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Employment Law BULLETIN

Welcome to our November employment law bulletin.

This month we cover a variety of cases and other developments.

In *MBNA Limited v Jones* the EAT considers whether inconsistency of treatment automatically makes a dismissal unfair.

In *Underwood v Wincanton Plc* the EAT considered whether an allegation of a breach of contract by an employer raised by four employees could be in the public interest and so qualify as a protected disclosure for the purposes of the whistleblowing legislation.

In *Bethnal Green and Shoreditch Education Trust v Dippenaar* the EAT upheld a finding of unfair dismissal by the Employment Tribunal but overturned its finding of indirect discrimination as no discriminatory practice had been established by the Claimant on the facts.

In *Monmouthshire County Council v Harris* the EAT considered what issues an employment tribunal should take into account when deciding whether a dismissal for disability related absence is fair in all the circumstances.

In Science *Warehouse Limited v Mills* the EAT considered whether conciliation has to start again when a pre-existing valid employment tribunal claim is amended to add a new cause of action.

On the European front, the European Court has, in *Ferreira da Silva e Brito & Others v Estado Português*, decided a classic business transfer case arising out of the collapse of the charter airline, Air Atlantis, and the taking over of its routes by TAP. And there are two new requests for a preliminary ruling from the ECJ on the question of whether there is a transfer of an undertaking, one from Spain and one from Sweden.

Finally, the long-running saga of when consultation about redundancies should have begun when the United States of America shut down a military base in Hampshire may soon be resolved. The Supreme Court has, in *USA v Nolan*, ruled that the British courts have jurisdiction to hear the merits of the claim for breach of the redundancy information and consultation obligations on the closure of that military base in the UK, notwithstanding the USA was a sovereign state engaged in the exercise of public powers.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

What's new in employment law?
Highlights of 2015 plus your 2016 HR planner

- Breakfast Seminar, 8th December 2015

And in conjunction with ACAS

TUPE: Making Sense of the Law and Business Process

- A full day conference, **Birmingham**, 10th December 2015

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Wherever you see this logo more detail is available on the BAILII website

1: New guidance from BIS on the use of zero hours contracts

In October, the Department for Business, Innovation and Skills published guidance for employers on the use of zero hours contracts.

The guidance explains that zero hours contracts are contracts under which the worker has no guaranteed hours. The employer has no obligation to provide work, and the worker may turn down the work when offered. Everyone who works under a zero hours contract will have the right to the National Minimum Wage, holidays, rest breaks and protection from discrimination (workers' rights).

Employers are advised in the guidance that a person working under what appears to be a zero hours contract may have the employment status of a "worker" or an "employee", depending on the reality of the working situation. Some people working under such a zero hours contract may have acquired rights as an employee. This might be the case where, in reality, the employee works regular hours and has a reasonable expectation that work will be offered so that a mutual obligation to provide and accept work exists. Employees benefit from, amongst other things, protection from unfair dismissal, statutory sick pay, statutory redundancy pay and the right to request flexible working.

Situations where zero hours contracts might be appropriate are set out in the guidance, for example on setting up a new business, carrying out seasonal work or work for special events. The guidance indicates that zero hours contracts may be appropriate where there are irregular or inconsistent demands for staff.

Employers are advised by BIS that zero hours contracts might not be appropriate where regular hours of work are required over a long period and that they will only rarely be appropriate to run the core business of an organisation.

The guidance gives alternative ways of structuring the contract including offering overtime to permanent staff, using part-time, fixed-term or agency workers. It suggests that annualised hours contracts could be used where there are fluctuations in demand through the year.

Best practice according to the guidance includes:

- ensuring contracts are transparent and clear about employment status;
- including in the contract a clear process for offering work and stating that work need not be accepted every time it is offered;
- planning ahead so that workers can make necessary arrangements; and
- avoiding the cancellation of work at short notice and having a policy for compensating the worker where losses are incurred (for example childcare costs).

