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— SOLICITORS —

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Employment Law BULLETIN

Welcome to our September employment law bulletin.

Despite the summer holidays there have been a number of cases of interest to report this month.

The Court of Appeal has dismissed UNISON's appeal in the long running challenge to the legality of tribunal fees. But it is reported that UNISON is seeking permission to appeal to the Supreme Court. And, further, the government is still carrying out its commitment to review the impact of employment tribunal fees.

In *British Waterways Board v Smith* the EAT considered whether an employee was fairly summarily dismissed on the ground of gross misconduct for making derogatory comments on Facebook about his employer.

In *Ethnic Minorities Law Centre v Deol* the EAT stressed the need for impartiality in disciplinary procedures, emphasising that an investigation must be separate from the disciplinary proceedings themselves and the respective processes carried out by different persons.

In *Cartwright v Tetrad Ltd* we examine a case where employees, faced with a fundamental breach of contract by way of a pay cut, failed to act promptly to dispute the pay cut and, in all the circumstances, were deemed to have accepted the change to their terms and conditions by their conduct in continuing to work.

The EAT in *Services for Education (S4E) Ltd v White* has considered the continuity of employment provisions in the Employment Rights Act 1996 which protect continuity of employment on a transfer of a business. In order to be protected an employee must be employed "at the time of the transfer". The EAT confirmed that "at the time of the transfer", for the continuity provisions, means not necessarily a single date, but can include a period of time, if that period is concerned with part of the transfer "process".

Agency workers have the right to be informed of any job vacancy within the end user organisation to which they are sent. But in *Coles v Ministry of Defence* the EAT has held that this does not extend to a right to be considered for the vacancy on the same terms as an employee of the end user.

In *Ibarz v University of Sheffield* the EAT has ruled that a university teacher employed under a series of fixed term contracts could combine a number of alleged acts of detriment over these contracts for the purposes of a claim against the employer under the Fixed Term Employees and Part Time Workers Regulations.

Our client briefing this month is on the subject of handling grievances.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

Changing Employment Contracts: New cases and practical guidance
- Breakfast Seminar, 20th October 2015

And in conjunction with ACAS

Understanding TUPE: A practical guide to business transfers and outsourcing
- Full Day Conference, **Leeds**, 9th September 2015

Understanding TUPE: A practical guide to business transfers and outsourcing
- Full Day Conference, **Newcastle upon Tyne**, 10th September 2015

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1: Court of Appeal dismisses union challenge to tribunal fees

Tribunal fees were introduced by the Employment Tribunal and Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893). These took effect on 29th July 2013. Many are of the opinion that the fees are set too high and deter claimants. There is however provision for fee remission depending on means, and special remission where there are "exceptional circumstances". Following the introduction of tribunal fees, claims have plummeted, leading many to draw the inference that claimants are just being put off claiming because of the cost, which is therefore a denial of access to justice.

On 1st July 2013 UNISON commenced judicial review proceedings (UNISON No.1) challenging the Lord Chancellor's decision to make the Fees Order. That application was rejected on the grounds that it was premature. Further proceedings were filed on 23rd September 2014, when there was evidence about the actual impact of the fees in the period of more than one year since they were introduced (UNISON No.2). The Divisional Court rejected this claim, and UNISON appealed to the Court of Appeal in ***R (on the application of UNISON) v The Lord Chancellor***.

In essence, the Court of Appeal was concerned about the overall decline in employment tribunal claims, but held that UNISON's application needed to be accompanied by evidence of the actual affordability of the fees in the financial circumstances of "typical" individuals. Underhill LJ also held that the provision for remission in "exceptional circumstances" meant that it could not be argued that the regime provided no effective remedy (as is required by European law). Further arguments by UNISON on the basis of indirect discrimination and breach of the public sector equality duty were also dismissed.

UNISON has indicated that it will appeal to the Supreme Court. In the meantime, the government has begun an internal Ministry of Justice review of the impact of tribunal fees. The Justice Committee is also conducting a separate select committee inquiry into the effect of tribunal fees on access to justice and the competitiveness of the legal services market. In the meantime, the Scottish Government has announced a proposal to abolish tribunal fees in Scotland.

2: Trade Union Bill

On 17th August 2015 over 80 academics in the field of industrial relations published a letter to the Guardian urging the government to reconsider the Trade Union Bill which will further restrict the legality of strike action, trade union representatives' facility time and the employer check-off. The letter argues that trade unions in Britain are not too strong but too weak and contribute in many ways to innovation, skills upgrading and workplace performance. It urges the government to consider more seriously how to engage and involve the British workforce and its representatives in rebuilding the UK economy and raising productivity through fairer and more supportive rights for workers.

