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Employment Law BULLETIN

Welcome to our December employment law bulletin.

In this issue the headline news is that UNISON has lost its second challenge to the employment tribunal fees regime and we comment on the reasoning of the High Court in reaching its decision in R *(on the application of UNISON (No. 2)) v The Lord Chancellor.* The judgment is undoubtedly a significant blow to the campaign for the abolition or review of the level of employment tribunal fees. But UNISON has been given leave to the Court of Appeal and this may not be the end of the story.

The latest figures available from ACAS on the take up of early conciliation show that only 24% of referrals to ACAS resulted in a tribunal claim. 18% of referrals resulted in a COT3 settlement and 58% did not proceed, for other reasons, to an employment tribunal.

The Small Business, Enterprise and Employment Bill is now reaching its final stages before becoming law in the Spring. Its most significant provision is the proposed ban on exclusivity clauses in zero hours contracts.

In *Burdett v Aviva Employment Services Limited* the EAT has considered the question of whether dismissal for gross misconduct inevitably falls within the band of reasonable responses available to a reasonable employer and is therefore fair. Following the earlier case of *Brito-Babapulle v Ealing Hospital NHS Trust* the EAT rejects this proposition. Even if the facts are very serious, and may amount to gross misconduct, it is always important that an employer considers any mitigation put forward by the employee, including all the circumstances of the case, before deciding on the appropriate sanction which could be, but is not necessarily, dismissal. The EAT also discusses the balancing exercise to be undertaken by the employer in deciding whether dismissing a person for gross misconduct who is suffering from a disability can be justified as a proportionate means of achieving a legitimate aim.

In *LLDY Alexandria Limited v UNITE the UNION* the EAT confirmed that it is obligatory, when providing information to appropriate employee representatives before a TUPE transfer, for the real reason for the transfer to be made plain. In this case the employer went wrong by alleging that economic reasons were behind its decision to subcontract part of its activities, whereas the real reason was a disagreement over a pay dispute. The EAT also emphasised that information to be given to employee representatives must be given 'long enough before the transfer' to enable consultation to take place. In this case, delivery of information just 10 days before the transfer was insufficient to allow this.

In *Yapp v Foreign and Commonwealth Office* the Court of Appeal considered the rules relating to remoteness of damages for psychiatric injury. Yapp, who was withdrawn from his post and suspended pending an investigation of allegation of misconduct, developed a depressive illness. He claimed damages. The question for the Court was whether it was reasonable foreseeable that the employer's conduct in withdrawing the claimant from his post might lead him to develop a psychiatric illness. According to the Court, it would be exceptional that an apparently robust employee with no history of any psychiatric ill-health would develop a depressive illness as a result even of a very serious set back at work. The loss in this case was therefore too remote, and the claim failed.

May I also remind you of our forthcoming events:

Click any event title for further details.

Managing change in the Employment Relationship
- HR Workshop, 13th January 2015

TUPE in practice: 10 top tips to getting the process right
- Conference, London, 5th December 2014

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1: UNISON loses challenge to employment tribunal fees second time round

Employment tribunal fees were introduced on 29th July 2013. Their impact has been controversial. There has been a fall of 61% in employment tribunal applications since their introduction.

Earlier this year, UNISON bought a legal challenge by way of judicial review. But the High Court dismissed the challenge, considering the application to be premature. The Court was not satisfied that the scheme had been running long enough to make out UNISON's claim. The door was left open, however, for the presentation of a further application for judicial review when more was known about the impact of the fees in practice.

In ***R (on the application of UNISON (No. 2)) v The Lord Chancellor*** the High Court heard UNISON's second challenge and gave judgment on 17th December 2014.

The challenge was made on two grounds. First, UNISON alleged that the fees scheme was unlawful because it infringed the EU principle of effectiveness. That is to say, the cost of presenting a claim was so high that it was virtually impossible, or at least exceptionally difficult, for a significant number of potential applicants to afford to bring a claim. Secondly, it was said that the fee scheme operated in an indirectly discriminatory way with respect of women, ethnic minorities and the disabled and that the Lord Chancellor had failed to establish that the disadvantageous treatment meted out to those groups was justified

The principal of effectiveness

In ***Levez v TH Jennings*** [1999] ICR 521 the European Court stated that:

> "The procedural requirements for domestic actions must not make it virtually impossible or excessively difficult to exercise rights conferred by EU law."

Article 6 of the European Convention on Human Rights also enshrines the right to a fair and public hearing. In Podbielski and PPU Polpure v Poland [2005] ECHR 543 the claimant complained that he was unable to pursue an appeal under Polish law because his company was insolvent and he was unable to pay the fees. The Court accepted that, whilst an obligation to pay fees might well not infringe article 6, it did so in the circumstances of that particular case. The Court was particularly interested in the aim of the Polish legislation which seems to have been the State's interest in deriving income from court fees in civil cases. UNISON adopted this argument. Fees for tribunal claims in the UK, it said, are for some people too high and the only purpose of imposing them is for the state to derive an income from them.

