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Employment Law BULLETIN

Welcome to our September employment law bulletin.

September has been a relatively quiet month in the employment tribunals and courts, but there are some interesting developments and cases to note.

ACAS has published guidance on supporting employees with ill or premature babies. The Presidents of the Employment Tribunals in England and Wales and Scotland have issued new guidance on the bands of compensation for injury to feelings in discrimination cases.

In *De Mota v ADR Network and The Cooperative Group Ltd* the EAT has taken a pragmatic approach to the requirements of an early conciliation certificate (which is necessary before an employment tribunal claim can be lodged). An employee wanted to bring a claim against two employers and named them on the ACAS online EC request form. ACAS issued just one EC certificate naming both employers. The EAT held that tribunal claims could be pursued against both employers notwithstanding there was only one certificate.

In *Barbulescu v Romania* the Grand Chamber of the ECHR has overturned the decision of the Lower Chamber and has ruled that, on the facts of the particular case, there was a breach of the Convention right in article 8 to respect for an individual's private life where an employer had monitored the content of an employee's emails without giving unequivocal advance notice of surveillance.

In British Airways v Pinaud the EAT upheld the decision of an employment tribunal that a part time aircrew member had been treated less favourably under the Part-Time Workers Regulations when required to be available for work on proportionately more days than a full time worker. The issue of whether that less favourable treatment could be objectively justified in pursuance by the employer of a legitimate aim was remitted to a freshly constituted tribunal for deeper consideration.

In *Brierley and others v Asda Stores Ltd* the EAT has upheld an employment tribunal's decision that a group of mainly female workers in Asda stores can be compared with a group of mainly male workers in Asda distribution depots for the purposes of the female staff's equal pay claims.

In *Thomas Cook Airlines Ltd v British Airline Pilots Association* the High Court decided not to grant an interim injunction preventing strike action. The employer asserted that the voting paper had to specify a particular date for strike action. But the High Court accepted the union's argument that all that needs to be specified is a window of time during which the strike might take place.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

The Summer's Harvest: An employment case round up

- Breakfast Seminar, Leeds, 17th October 2017

In conjunction with ACAS

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

- A full day conference, Leeds 4th October 2017

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

- A full day conference, Newcastle upon Tyne, 13th October 2017

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Wherever you see the BAILII logo simply click on it to view more detail about a case

1: Employment Tribunal fees - recent decisions by tribunals

Employment tribunals are now reported to be making decisions concerning fees which consider the Supreme Court's decision R (*on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 that Employment Tribunal fees are unlawful.

For example, the Sheffield employment tribunal reportedly decided not to order an employer to pay a successful claimant's tribunal fees, reasoning that the claimant would in the near future be able to recover these fees from the Government. An employment judge in the Southampton employment tribunal acknowledged a claimant's argument that the time limit for a discrimination claim should be extended due to an inability to pay tribunal fees (although the extension was in fact granted for other reasons). It has also been reported that a number of tribunals have reinstated cases which were previously struck out for non-payment of fees.

2: ACAS publish guidance on supporting employees with ill or premature babies

ACAS has published useful guidance for employers on dealing with the parents of premature or sick babies.

The guidance, which is available ***here***, gives an overview of employers' obligations and employees' rights when a baby is born prematurely. It also advises employers on their approach to those very difficult cases where the baby is sick, still-born or dies after birth and provides sensible guidance on communicating with the parents, explaining the situation to colleagues, and helping parents dealing with bereavement and trauma in terms of their well-being and return to work.

3: New bands for compensation for injury to feelings in discrimination claims

The President of the Employment Tribunals (England and Wales) and the President of the Employment Tribunals (Scotland) have issued joint presidential guidance concerning the value of injury to feelings awards in discrimination claims presented on or after 11 September 2017.

The well known sex discrimination case of *Vento v The Chief Constable of West Yorkshire Police* [2002] EWCA 1871 originally set out value bands for injury to feelings awards. These have been updated by judicial pronouncements from time to time. The so-called "Vento bands" will, following recent presidential guidance, be as follows:

Lower band: £800 to £8,400 (for less serious cases of discrimination, such as a one off event)

Middle band: £8,400 to £25,200 (for serious cases of discrimination, but not those which fall into the higher band)

Higher band: £24,300 to £40,500 (for the most serious discrimination cases, such as extended campaigns of harassment)

The bands have been uprated to take account of inflation (calculated using the Retail Prices Index) and include the 10% uplift applied to awards in civil claims for pain, suffering or mental distress since the Court of Appeal case of Simmons v Castle [2012] EWCA Civ 1288. The bands will from now on be reviewed annually each March.