The guidance also refers to the recent change to the law making exclusivity clauses in zero hours contracts unenforceable. It makes clear that employers must allow individuals to take work with other employers. A worker can effectively ignore any clause which prohibits work for another employer, or requires the worker to obtain the employer's consent before working for others.

The guidance is available ***here***.

2: Public and private sector commitment to “name-blind” recruitment procedures to avoid discrimination

The Prime Minister announced at the end of October that key public and private sector organisations have committed to recruiting graduates on a “name-blind” basis in an attempt to avoid unconscious bias. In his recent speech to the Conservative Party Conference, David Cameron referred to a number of research projects which indicate that people with “white-sounding” names are nearly twice as likely to get call-backs for jobs than people with “ethnic-sounding” names.

The organisations which have already signed up to the scheme currently employ 1.8 million people and include the Civil Service, Teach First, HSBC, Deloitte, Virgin Money, KPMG, the BBC, the NHS, learn direct and local government. Some of these have committed to name-blind procedures for other external applications, including those for apprenticeships. Deloitte will also introduce the practice of redacting school and university names from applications for interview purposes.

The Chartered Institute of Personnel and Development has stated that it will aim to promote name-blind recruitment procedures as standard in its training and development courses, suggesting that this approach to recruitment will become more common across all sectors in the future.

3: Does inconsistency of treatment make a dismissal unfair?

Not necessarily said the EAT in ***MBNA Limited v Jones***.

Two employees were at a corporate social event prior to which they had been warned that normal standards of behaviour and conduct would apply. But the two began drinking and fell out. Mr Jones punched a Mr Battersby in the face. In turn, later on, after the event, Mr Battersby texted Mr Jones on a number of occasions threatening, inter alia, to “rip your f…ing head off”. He never carried out his threats.

A disciplinary investigation ensued with charges brought against both. The outcome was that Mr Jones was dismissed for his behaviour but Mr Battersby was given a final written warning.

In the unfair dismissal case brought by Mr Jones the employment tribunal considered his dismissal to be unfair because of the inconsistency of treatment between the two. On appeal the EAT overturned this decision. The employment judge had not applied the test set out in section 98(4) of the Employment Rights Act 1996, which requires recognising that there may be a range of reasonable ways in which an employer may react to the circumstances which give rise to the dismissal. He had also failed to apply the test in *Hadjioannou v Coral Casinos Limited* [1981] IRLR 352, and in particular failed to consider whether there was a decision made in truly parallel circumstances which made it unreasonable for the employer to dismiss the employee.

In the present case the employment judge had not expressly, for the purposes of a disparity argument, drawn a distinction between a deliberate punch in the face at what was designated to be a workplace and a threat afterwards that was never carried out. If he had, he would have been bound to conclude the circumstances were not the same.

4: European Court of Justice decides a classic business transfer case

In ***Ferreira da Silva e Brito & others v Estado Português*** the European Court considered the winding up of Air Atlantis (referred to in the judgment as AIA) and the taking over of its activities by its major shareholder, TAP. TAP disputed that there was a transfer of an undertaking. But TAP took over the routes previously served by Air Atlantis and used significant assets, including four aeroplanes. TAP also assumed responsibility for the payment of charges under the leasing contracts relating to those aircraft and took over the office equipment which belonged to Air Atlantis and which had been used at Air Atlantis' premises in Lisbon and Faro. TAP also took on a number of former Air Atlantis employees.

The Portuguese Court had taken the view that TAP had simply taken over Air Atlantis' licence to operate. The European Court however considered that there had been a transfer of an undertaking.

The Court reiterated its incremental jurisprudence that the Acquired Rights Directive is applicable where, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the business, who incurs the obligations of an employer towards employees of the undertaking (see recently, *Amatori and Other* (Case C-458/12)).

