour meant that he could have no trust and confidence in their actions (which was a breach of the implied term).

Mr Mostyn claimed constructive unfair dismissal, amongst other claims. An employment tribunal held that Mr Mostyn had resigned because of the breach of the implied term; however this breach could be justified as S and P had reasonable and proper cause for imposing the salary reduction and breaching the implied term of trust and confidence. The tribunal therefore dismissed Mr Mostyn's claim.

The EAT disagreed. The EAT considered that "there is a real danger" if tribunals were to consider whether a respondent has reasonable and proper cause for conduct which amounts to a repudiatory breach of contract. The EAT noted that the tribunal had appeared to confuse the reasonable and proper cause test and the band of reasonable responses test for unfair dismissal. On the question of whether the dismissal was unfair, the EAT held that the tribunal had been wrongly influenced by their decision in relation to the reasonable and proper cause test and had not properly addressed the question of whether the employer had acted reasonably in treating the employee's capability as sufficient reason for dismissal. This question was remitted to a fresh tribunal.

The case acts as a cautionary tale to employers who are seeking to make changes to their employees' employment contract without employee consent, particularly where these changes are to fundamental provisions such as salary. The imposition of a significant pay cut will entitle the employee to treat the contract as breached, to resign and bring a claim for constructive dismissal. Employers should seek agreement from employees to a fundamental change of contract. Where employees do not agree, it is important to follow a fair process including consultation, as imposing the change will be a dismissal and re-engagement on new terms.

Discrimination arising from disability: dismissal was discriminatory despite employer's lack of knowledge of link between disability and misconduct

In *City of York Council v Grosset*, the Court of Appeal has upheld a finding of discrimination arising from disability where the employer did not know about the link between the disability and the misconduct at the time of the dismissal.

Mr Grosset was Head of English at a maintained school in York. He suffers from cystic fibrosis and it was accepted by the employer that his condition is a disability for the purposes of the Equality Act 2010. His condition requires a daily three hour exercise regime to clear his lungs. His workload at work increased and he suffered stress which worsened his condition. Mr Grosset showed an X-rated horror film, "Halloween", to a class of 15 and 16 year olds, some of whom were particularly vulnerable. He was suspended and dismissed for gross misconduct. At the time of the decision to dismiss, the employer did not believe the misconduct to be caused by the disability.

Mr Grosset brought claims for unfair dismissal and various discrimination claims, including

discrimination arising from disability and a failure to make reasonable adjustments. The dismissal decision was found to be fair by an employment tribunal. Based on the evidence available to the employer at the time (which did not suggest a link between the misconduct and the disability), the decision to dismiss was within the band of reasonable responses.

However, the tribunal found that Mr Grosset had been discriminated against as a consequence of something arising from his disability. An employer can defend this claim if it can show that it did not know or could not reasonably be expected to know that the claimant was disabled. Here, the employer conceded that it knew of the disability. The tribunal found that the council had dismissed Mr Grosset because of his misconduct and that misconduct arose from his disability. It found that the council could not justify its decision to dismiss as a proportionate means of achieving a legitimate aim. The tribunal also found that the council had failed in its duty to make reasonable adjustments.

The EAT agreed. It reiterated the two stage test in discrimination arising from disability cases as set out in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14. The tribunal will consider: whether the claimant's disability caused or had the consequence of, or resulted in, "something"; and whether the employer treated the claimant unfavourably because of that "something".

The EAT noted that the evidence before the tribunal showed that the cystic fibrosis caused the misconduct and it was irrelevant that the employer did not have evidence showing this link at the time of the unfavourable treatment. It was also clear that the employer treated Mr Grosset unfavourably (by dismissing him) because of the misconduct (indeed that was the employer's case in defence of the unfair dismissal claim).

The Court of Appeal agreed. It made clear that the tribunal should examine the subjective state of the decision-maker's mind when considering whether the claimant had been treated unfavourably because of the "something" arising in consequence of disability. However, what was in the employer's mind was not part of the consideration of whether the "something" arose in consequence of the disability. This is an objective assessment. The Court of Appeal pointed out that if this were not the case, the defence that the employer did not know about the disability would be redundant.

On the question of whether the dismissal was justifiable as a proportionate means of achieving a legitimate aim, the Court of Appeal commented on the importance of the tribunal's finding that Mr Grosset would not have suffered the same degree of stress if the employer had not failed in its duty to make reasonable adjustments.

Employers should be aware that different tests are applied by the tribunal when assessing whether someone has been unfairly dismissed and whether they have been discriminated against. Discrimination awards are uncapped in the Employment Tribunal, whereas compensatory awards for unfair dismissal are capped at the lower of £83,682 or 12 months' gross pay.

When undertaking a disciplinary process with a disabled employee, it is important to seek medical evidence on the question of whether the misconduct could be linked to the disability. However, as this case shows, even where medical evidence states there is no link, there is a risk that later evidence of a link could found a discrimination arising from disability claim.

The tribunal award in this case was in the region of £650,000 as it included significant career loss and pension liabilities. It has been reported that the Council will not attempt to appeal this decision in the Supreme Court.

Cycle courier was a worker and entitled to paid statutory holiday

In *Addison Lee Ltd v Gascoigne*, the EAT upheld the decision of an employment tribunal that a

cycle courier was a worker and so entitled to paid annual leave.

Mr Gascoigne worked as a cycle courier for Addison Lee Ltd for nine years. His contract described him as an independent contractor. It stated that there was no obligation on the company to offer him work and no obligation for him to accept work when offered but that that he would be deemed to be available for work when he was logged into the company palmtop computer or app.

Mr Gascoigne brought a claim for holiday pay to an employment tribunal. The tribunal had to determine whether he was a worker and so entitled to paid annual leave. The tribunal found that the employment contract did not reflect the reality of the situation and that he was a worker rather than a self-employed contractor. This was because he was obliged to perform work personally for the company and was under its control. He was not in business on his own account but carried out work for wages. The tribunal found that, while logged into the app, there was a contract in place with mutuality of obligation: the company was obliged to provide work and the courier to accept it during logged in periods.

The EAT agreed. It stated that the question of whether there was mutuality of obligation was one of fact and that the tribunal had correctly concluded from its factual findings that a contract existed with the necessary mutuality of obligation while Mr Gascoigne was logged in to the app. Importantly, the tribunal found that there was no right to send a substitute when the courier was unable or unwilling to perform the work. Addison Lee couriers had to pass criminal record checks and so they had to perform the work personally.

Employers should be aware that a so-called self-employed contractor or consultant may be found by a tribunal in reality to be a worker, giving rise to employment rights such as holiday leave and pay, limits on working time and minimum rest breaks, the National Minimum Wage and pension autoenrollment. There will also be PAYE and NICs obligations where worker status is found for tax purposes. HMRC provides an online tool to assist employers in determining employment status.

In some cases, the "contractor" may be found to be an employee where there is a high degree of control by the employer, the employee is integrated into the business and there is an obligation to provide and accept work. In such cases, further rights will apply, such as statutory notice, statutory redundancy pay and the right to bring an unfair dismissal claim.

A true contractor will be in a client/customer relationship with the company, have bargaining power in the relationship and have an almost unlimited right to send someone else to perform the work.

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