4: Single ACAS Early Conciliation certificate naming two employers was sufficient

In ***De Mota v ADR Network and The Cooperative Group Ltd,*** the EAT determined that it was not necessary for a claimant, when bringing his claims against two employers, to be issued with a separate EC certificate naming each employer.

The case concerns a Portuguese lorry driver for whom English is not a first language. He wished to bring claims against two employers and his friend completed the ACAS on-line form on his behalf, naming both employers and giving their addresses within the employer address section. Despite clear instructions on the ACAS webpages which state that separate forms should be filled in for each respondent or the form "will be rejected", ACAS accepted the forms and subsequently issued one EC certificate naming both employers.

The employment tribunal accepted the ET1 which named both employers. The respondents questioned whether the tribunal had jurisdiction to hear the claim, arguing that the EC certificate was invalid. The tribunal struck out the claim against both respondents on the basis that the EC certificate did not clearly identify one employer or the other and the rules state that separate forms should be used. The judge commented that he would have allowed the claim to proceed against one employer where that employer had been clearly identified (as in the 2016 EAT case of *Mist v Derby Community Health Services NHS Trust* [2016] ICR 543) but this was not the case here.

However the EAT disagreed. It remitted the case to the same tribunal to proceed with the claims. The EAT rejected the technical approach taken by the employment tribunal. The judgment makes clear that under the EC rules, ACAS is not bound to reject an EC form which names two employers. Interestingly, the judgment focuses on the purpose behind the EC rules which is not, in the EAT's view to bar claims on a technicality, but to allow a structured opportunity for conciliation with the correct parties. In the words of His Honour Judge Richardson; "It is one thing to impose a requirement for good order; another thing altogether to elevate it to such a height that it bars access to the courts."

5: New bands for compensation for injury to feelings in discrimination claims

We previously reported on the European Court of Human Rights decision in ***Bărbulescu v Romania*** in January 2016. This case concerned an alleged breach of European Convention on Human Rights (Convention) privacy rights in connection with covert monitoring of a work-related email account. The case has now been considered on appeal by the European Court of Human Rights (ECHR) Grand Chamber.

Mr Bărbulescu worked as an engineer in charge of sales for a heating company in Romania. At his employer's request, he created a Yahoo Messenger account for responding to clients' enquiries. The employer monitored this account for a period of two weeks and then informed the employee of this monitoring. Mr Bărbulescu had sent personal messages to his fiancée and brother and referred to very personal issues, such as his sexual health. The employer dismissed Mr Bărbulescu for the breach of company regulations which prohibited the personal use of work computers. He brought a claim challenging his dismissal. The Romanian court found the dismissal to be fair and determined that his employer was entitled to monitor the content of his emails as he had been given adequate notice of monitoring. Mr Bărbulescu brought a claim against the Romanian government in the ECHR, arguing that it had failed to protect his privacy rights under Article 8 of the Convention.

The Lower Chamber of the ECHR ruled that the employee should have reasonably expected his internet use to be monitored and as such rejected Mr Bărbulescu's claim.

However, the Grand Chamber of the ECHR has now overturned this decision, ruling that the employer acted in contravention of the Convention right in Article 8 to respect for the individual's private life. The Grand Chamber ruled that employee's private correspondence was not open to the employer merely because it had been sent from an employer's computer. The Grand Chamber identified that, whilst Mr Bărbulescu was aware of the prohibition on the personal use of equipment, the nature and extent of monitoring had not been adequately explained to him and, in particular, the fact that email content would be monitored had not been explained. The employer's policy did not include specific warning that the content of emails would be monitored.

The Grand Chamber concluded that there needed to be an unequivocal advance notice of any monitoring, and that employers are required to explain such monitoring, which must be justifiable. The Grand Chamber added that monitoring the content of emails requires greater justification than simply monitoring to whom employees send emails. The Romanian court had failed adequately to consider whether there was any justification for the monitoring of emails, nor had the court considered whether there were less intrusive methods of monitoring emails.

Individuals can only bring claims under the Convention against public bodies, that is courts or tribunals and organisations carrying out a public function. However, it remains advisable for all employers to have clear policies on internet use, including clear reference to any potential monitoring, and for employees to be asked to sign the policy to indicate their consent. When considering monitoring of employees, employers should be aware of the Information Commissioner's Guidance in its Employer Practices Code which is available ***here*** as well as their obligations under the Data Protection Act 1998 and Regulation of Investigatory Powers Act 2000.