The Court stated (para 25):

> "According to settled case law, the aim of Directive 2001/23 is to ensure continuity of employment relationships within an economic entity irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of that Directive is, therefore, the fact that the entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed."

In order to determine whether that condition is met it is necessary to consider, as a whole, the facts characterising the transaction concerned, depending on the type of undertaking or business concerned, which might involve consideration of whether tangible assets, intangible assets, the majority of employees, the circle of customers and so forth are transferred. The importance to be attached to each criterion will necessarily vary depending on the type of activity concerned.

Of paramount importance was that this case concerned the air transport sector. So the transfer of the assets necessary to operate Air Atlantis' business was crucial. In this regard the Court referred to the authority of *Oy Liikenne* (Case C-172/99), a case involving the bus transport sector where a high degree of importance was attached to whether the assets of the business, namely the bus fleet, were transferred. Thus:

> "In that regard the order for reference indicates that TAP replaced AIA in the aircraft leasing contracts and actually used the aircraft concerned, which shows that it took over assets that were essential for pursuing the activity previously carried on by AIA. In addition, a certain amount of other equipment was taken over."

Secondly, it was immaterial that Air Atlantis lost its autonomy following the TAP takeover. Following the case of *Klarenberg* (Case C-446/07) the Court confirmed that a loss of autonomy does not prevent a TUPE transfer. This is provided that the various elements of production remain the same, and are used by the new employer to carry out the same or similar activities.

5: Supreme Court rules that there is jurisdiction to hear the merits of the claim for breach of the redundancy information and consultation obligations in *USA v Nolan*

Employment lawyers have been waiting for some years for a definitive view on when, exactly, the duty on employers to inform and consult on multiple redundancies under section 188 of TULR(C)A commences. Is it, for example, on a closure of the business, at the point when the employer is considering closing the business or, alternatively, is it only when consequential redundancies are proposed following that closure? In *UK Coal Mining Limited v National Union of Mineworkers* (Northumberland Area) (EAT/0397/06/R9) the EAT (Elias P as he then was) held that there was a duty on employers to consult on the business reasons for closing the business (where redundancies would be inevitable), not just on the consequential proposal for redundancies which followed.

Subsequent to this, the European Court handed down guidance on this issue following a referral from the Supreme Court of Finland in the case of *Akavan Erityisalojen Keskuslitto AEK ry v Fujitsu Siemens Computers Oy* (Case C-44/08; [2009] IRLR 944). The ECJ in that case, in considering when the duty to consult arises, noted (in agreement with the UK government) that should the duty to consult occur *prematurely*, this could lead to results that would be contrary to the aim of the Directive, by creating employee uncertainty and by reducing employer flexibility. On this basis, the European Court held that the consultation procedure should be commenced by an employer "once a strategic or commercial decision compelling him to contemplate or plan for collective redundancies has been taken".

But the decision is far from crystal clear. And it seems, in some respects, at odds with UK law (in particular *UK Coal Mining Limited v NUM*).

So an ideal opportunity arose for a clearer view in *United States of America v Nolan* [2014] EWCA Civ 71. This case concerned a claim on behalf of civilian employees at a US Military base in the UK that they had not been consulted soon enough for the purposes of section 188 when, on a decision to close the base, this led to multiple redundancies. The decision to close the military base had been made by the Secretary of the US Army in early 2006. The British authorities were informed in April 2006. The commanding officer informed the workforce at that time. Consultation about the redundancies did not commence until 5th June 2006. The Court of Appeal referred the issue of when consultation should have begun to the European Court.

It is important to note that, in this case, the United States did not plead sovereign immunity and submitted to the proceedings, although it was "common ground that it could successfully have done so" (see Lord Mance in the Supreme Court at para 3).