Meanwhile, in Northern Ireland, Department of Employment and Learning Minister Stephen Farry has confirmed there are no plans to undertake a similar initiative in Northern Ireland (where employment law is a devolved matter).

3: Facebook comments and the reasonable employer

In ***British Waterways Board v Smith*** an employer fairly summarily dismissed an employee for gross misconduct on the ground of making derogatory comments on Facebook about his employer.

Mr Smith was a manual worker for British Waterways Board. British Waterways' disciplinary procedure classed drinking alcohol whilst on standby as gross misconduct. It also had a social media policy prohibiting action on the internet which might "embarrass or discredit" British Waterways. Mr Smith worked with a group of individuals described by the employment tribunal as "not a happy team". There was a history of employees complaining about health and safety and how they were spoken to by team leaders and supervisors. Mr Smith raised a formal grievance complaining about another employee. He followed this with a further complaint about others including a Ms McMillan. There was an attempt at mediation but then this was halted. The reason was that Ms McMillan had checked out Mr Smith's Facebook account. This search was unfavourable to Mr Smith. There was a raft of posted comments (some of which dated from two years before) which were derogatory about the employer, including comments such as: "hard to sleep when the joys of another week at work are looming NOT"; "going to be a long day I hate my work". There was more of the same, punctuated with expletives. Of significance was one particular post which stated "on standby tonight so only going to get half pissed lol".

Mr Smith was suspended, then summarily dismissed, for gross misconduct on the ground of these comments, including in particular the comment which suggested he had been drinking alcohol whilst on a standby shift contrary to the rules of the employer.

The employment tribunal held the dismissal was unfair as falling outside the band of reasonable responses. It found that no reasonable employer would have dismissed in these circumstances, given the historic nature of the comments, that in the two years since the comments had been made, the public had not been at risk, and that there had been no actual evidence of Mr Smith being drunk on standby.

On appeal, the EAT was not impressed. The employment tribunal had taken on itself to reclassify Mr Smith's behaviour as merely misconduct as opposed to "gross misconduct". It had also clearly substituted its own views for that of the employer when it made findings about the employer's actual lack of problems with employees drinking whilst on standby, concluding thereby that there was no risk to the public. In other words it fell exactly into the "substitution mind set" counselled against by the Court of Appeal in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220. The EAT substituted a finding that the dismissal was fair and found that the decision by the employer to dismiss had been within the band of reasonable responses.

Cases on employees' Facebook misdemeanours are now commonplace. The EAT confirmed there is no need for special rules in social media misuse cases. Such cases fall to be determined in accordance with the ordinary principles of the law applied in all cases, the EAT on this point agreeing with a similar opinion expressed by the EAT in *Game Retail Limited v Laws* (UKEAT0188/14/DA).

4: Unfair dismissal and impartiality of procedures

The case of ***Ethnic Minorities Law Centre v Deol*** illustrates the difficulties that a small employer can get into by not separating the functions of investigation into alleged conduct and the disciplinary proceedings which follow, and by not following the rule that the person chairing the disciplinary proceedings must be impartial and uninvolved in the lead up to those proceedings.

Ethnic Minorities Foundation is a small charity employing some 30 staff and volunteers. Its purpose was the provision of legal advice and assistance with immigration, benefits, housing and other matters to ethnic minority groups in the Strathclyde area. The claimant, Mr Deol, was originally a volunteer, and then became office manager. He was recruited by the founder member and director, Mr Squire.

Once his employment was under way Mr Deol decided to train to be a nurse. The charity supported him in completing a degree in nursing through part time study whilst continuing to work for the charity. He was allowed time off and changes in work pattern to facilitate his study. Then it became clear that Mr Deol would require post-degree experience as an intern nurse and again this was accommodated by Mr Deol working part-time for the charity and part-time in the hospital to gain experience in nursing.

Then Mr Deol decided he wanted to work in the NHS going forward and also to keep his post with the charity. This was discussed with Mr Squire who did not see any difficulty. There was some vagueness (and indeed flexibility) about Mr Deol's hours at the hospital. There was no policy about notification of hours worked in other jobs. Mr Deol also failed to follow the charity's holiday policy when booking holiday, although no point was taken at the time.

In February 2013 the charity received a penalty notice and a £50 fine from Glasgow City Council about putting rubbish out in the wrong type of bags. Mr Deol's line manager enquired about this as Mr Deol was responsible for ordering bags. His response was that it was the cleaner's fault and that "ordering bags is a different matter than (sic) disposing of bags".

