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Employment Law BULLETIN

Welcome to our October employment law bulletin.

In this issue we cover a number of interesting cases.

In *Inex Home Improvements Limited v Hodgkins* the EAT considered that a temporary lay off of employees did not stop a service provision change TUPE transfer.

In *Ramphal v Department for Transport* the EAT considered that an employer's decision to dismiss was flawed on the ground of excessive input by an HR support officer.

In *Federacion de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and another* the European Court has followed the Advocate General's opinion in deciding that the time spent travelling to the first assignment of the day and home from the last assignment of the day by a person who does not have a fixed place of work is 'working time' for the purposes of the Working Time Directive.

In *Hall v Chief Constable of West Yorkshire* the EAT considered the distinction between claims for direct discrimination on the ground of disability and those for discrimination arising from disability.

In *Flanagan v Liontrust Investment Partners LLP and others* the High Court has ruled that an LLP agreement between more than two members will not be terminated when a repudiatory breach by the LLP is accepted by a member of the LLP.

In *Thompson v London Central Bus Company Limited* the EAT has suggested that it may be possible to bring a claim under the Equality Act 2010 where the claimant alleges that he has been subject to a detriment because of someone else's protected act.

Our client briefing this month is on employee grievances.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

Managing Employment Risk Today

- A full day conference, **London**, 27th November 2015

And in conjunction with ACAS

Understanding TUPE: A practical guide to business transfers and outsourcing

- A full day conference, **Leeds**, 9th November 2015
- A full day conference, **Newcastle upon Tyne**, 10th November 2015

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1: Temporary lay off did not affect an organised grouping of employees for the purposes of a service provision change TUPE transfer

In *Inex Home Improvements Limited v Hodgkins & Others* the claimant employees worked on contracts which had been subcontracted to Inex, their employer, by another organisation. The work was released by the main contractor in tranches, each with its own works number. During November and December 2012 Inex completed works subject to work order no.8. No new order had been issued. It was anticipated that the next order would be issued in January 2013. Temporarily there was no work for the employees to do. They were employed under the terms of the Construction Industry Joint Council Working Rule Agreement which allowed for layoff. They were thus laid off and informed this was temporary pending the next order. However this expected order was given to another subcontractor. The employees claimed to transfer with that work. An employment tribunal had considered that the employment of the individuals could not transfer because immediately before the date of the service provision change they were no longer an organised grouping of employees. The employment judge's reasoning was that they could not be part of such a grouping because they were not working, having been temporarily laid off. If no work was being carried out, there could be no organised grouping as the activity had ceased.

The EAT (HHJ Serota QC) held that a temporary absence from work or cessation of work did not of itself deprive employees who had been involved in the relevant "activities" of their status as an organised grouping of employees.

The main point of interest in the case however is the judge's willingness to apply principles derived from case law on the construction of the Acquired Rights Directive notwithstanding that the service provision change rules did not derive from the ARD. He considered nonetheless a helpful analogy could be drawn from the cases on the ARD on temporary cessation of activities (see *Bork International a/s v Foreningen Af Arbejdsledere I Danmark* [1989] IRLR 41. It would of course be odd if the position of employees on a service provision change was actually **worse** than in relation to a business transfer.

HHJ Serota QC considered that case law on service provision change favouring the literal or plain meaning of interpretation of the provisions concerned could not have been intended to exclude the well recognised canons of statutory interpretation developed by English law. Prima facie, the legal meaning of an enactment, when applied to particular facts, is presumed to be that which corresponds to the literal meaning of the enactment in relation to those facts. But where an enactment is to remedy a particular mischief it is presumed that the courts are expected by Parliament to find a construction which applies the remedy provided in such a way as to address the mischief. This is the presumption that the court should find a construction which furthers every aspect of the legislative purpose. So regulation 3(1)(b) although not derived from European law, was still primarily intended to protect employment and avoid redundancy; and it could not have been intended that in any case where there was a temporary cessation of work, including temporary layoff, the organised grouping could lose its identity.

Accordingly, applying the European Court case law on temporary cessation of work or temporary layoff should not deprive employees from protection if there were a service provision change during the period of that temporary cessation.

2: High level of HR input into investigation report could lead to unfair dismissal

In ***Ramphal v Department for Transport***, the EAT set aside an employment tribunal's finding that a dismissal was fair due to significant input from the HR department into the report of the investigating officer.