In *United States of America v Nolan* (Case C-583/10) Advocate General Mengozzi considered that an employer who is contemplating collective redundancies must begin consultations with workers' representatives in good time with a view to reaching an agreement. However the obligation should not be triggered prematurely (see *Akavan*). *Akavan* and *Nolan* both concerned cases where the employer who was proposing a strategic or operational decision about closure (in *Nolan*, the US Army) was not the same as the employer who was proposing the consequential redundancies (in *Nolan*, the commanding officer of the base in the UK).

So in the Advocate General's view the Directive should be interpreted as meaning that an employer's obligation to conduct consultations with workers' representatives arises when a strategic or commercial decision which compels him to contemplate or plan for collective redundancies is made by a body or entity which controls the employer. It is for the national court to identify when the strategic decision, which exerted such a compelling force on the employer, for the purposes of triggering the consultation obligation, occurred.

The litigation however took a turn for the worse before the European Court itself ([2012] IRLR 1020) where a jurisdiction point was taken by the Court.

The European Court itself held that although UK domestic law, contained in section 188, does *not* exclude public administrative bodies or establishments governed by public law and applies to all, Article 1(2)(b) of the Collective Redundancies Directive 98/59 *does* exclude such bodies.

The Court therefore held that whilst it was in the interests of the European Union to secure the uniformity of interpretations of an EU instrument and national laws which transpose it, this was not possible where, as in the present proceedings, the EU measure expressly provides an exclusion from its scope. So in a nutshell the European Court simply did not have jurisdiction to respond to the question referred by the UK Court of Appeal as the United States Army was a public administrative body or an establishment governed by public law.

On the return of the case to the Court of Appeal [2014] EWCA Civ 71, however, it was held that, on a proper construction of section 188 of TULR(C)A 1992, the statutory wording of the domestic legislation was *wider* than the directive. In particular it was not appropriate to imply an exemption for a sovereign state such as the United States engaged in the exercise of public powers. In other words the United States (having failed to claim state immunity) was subject to section 188. An appeal was made to the Supreme Court on this jurisdictional point.

The ***Supreme Court*** [2015] UKSC63 has now upheld the Court of Appeal and agreed that section 188 of TULR(C)A applied to the redundancies made at the US Military base in the UK. Although the USA would have been entitled (see above) to seek state immunity against the jurisdiction of the UK courts it had waived its rights to do so by participating in the proceedings.

Lord Mance gave the leading judgment with whom Lord Neuberger, Lady Hale and Lord Reed agreed (Lord Carnwath dissenting). In Lord Mance's opinion (para 14) it is a cardinal principle of European and domestic law that domestic courts should construe domestic legislation intended to give effect to a European Directive so far as possible (also as far as they can do so without going against the 'grain' of the domestic legislation) consistently with that Directive. But where a Directive allows a Member State to go further than the Directive requires there is no imperative to achieve a 'confirming' interpretation. Lord Mance comprehensively reviewed the authorities in this area. And the fact that the US Secretary of Defense and US Secretary of the Army and Washington would have been a foreign state entitled to rely on state immunity was a factor of relevance when considering whether, objectively, TUL(C)RA should be read as containing any implied limitation to exclude public administrative bodies or establishments governed by public law. Finally, the argument that the redundancy obligations as finally drawn were ultra vires section 2(2) of the European Communities Act was rejected.

The case has now been referred back to the Court of Appeal to rule on the substantive question of when, in this case, consultation should have begun. In this regard it is hoped that *issues such as any conflict between the domestic authority of UK Coal Mining Limited v National Union of Mineworkers* (Northumberland Area) and the ECJ decision in *Akavan* will be resolved. It is unfortunate that this will be undertaken without the guidance of the European Court.

6: Two new requests for a preliminary ruling by the European Court on transfers of undertakings

There have been two new requests for rulings from the European Court on transfer issues, one from Spain and one from Sweden.

In *Confederación Sindical ELA, Juan Manuel Martínez Sánchez v Aquarbe S.A.U., Consorcio de Aguas de Busturialdea* (Case C-118/15) the Court will be asked to consider whether a public sector body may take a service previously contracted out back in house without assuming responsibility for the contractor's staff.