The line manager found the tone of the email unacceptable. At the same time Mr Squire became increasingly concerned that Mr Deol might have been working at the hospital whilst telling the charity that he was sick. He felt betrayed and thought that Mr Deol had taken advantage of the friendship he had shown him. Mr Deol was then suspended for alleged gross misconduct on ground of breaching policies and procedures, conduct likely to bring the charity into disrepute and acts of insubordination.

The charity then decided to proceed to a disciplinary hearing. Apart from the allegedly offensive email the charges against Mr Deol were found to be proven. Mr Deol was summarily dismissed. There was an appeal but this did not involve a rehearing, rather a review of the case.

The employment appeal tribunal decided that Mr Deol's dismissal was unfair. It considered that the evidence was sufficiently vague so that it could not justify the inference that Mr Deol was working whilst claiming to be sick. Further it found that Mr Squire had become disillusioned with Mr Deol, forming the view that Mr Deol was "at it" and abusing friendship and goodwill. As a result he could not act impartially given the views he had already formed about Mr Deol. Mr Squire had also been involved in the investigation (to get more information from the other employer) as well as the disciplinary process. Finally, it must have been obvious to Mr Squire that there was likely to be a dispute between Mr Deol and the employer about Mr Deol's right to work in two jobs at the same time.

The employment tribunal also considered whether the appeal cured the difficulties that it had identified in the disciplinary hearing. The appeal did not cure those defects. The appeal was not a rehearing. It was a form of a review of a disciplinary decision, and no more. The EAT upheld the employment tribunal's decision. The employment tribunal had considered carefully and at length the investigation carried out and found it lacking. It also found that Mr Squire did not have an open mind and, for that reason, the dismissal was unfair.

It is difficult in a small organisation to avoid becoming involved both in the complaint and the investigation and, sometimes the disciplinary process itself. If the organisation has insufficient personnel impartially to carry out these various functions it should engage external assistance, such as, for example, an HR consultant.

5: Employees impliedly consented to pay cut

It is settled employment law that an employee faced with a breach of contract such as a pay cut may object to this, work on under protest and recover the shortfall in wages in any future proceedings. If an employee does not so object and reserve his position, however, the danger is that he may impliedly have consented to the change.

Such was the case in ***Cartwright v Tetrad Limited***. Here, the employer was a furniture manufacturer in financial difficulties. In April 2012 the board of directors decided to impose a 5% wage cut across the workforce in order to satisfy the bank. The workforce was unionised. A meeting took place promptly between management and union representatives. The employment tribunal found that the union full time officer was equivocal as to whether or not his members would agree to the pay cut. No employee gave express consent to the pay reduction. A union meeting took place the next month but no outcome was communicated to management. It was not until October 2012 that the union's solicitors wrote a letter before action indicating a future 'Wages Act' (unlawful deduction from wages) claim. The first ET1 claim form to the employment tribunal was not in fact lodged until February 2013.

The employment tribunal found there was no formal objection by the union to the change in the pay rate which took effect from 30th April 2012 and first appeared in pay statements on 10th May. No grievance was raised and no individual objections were raised by employees. The union's solicitor's letter of 23rd October 2012 was the first indication of any objection. On those facts the employment judge concluded that the employees concerned had accepted the variation by conduct and so no unauthorised deductions had been made from May 2012.

On the basis of the undisputed facts as found by the employment judge the EAT dismissed the employees' appeal. By continuing to work without protest until 23rd October the employees, taking into account all of the circumstances, accepted the change in their terms and conditions as to pay.

6: Business transfers and continuity of employment: employment "at the time of the transfer"

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) an employee has to be employed in the undertaking or part concerned "immediately before" the transfer in order to be transferred under TUPE.

But for the purposes of establishing statutory continuity of employment on a change of employer due to a business transfer, the test is slightly different. Under section 218(2) of the Employment Rights Act 1996, on a transfer of a trade, business or undertaking, the period of employment of an employee in the business "at the time of the transfer" counts as a period of employment with the transferee.

In Clark & Tokeley Limited v Oakes [1999] ICR 276 the Court of Appeal held that "at the time of the transfer" for the continuity provisions of the ERA 1996 meant a process extending over a period of time rather than a singular moment in time.

This authority was applied by the EAT in ***Services for Education (S4E) Limited v White***.