This case concerned Mr Ramphal, an aviation security compliance officer working for the Department for Transport. Following an audit, an investigation was commissioned into Mr Ramphal's expenses claims and his use of a company credit card. The investigating officer (who also acted as the disciplinary officer) took advice from the HR team on the disciplinary process. He then produced a first draft of the investigation report, which contained criticisms of the employee alongside more positive comments that some of the employee's explanations were plausible and consistent. This version of the report concluded that the employee's actions amounted to misconduct, for which the sanction would be a final warning. Over the next six months, the draft report underwent several significant alterations in content as a result of communication between HR and the investigating officer. The final report made a finding of gross misconduct and recommended summary dismissal.

Mr Ramphal brought a claim for unfair dismissal. An employment tribunal found that the process was fair and the decision to dismiss was within the band of reasonable responses.

The EAT allowed Mr Ramphal's appeal. It made reference to the Supreme Court case of *Chhabra v West London Mental Health NHS Trust* [2014] ICR 194, which established that HR input into the disciplinary process should be limited to advice on employment law, procedure, and the clarity and presentation of reports. HR officers should **not** have an influence on decisions as to whether an employee is culpable and should **not** advise on appropriate sanctions in a particular case.

To achieve a fair disciplinary process leading to a fair dismissal on the ground of conduct, an employer must: believe the employee to be guilty of misconduct; have reasonable grounds for believing in the employee's misconduct; and those grounds must be based on a reasonable investigation. Following *Chhabra*, the investigation report must also be the work of the investigating officer and based on that officer's **own** investigations.

3: ECJ follows Advocate General's opinion on travel time and working time

In ***Federacion de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and another***, the European Court has decided that the time spent travelling to the first assignment of the day and home from the last assignment of the day by workers who do not have a fixed place of work is "working time" for the purpose of the Working Time Directive (the Directive).

The Directive defines "working time" as any time during which the worker is: working; at the employer's disposal; or carrying out activities or duties in accordance with national laws and/or practice.

The case concerned a group of security system technicians working for a Spanish company, Tyco. Before Tyco closed its regional offices in 2011, the technicians were required to pick up their vehicles and daily task list from the office before travelling to the first assignment of the day; a technician's working time was calculated from the time of arrival at the regional office until the time the vehicle was dropped off at the office at the end of the day. Following the closure of the regional offices, working time was calculated from the time the technician arrived at the first assignment of the day to the time the technician completed his last assignment of the day. Travel to and from these assignments (which sometimes covered a distance of over 100km) was not included as working time.

The ECJ agreed with the Advocate General's opinion that this travel time met the three criteria for working time set out in the Directive. First, travelling is an integral part of being a peripatetic worker, meaning that the technicians are "working" when travelling. Secondly, the employer has control over the order of assignments and can remove assignments from or add assignments to the task list, suggesting that the technicians are "at the employer's disposal". And thirdly, travel to and from these assignments constitutes the technicians "carrying out their activities and duties", particularly because the first and last journeys of the day were counted as working time before the closure of the regional offices.

The ECJ commented that the workers should not be disadvantaged by the employer's decision to close the regional offices, leading as it did to the workers' inability to control the distance they had to travel between their homes and the place at which their working day began.

4: Lower hurdle for discrimination arising from disability claims

In ***Hall v Chief Constable of West Yorkshire***, the EAT considered the distinction between claims for direct discrimination on the ground of disability and those for discrimination arising from disability.

This case confirms the "loose" causation test applicable in discrimination arising from disability claims under section 15 of the Equality Act 2010 (EA 2010) and suggests that such claims will be easier to make out than those for direct discrimination under section 13 EA 2010.

Under section 15 EA 2010, discrimination arising from disability occurs where A treats B unfavourably "because of something arising in consequence of B's disability" and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Ms Hall was employed by West Yorkshire Police for many years. In 2010, she had a period of sickness absence due to stress, anxiety, depression and a heart condition. During this time, allegations arose that Ms Hall was working in a pub, leading her employer to arrange for covert surveillance. One month after heart surgery, Ms Hall received a notice of investigation from her employer, followed by a letter which stated that she was expected to return to work and to have no further absences for three months. After two further notices, West Yorkshire Police arranged for a disciplinary hearing. Ms Hall requested extra time to prepare for the hearing, but this was refused. The hearing was conducted in her absence and concluded that Ms Hall should be dismissed for gross misconduct.