In *Unionen v Almega Tjänsteförbunden, ISS Facility Services AB* (Case C-336/15) the Court will be asked to consider whether after a year following a transfer of an undertaking and the application of a new collective agreement, the transferee must respect an employee's acquired service with the transferor, as provided for in the transferor's previous collective agreement.

7: A complaint relating to an individual's contract of employment may constitute whistleblowing

In ***Underwood v Wincanton Plc*** the EAT considered whether an allegation of a breach of contract by an employer raised by four employees could be in the public interest and so qualify as a protected disclosure for the purpose of the whistleblowing legislation.

Mr Underwood was employed by Wincanton as a HGV driver. He was dismissed and brought a claim for automatically unfair dismissal, alleging that he had been dismissed for whistleblowing. His claim referred to a letter sent by him and three colleagues raising concerns about the unequal distribution of overtime among haulage drivers at Wincanton. The claimant asserted that the allegations made in this letter qualified as protected disclosures.

Under section 43B of the Employment Rights Act 1996 (ERA) a disclosure will qualify for protection if, in the reasonable belief of the worker making the disclosure, it is in the public interest and meets one of six criteria. In this case, the claimant asserted that the disclosure was in the public interest and tended to show that the employer had failed to comply with its legal obligation (here the implied contractual obligation not to act arbitrarily, capriciously or inequitably).

Following a preliminary hearing and consideration of further submissions, the employment judge struck out the claim relating to whistleblowing as having no reasonable prospect of success, specifically because the disclosures in question could not be said to be in the public interest. The employment judge reasoned that the disclosures related only to a contractual dispute between employee and employer. He stated that this was not something which could directly or indirectly affect the public and determined that the claimant could therefore not have had a reasonable belief that the disclosure was in the public interest.

The EAT allowed the appeal by the claimant and remitted the whistleblowing claim to the Employment Tribunal to be heard along with the other claims.

The EAT found that the disclosures in question, even though unclear, could potentially be in the public interest and therefore the claimant could reasonably have believed this was so. Taking this into account, the EAT ruled that the claim should not have been struck out as it could not be said to have no reasonable prospect of success.

This decision followed the recent EAT judgment in *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* UKEAT/0335/14 which is listed for appeal to the Court of Appeal in October 2016. *Chesterton* involved a disclosure which purported to concern around 100 senior managers at the respondent company. The EAT commented in this case that a disclosure need not be in the interests of the public as a whole and suggested that it is at least possible for a matter concerning a contractual dispute between employee and employer to be in the public interest, even where the group of employees involved is "relatively small". This case also makes clear that the claimant's belief that the disclosure is in the public interest can be wrong, but the disclosure will still qualify for protection if that belief is reasonably held.

This decision seems at odds with the addition to the ERA in 2013 of the requirement that a qualifying disclosure be "made in the public interest". The addition was made with a view to ensuring that disclosures made as part of contractual disputes between parties would not be protected. This case, on the other hand, suggests that a small group of employees could potentially constitute a sufficient subset of the "public" to meet the public interest test. It should be noted, however, that the EAT made it clear that the factual context of each claim must be taken into account and the eventual outcome of the case will depend on the employment tribunal's decision when the case returns for a hearing on the merits.

8: Teacher's indirect age discrimination claim quashed on appeal due to in sufficient evidence to establish a PCP

In ***Bethnal Green and Shoreditch Education Trust v Dippenaar***, the EAT upheld a finding of unfair dismissal by the employment tribunal but overturned its finding of indirect age discrimination as no discriminatory practice had been established by the Claimant.

In order for indirect discrimination to be made out, the claimant must first prove the existence of a provision, criterion or practice (PCP). Once this is established, the claimant must then show that the PCP was applied to people not sharing the protected characteristic of the claimant; that the PCP put people sharing the claimant's protected characteristic at a particular disadvantage; and that the claimant suffered that particular disadvantage. Should the claimant be able to show this, the burden of proof will then shift to the respondent to show that the PCP was a proportionate means of achieving a legitimate aim.