Mr White was a sessional music teacher for Birmingham Music Service which was part of Birmingham City Council. He had been employed since 1992 under a series of contracts each running for the academic year. His latest contract expired on 31st July 2013. There was no guarantee of work the following academic year but there was an expectation that there would be work.

BMS was transferred to S4E on 1st September 2013. In fact, negotiations for the transfer commenced as early as October 2011, but it was a drawn out process, including substantial delays in gaining access to the Teachers Pension Scheme for the permanent staff who were to transfer. This caused the delay.

Mr Wright was then offered a new contract (on less favourable terms) from 3rd September 2013 and he made claims for unfair dismissal and unpaid holiday pay against S4E. The employment judge decided that Mr Wright was not protected by TUPE since, by 1st August 2013, he was no longer the Council's employee and therefore he was not employed, for TUPE purposes "immediately before" the transfer.

However, for the purposes of bridging his continuous employment between the Council and S4E he had been employed "at the time of the transfer" for the purposes of section 218(2) of the ERA 1996. The EAT agreed. A transfer involving a public sector transferor will often have different characteristics from a transfer between two private sector bodies because, for example, the frequent complications caused by the securing of pension entitlements. These negotiations over the pension arrangements were, as a matter of fact, part of the transfer "process". The employee was therefore able to bridge continuity between the Council and S4E for the purposes of his employment claims.

7: Agency worker's right to be informed of a job vacancy

In ***Coles v Ministry of Defence***, the EAT held that an agency worker working for an end user or hirer has the right to be informed of a job vacancy with the hirer, but that this right does not extend to a right to be considered for that vacancy on terms comparable to a permanent employee.

Mr Coles was an agency worker at the Defence Housing Executive (the hirer). As part of a restructuring exercise, the hirer placed 530 employees into a redeployment pool. These employees had priority access to suitable vacancies. Mr Coles's work was advertised as a vacant role to all internal workers, including Mr Coles. Despite this, Mr Coles did not look at the advertisement or apply for the role. A candidate was appointed and the hirer issued notice that Mr Coles's services were no longer required.

Mr Coles brought claims for breach of the Agency Workers Regulations 2010 and the Temporary Workers Directive (2008/104/EC), arguing that the hirer had not given him access to details of the vacancy and had denied him the right to apply for the role.

Upholding the employment tribunal's decision, the EAT found that the right under the Regulations and the Directive is limited to a right to be notified of a vacancy (which the hirer had complied with). The right does not extend to a right to be considered for the vacancy on the same terms as an employee of the hirer. Neither the Regulations nor the Directive stop the hirer organisation giving priority to their existing employees when considering applications for vacancies.

8: Detriment over a series of related fixed-term contracts

In ***Ibarz v University of Sheffield*** the EAT ruled that a university teacher employed under a series of separate semester-long contracts could claim that a number of alleged acts of detriment over these various contracts formed "a series of similar acts" for the purposes of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

Dr Ibarz worked as a teacher of Spanish and Latin American studies at the University of Sheffield over a period of nine years. Each of his contracts was one semester in length, with gaps over holiday periods during which Dr Ibarz was not contracted to work. Following the expiry of the last of these contracts in May 2013, Dr Ibarz brought claims under the 2002 Regulations and the 2000 Regulations, alleging detriments relating to holiday pay, pay progression, access to pension and wages.

The employment tribunal found that Dr Ibarz was out of time for all claims save for those relating to his most recent contract, as claims under both sets of Regulations must be brought within three months of the last detrimental act.

The EAT disagreed, ruling that detriments which are suffered during a series of separate contracts can form "a series of similar acts". The EAT made clear that the employment tribunal was wrong to rule that no claim could be brought where no contract was in place under the terms of which Dr Ibarz might have been subjected to less favourable treatment.

Employers should take note that individuals who are employed under a number of fixed-term contracts with gaps between each may still bring detriment claims under the Regulations for losses dating back to earlier contracts, as long as the claim is brought within three months of the most recent contract.

9: 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.

The ACAS Code – why is this important?

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 organisation 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 organisation.

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 the 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 trade union representative) to a grievance meeting.

The employee has a right of appeal

The organisation 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 must specify the grounds of appeal. If an employment claim is brought without first going through the appeal process, any compensation awarded may be reduced.

The appeal should, if possible, be dealt with by a manager who has not 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 organisation 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 organisation must decide whether to suspend the disciplinary procedure to fully investigate the grievance or, if the issues are interrelated, deal with them both concurrently.

Practical steps organisations 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:

- 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; and
- Communicate decisions effectively and promptly setting out reasons.

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