Ms Hall brought a claim for unfair dismissal (upheld by the Employment Tribunal) and a claim for discrimination arising from disability. This latter claim was dismissed by the Employment Tribunal. While it determined that the employee had been subjected to unfavourable treatment (for example the covert surveillance and not allowing her extra time to prepare for a hearing), the tribunal stated that under section 15 the disability had to be a cause of the employee's unfavourable treatment and "not merely the background circumstance".

Setting aside this decision, the EAT found that the Employment Tribunal had not applied a sufficiently "loose" causation test. Considering the legislative background to section 15 EA 2010, the EAT made clear that the provision was intended to lower the hurdle for claims where the reason for the unfavourable treatment was not the disability itself, but something arising from that disability. The EAT clarified that disability need only be "a significant influence on the unfavourable treatment or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the treatment". It also stated that the motivation of the employer was not a relevant factor in a section 15 claim. This, the court stated, is distinguishable from a claim for direct disability discrimination, in which the reason for the less favourable treatment is the disability itself.

5: Doctrine of repudiatory breach does not apply to an LLP agreement

The High Court has recently ruled that a LLP agreement between more than two members will not be terminated when a repudiatory breach by the LLP is accepted by a member of the LLP.

In ***Flanagan v Liontrust Investment Partners LLP and others***, Henderson J found that the statutory regime governing LLPs implicitly excludes the doctrine of repudiatory breach.

LLPs are governed by the Limited Liability Partnerships Act 2000 (LLPA 2000). Under section 5(1) LLPA 2000, LLPs are governed by the terms of an agreement between the members, or (in default of such agreement) by the Limited Liability Partnership Regulations 2001 (LLPR 2001). Under these default provisions, all members of an LLP are entitled to an equal share of capital and profits and may take part in managing the LLP. It is not possible for a majority of the members to expel a member unless there is express provision for this in the LLP agreement.

Mr Flanagan was a member of a LLP which ran a hedge fund. The LLP agreement and side letter which governed the claimant's relationship with the LLP stated that Mr Flanagan's membership could not be terminated within two years of commencement and that six months' notice of termination was required. He was entitled under the agreement to a fixed allocation of £125,000 along with a variable allocation of profits dependent on his own and his team's performance. He had no equity interest in the LLP.

The LLP took the decision to close down the fund and terminate Mr Flanagan's membership. Mr Flanagan was served with a notice to retire more than six months from the end of his term of two years. This notice had not been issued following a management committee meeting and it was later discovered that meeting minutes relating to the notice had been falsified.

Mr Flanagan applied to the High Court for declarations that the LLP agreement and side letter had been terminated and so the statutory default provisions now applied to his relationship with the LLP. He also brought a petition for unfair prejudice, asserting that the service of an invalid notice to retire was a repudiatory breach of contract, his acceptance of which acted to terminate the contract. Mr Flanagan argued that under the statutory default provisions he was now entitled to an equal share of the LLP's capital and profits (amounting to £8 million) and to take part in management committee meetings. He claimed that the LLP could not expel him, given that the default provisions only allow for cessation of membership on death, dissolution, by notice of the retiring member, or by agreement with the other LLP members.

The High Court found that the notice to retire was invalid and constituted a breach of contract which was repudiatory in nature. It also held that Mr Flanagan had not affirmed the contract by continuing to receive payments into his bank account. However, it ruled that the common law doctrine of repudiatory breach did not apply to the LLP agreement and that the contract could not be treated as terminated.

The court commented on the incoherence which would ensue where some members of a LLP continued to be governed by the LLP agreement while others were governed by the statutory default provisions. The court ruled it is implicit in the statutory regime that all members of a LLP are governed by the same rules. It was also influenced by the fact that the LLP agreement in this case expressly excluded the relevant provisions of the LLPR 2001. Henderson J declared that Mr Flanagan was still a member of the LLP and could bring a claim for damages if he had suffered loss as a consequence of the breach. He commented that, as the LLP agreement was still intact, it was still open for a majority of members to expel Mr Flanagan. The court left open the question of whether the default provisions would apply in the case of a LLP with only two members.

6: Victimisation by association with others who have carried out protected acts

In ***Thompson v London Central Bus Company Limited***, the EAT suggested that it may be possible to bring a claim under the Equality Act 2010 where the claimant alleges he has been subjected to a detriment because of someone else's protected act.

Under the Equality Act, A victimises B when A subjects B to a detriment because of B's protected act or because A believes that B has done or will do a protected act. This would suggest that the person bringing the claim must be the person to have done, or been thought to have done, the protected act.