Ms Dippenaar was a 39 year old teacher of physical education with 13 years' teaching experience. Her teaching was highly rated in both internal and external evaluations and there were no concerns about the performance of pupils in her charge. This changed after the appointment of a new Head of Faculty / Director of Learning who evaluated Ms Dippenaar as a poorly performing teacher. Feeling that she was being "managed out", Ms Dippenaar offered to leave and the Headteacher agreed that a fair reference would be provided but this agreement was not honoured by the Headteacher.

Ms Dippenaar brought a claim for unfair dismissal. She argued that she had been constructively dismissed and discriminated against on the ground of age as the school had pushed her out with a view to replacing her with a younger and less expensive teacher.

The employment tribunal found that the claimant had been unfairly dismissed. It determined that the employer had committed a repudiatory breach of contract by subjecting the claimant to an unjustified capability process and reneging on a promise to provide a fair reference. The tribunal was of the view that Ms Dippenaar had resigned as a consequence of this breach of the implied obligation of trust and confidence.

The tribunal determined that direct discrimination could not be made out as it was the claimant's case that she had been dismissed because she was at the top of the teacher's pay scale and not directly because of her age. It found, however, that the claimant had been indirectly discriminated against on the ground of age.

On appeal, the EAT upheld the finding of unfair dismissal, finding that the education trust had acted in a way which was likely to damage seriously the relationship of trust and confidence between employee and employer. However, the EAT overturned the finding of indirect discrimination. It found that the tribunal had inferred a practice of "replacing more experienced teachers with less experienced teachers" rather than establishing the existence of such a practice after examining the evidence on this point. The EAT stated that the tribunal had relied upon unclear statistical evidence along with witness evidence regarding "rumours" that more senior staff were likely to be replaced by less senior staff and that these were insufficient proof to establish the existence of a practice.

The EAT also found that the claimant had failed to show that the practice (if it existed) put other people in the same age group as the claimant at a particular disadvantage. It stated that the tribunal had wrongly used evidence of the claimant's disadvantage to prove that others sharing her protected characteristic were or would be disadvantaged.

This case also includes interesting comment on how far a tribunal can go in questioning the judgment of a professional in evaluating a colleague. The EAT stated that often such a judgment will not be justiciable and that the courts must always remain aware that they are "not Ofsted inspectors". However, in this case, the EAT stated that the employment tribunal was right not to abandon entirely an evaluative role. This was based on the existence of some evidence to support the view that the Head of Faculty's evaluation of the claimant's lessons was not honest or fairly reached.

9: What should the employment tribunal take into account when deciding if a dismissal for disability-related absence is fair in all the circumstances?

In ***Monmouthshire County Council v Harris*** the EAT ruled that the employment tribunal rightly took into account past failures to make reasonable adjustments, but wrongly failed to ask how long the employer could have been expected to wait before dismissing, given the pressures it was under at the time.

Mrs Harris was a Senior Education Welfare Officer employed by Monmouthshire County Council (the Council). She was known by the Council to be disabled, having depression, sinusitis, asthma and an underactive thyroid. Mrs Harris had been permitted to work from home following advice from Occupational Health. A new line manager did not support these arrangements and, after she was called into work by him for a meeting at short notice on a day on which she was supposed to be working from home, Mrs Harris raised a complaint about her line manager and went on sick leave. An Occupational Health report stated that Mrs Harris was unfit for work at that time but did not clearly indicate when she might be able to return to work. Following two meetings with a human resources officer at which the risk of dismissal was not clearly explained, a letter confirming dismissal was sent to Mrs Harris and her employment terminated at the end of July 2013. This decision was confirmed after an appeal.