6: Requirement for part-time worker to be available for work on proportionately more days than a full-time worker was less favourable treatment.

In ***British Airways v Pinaud***, the EAT upheld the decision of an employment tribunal that a part-time air crew member had been treated less favourably because of her part-time status, contrary to the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

The claimant was a long-serving member of air crew for British Airways who initially worked full-time. She returned to work after a period of maternity leave and worked for a further 10 years on a part-time basis. Full-time crew members worked a pattern of six days on and three days off. Over a full year, full-time crew members had to be available for work on 243 days and were not required for 122 days. Part-time crew, including the claimant, worked a pattern of 14 days on and 14 days off. During the 14 days on, the crew member had to be available for 10 days. Over a full year this meant part-time crew had to be available for 130 days. There was a system of bidding for work on available days. Crew members could also be required for ground duties such as training or would have to be on standby during available days. While there was no clear link between available days and hours worked, the annual basic salary did not vary with the number of hours worked.

The claimant brought a claim under the Part Time Workers Regulations on the basis that she had been treated less favourably because she had to be available for 53.5% of full-time hours but was paid only 50% of full-time salary. The employment tribunal and the EAT agreed.

Of course, less favourable treatment under the Regulations may be justified on objective grounds. British Airways argued that its legitimate aim was to provide a 50% contract working pattern. It argued that the impact on the claimant was limited because its statistics showed that she was not in practice

required to work more hours proportionately than her full-time comparator. The employment tribunal suggested that a less discriminatory means of achieving the legitimate aim of offering a flexible part time position would be to pay part time workers at 53.5% of full-time salary. But the EAT ruled that this was too simplistic an approach and remitted the question of justification to a freshly constituted tribunal for consideration of the statistical evidence put forward by British airways on the actual impact on the part-time worker.

The judgment is a reminder that employers should carry out an exercise to assess whether working practices discriminate against those who work part-time; should examine possible alternative approaches which have a less discriminatory impact on part-time workers; and consider whether any discriminatory practices are justifiable.

7: Asda retail workers can compare themselves to depot workers in equal pay claims

We reported in October 2016 on the employment tribunal decision in the case of ***Brierley and others v Asda Stores Ltd***. The employment tribunal determined at a preliminary hearing that a group of mainly female workers in Asda stores can be compared with a group of mainly male workers in Asda distribution depots for the purposes of the female staff's equal pay claims.

The EAT has now upheld the employment tribunal's decision on the grounds that the executive board of Asda Stores Ltd exercised control over both retail and distribution divisions of the company.

The EAT confirmed that differences in the way pay is set and the way in which the terms and conditions of different workers originated are not relevant to the equal pay rules. It confirmed that comparability between two groups of workers is possible where there is one body which is a single source of pay and conditions for both groups and where that body could be responsible for the inequality and act to restore equal treatment.

The EAT agreed with the tribunal that the depot workers could be comparators for the retail workers. To qualify as a comparator under the Equality Act, the workers must work for the same (or an associated) employer and either work at the same establishment or under common terms. The EAT ruled in this case that the depot workers are employed by the same employer under sufficiently similar terms to the retail workers to qualify as comparators.

It has been reported that the value of the claims in this case (which number over 7000) could exceed £100 million. This is already a very long running case and is unlikely to be finally resolved in the near future. Asda has applied for permission to appeal to the Court of Appeal and it is possible that this case will go to the Supreme Court and that questions will be referred to the ECJ.

8: High court rules no requirement to set out precise date for industrial action on voting paper

In ***Thomas Cook Airlines Ltd v British Airline Pilots Association***, the High Court decided not to grant an interim injunction preventing strike action on the basis that information given in the voting paper was insufficient.

The voting paper in this case stated: "it is proposed to take discontinuous industrial action in the form of strike action on dates to be announced over the period from 8 September 2017 to 18 February 2018." Thomas Cook Airlines argued that the new legislation governing industrial action requires a particular date for strike action to be specified on the voting paper. The Trade Union Act 2016 sets out the information which is required to be included on a voting paper. This must include a summary

of the matter or matters in issue in the trade dispute and to which the proposed industrial action relates; where a strike is not proposed, the type of industrial action which is proposed; and the time period or periods within which the industrial action of whatever kind is expected to take place.

The High Court did not agree with Thomas Cook Airlines' argument. It took into account the dynamic nature of industrial negotiations and ruled that it is not practical for a trade union to specify a strike date on the voting paper. The window of time during which the strikes may take place is all that is required to be specified.

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