Direct discrimination and harassment claims based on association with others with a protected characteristic can already be brought under the Equality Act. Recent European Court of Justice case law has had the effect of extending the concept of discrimination by association to indirect discrimination claims. Following Thompson, it now appears to be possible to bring a claim for victimisation by association with a third party.

Mr Thompson was a bus driver for London Central Bus Company Ltd (London Central). He claimed that he had advised management that he had overheard a conversation in which it was suggested that London Central had targeted certain employees who had made allegations of racism several years ago. Soon after this, Mr Thompson was involved in disciplinary action based on his alleged contravention of Health and Safety requirements. Mr Thompson claimed that he was "associated" in the mind of London Central with those employees who had made discrimination allegations, partly because he was a member of the same trade union. He claimed that the disciplinary action constituted victimisation because of someone else's protected act.

A preliminary hearing confirmed that victimisation by association was possible. At a second preliminary hearing, the case was struck out as the link or association between the employees who had performed the protected acts and Mr Thompson was not thought to be sufficient.

The EAT allowed the appeal considering that the judge had erred in not considering the evidence and the factual basis for the treatment. The EAT remitted the case for a rehearing, considering that the appropriate test was whether the employer subjected the claimant to a detriment by reason of the protected acts of others. There need not be a particular form or degree of association. The EAT stated that the test is whether, in the mind of the employer, the reasons for the employee being subjected to a detriment included the protected act of a third party.

7: Client Briefing: Dealing with employee grievances

This client briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.

This client briefing sets out how an organisation should respond if an employee raises a grievance.

Why is it important to follow the ACAS Code?

It can avoid a potential claim

The ACAS Code of Practice on disciplinary and grievance procedures was introduced to help organisations and employees resolve grievances in the workplace. Dealing with a grievance effectively can avoid employment tribunal claims by allowing the issue to be resolved internally.

It can affect the level of compensation

If an employee's claim is successful, but either the organisation or the employee has failed to follow the ACAS Code, the level of compensation awarded can be affected:

- If the employer unreasonably failed to follow the Code, the employment tribunal may increase the employee's compensation by up to 25%; or
- If the employee unreasonably failed to follow the Code, the employment tribunal may reduce their compensation by up to 25%.

This regime applies to the majority of claims brought in an employment tribunal, including those related to:

- Discrimination;
- Unfair dismissal; and
- Breach of contract.

How should grievances be handled?

The grievance should be raised in writing

A grievance can be any concern, problem or complaint an employee raises with the employer.

If a grievance cannot be resolved informally, the employee should raise this in writing with a manager. If the grievance concerns their line manager, their grievance should be raised with another manager.

A failure to raise the grievance in writing does not prevent an employee bringing an employment tribunal claim. However, in these cases, less compensation may be awarded.

The organisation should hold a meeting and investigate the complaint

A meeting should be held with the employee to enable them to explain their grievance and how they think it should be resolved.

If the matter needs further investigation, the meeting should be adjourned and resumed after the investigation has taken place.

When the meeting is concluded, the organisation should communicate its decision promptly in

writing, including details of any action it intends to take to resolve the grievance.

The employee can bring a companion

An employee has the legal right to bring a companion (a fellow worker or a trade union representative) to a grievance meeting.

The employee has a right of appeal

The employer should inform the employee that they have a right of appeal when the decision is communicated. If the employee is not satisfied with the outcome, any appeal must be made in writing and specify the grounds of appeal. If an employment claim is brought without first going through the appeal process, an employee's compensation may be reduced.

The appeal should, if possible, be dealt with by a manager who has not been previously been involved. The employee should be informed in advance of the time and place of the appeal hearing and may bring a companion. The employer should communicate its decision promptly in writing.

Handling grievances during a disciplinary procedure

Employees often submit grievances during disciplinary procedures, either regarding the procedure itself or the circumstances leading up to the initiation of that procedure. The employer must decide whether to suspend the disciplinary procedure to investigate the grievance fully or, if the issues are related, deal with them both concurrently.

The practical steps employers can take to improve their grievance procedures

Involve employees or their representatives in developing workplace procedures and make sure those procedures are transparent and accessible to employees.

Train managers on:

- how to handle grievances effectively;
- when to involve HR; and
- how to spot potential legal claims.

Encourage managers to resolve issues quickly and informally before they get to a formal grievance stage.

Allow employees to put their side of the story at a meeting before undertaking any necessary investigation and again before making a decision.

Keep written records, including minutes of meetings.

Communicate decisions effectively and promptly, setting out reasons.

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