Three medical reports (relating to Mrs Harris's unsuccessful application for ill-health retirement) were commissioned between June and October 2013. Each of these concluded that Mrs Harris would not be fit for work for the foreseeable future, but none of the reports went as far as stating that she would never be capable of work.

Mrs Harris brought claims for unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments and harassment relating to her disability.

The employment tribunal found that Mrs Harris had been unfairly dismissed and that her dismissal was discrimination arising from disability. The reasonable adjustment and harassment claims were found to be out of time. At the remedy hearing, the tribunal declined to make any reduction based on the probability that the claimant would have been dismissed in any event, had the unfairness or discrimination not occurred (a Polkey reduction). It stated that it could not speculate about what might have happened if the Council had continued to allow Mrs Harris to work from home.

On appeal, the EAT overturned both the finding of unfair dismissal and that of discrimination arising from disability. Her Honour Judge Eady also stated that she would have allowed the Council's Polkey reduction appeal.

In reaching its decision that the dismissal was fair, the EAT referred to the case of *BS v Dundee City Council* (2014) which sets out the approach to be taken by employers when deciding whether to dismiss in a case of long-term sickness. First, the question of whether the employer can be expected to wait any longer must be considered. Secondly, the views of the employee on the question of fitness to return to work should be taken into account. And thirdly, the medical position should be ascertained, although there is no requirement for the employer to pursue a detailed medical examination. The EAT stated that the tribunal had failed to consider all the pressures the Council was under at the time of the decision to dismiss.

The EAT found that Mrs Harris had been dismissed because of something arising from her disability (her sickness absence) but that the Council's action in dismissing her was a proportionate means of achieving a legitimate aim. It stated that the employment tribunal had failed to weigh the real needs of the Council against the discriminatory effect on the claimant. The tribunal had focussed too much on the Council's past failure to make reasonable adjustments when it refused to allow her to work from home. This obligation was not on-going at the time of the dismissal and the past failure should only have been considered as part of the background circumstances when deciding on the proportionality of the dismissal. According to the EAT, the tribunal failed properly to take into account the Council's legitimate aim of safeguarding public funds and mitigating the stress on the remaining Education Welfare Officers. The EAT was also clear that the claimant's medical condition had been properly ascertained at the time of dismissal and there was no need for the Council to await the later ill-health retirement medical reports.

Despite the fact that consideration of the remedy appeal was rendered unnecessary by the decisions on liability, Her Honour Judge Eady stated that she would have allowed the Polkey reduction appeal. She commented that the tribunal had failed to consider that a dismissal could potentially be fair even where the employer has caused or exacerbated the employee's incapacity (the approach approved in *McAdie v Royal Bank of Scotland* [2007] EWCA Civ 806).

10: When an ET claim is amended to add a new cause of action, is early conciliation required?

No, said the EAT in ***Science Warehouse Limited v Mills***.

Ms Mills resigned her employment with her employer whilst on maternity leave. She made various allegations under the Equality Act 2010 and went through early conciliation. No settlement was reached and ACAS issued an EC certificate.

The Claimant then presented an ET claim form (ET1) complaining of discrimination on account of pregnancy or maternity contrary to the Equality Act 2010. This was defended by the employer.

The employer also said in its ET3 that, had she not resigned, the Claimant would have been subject to an investigation and potential disciplinary action in relation to a conduct issue.

When the Claimant received that response, she made an application to amend her claim to include a complaint of victimisation in respect of the employer's allegation against her in the ET3.

The employer objected to the amendment on the basis that the Claimant had not gone through the early conciliation procedure in relation to that added claim.

The EAT held however that section 18A of the Employment Tribunals Act 1996 did not require that the EC process be undertaken in respect of each claim, as it used the broad terminology of "matter". When a Claimant had lodged a previously valid ET claim following an EC reference and was applying to amend to add a new, but related, claim, this was a matter for the ET's general case management powers and a fresh application for early conciliation was not necessary.

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