The High Court agreed that any restrictions on access to justice must be proportionate and, if an unnecessary hurdle which serves no useful purpose puts off people from claiming, that would not be proportionate. However, UNISON failed on this point because of lack of evidence. UNISON was relying on notional rather than actual claimants. There was an assumption that people had been put off claiming because of the fees; but no individual case was put forward to the Court to consider as to whether anyone had actually been put off from claiming because of the fees. In the absence of individual evidence, reliance on employment tribunal statistics, which demonstrated the fall in the number of claims, was not enough.

Indirect discrimination

Employment tribunal claims are spilt into two kinds for the purposes of fee levels, type A claims (breach of contract, holiday pay, redundancy etc.) and more complex claims in type B which include discrimination claims. The focus was therefore on type B claims. Did the regime amount to indirect discrimination against women and other persons with protected characteristics and if so, could the fee system be justified? Here the Court held that the high level of fee for a type B claim could be justified by the level of service in the tribunals or the resources expended and the Court held that the appropriate pool for consideration in terms of disparate impact included both male and female claimants, 55% of claimants in type B being men and 45% women. The burden of proof of showing adverse impact was not discharged by UNISON and said the Court, "even if it has, the extent of any adverse impact is very small".

In any event, the scheme could be justified because of the objectives of, first, a contribution to the annual cost of running employment tribunals and the EAT to those users who benefited from it; secondly to make tribunals more efficient and effective, not least by removing unmeritorious claims; and, thirdly, to encourage alternative methods of employment dispute resolution so that litigation is not the first resort.

This is undoubtedly a significant blow to the campaign for the abolition or review of the level of employment tribunal fees. But UNISON has been given leave to appeal to the Court of Appeal and of course it is not impossible for a further application to be made when individual evidence becomes available concerning people who were actually put off claiming because of the fees.

2: ACAS Early Conciliation update: April to September 2014

In the same context, ACAS has published its statistics on early conciliation for the period April to September 2014. The figures show that ACAS received approximately 1,000 notifications per week during April 2014, increasing to around 1,600 per week for the rest of the period. Of the cases notified between April and June 2014 the outcomes were as follows:

Status of Cases Notified April - June 2014 at end October 2014	Number	Proportion
COT3 Settlement	3,046	18%
Did Not Progress to Tribunal Claim	9,918	58%
Dispute Progressed to Tribunal Claim	4,198	24%
Total	17,162	

3: Small Business, Enterprise and Employment Bill: progress thus far

This Bill was announced in the 2014 Queen's Speech and introduced into Parliament on 25th June 2014. It had its third reading in the House of Commons on 19th November 2014 and was introduced into the House of Lords on the same date. It had its second reading in the House of Lords on 2nd December 2014. The Government intends the Bill to complete its legislative passage before the dissolution of Parliament on 30th March 2015 (in advance of the general election on 7th May 2015). However the majority of the employment provisions of the Bill will require commencement orders before they enter into force. Given the limited time left in this parliament it is considered to be unlikely that commencement orders will be made before Parliament dissolves.

The Bill's main provisions cover:

- an extension to the financial penalties for failure to pay the national minimum wage
- a power to restrict the number of times that a party can postpone or adjourn an employment tribunal hearing;
- a power to require "prescribed persons" (usually a regulator) to produce any reports of protected disclosures (whistleblowing reporting);
- power to require repayment of public sector exit payments in certain circumstances.

Of most interest and controversy in the Bill is the proposed regulation (to an extent) of zero hours contracts. Clause 148 of the Bill would insert two new provisions into the Employment Rights Act 1996 making exclusivity clauses in zero hours contracts unenforceable. The provision is in response to the consultation on zero hours contracts where an overwhelming majority of respondents (82%) were in favour of banning exclusivity clauses in contracts that do not guarantee hours of work. Under the Bill a zero hours contract is defined as follows:

> "A contract of employment or other worker's contract under which (a) the undertaking to do or perform work or services is an undertaking to do or to do so conditionally on the employer making work or services available to the worker and (b) there is no certainty that any such work or services will be made available to the worker."

The explanatory note to the Bill confirms that the new section 27A will apply to existing zero hours contracts as well as to those which are entered into after the new section comes into force.

A new section 27B of the ERA 1996 would give the Secretary of State power to make regulations "for the purpose of securing zero hours workers, or any description of zero hours workers, are not restricted by any provision or purported provision of their contracts or arrangements with their employers from doing any work otherwise than under those contracts or arrangements."

The point of this provision is that it may be used to deal with attempts by employers to avoid the ban on exclusivity terms referred to above.

Labour's proposed amendment to oblige employers to convert a zero hours contract into fixed hours after a given period was defeated. Also running alongside the Bill, in Parliament, is the Private Member's Zero Hours Contract Bill 2013/14. It would indeed also oblige employers to convert a zero hours contract into a fixed hours contract after 12 weeks regular work; but as a Private Member's Bill it has little or no chance of progressing further.

4: Gross misconduct and the band of reasonable responses

In ***Brito-Babapulle v Ealing Hospital NHS Trust*** UKEAT/0358/12 the EAT reminded us that dismissal for gross misconduct is not automatically fair. In that case, the claimant, who was a consultant haematologist, continued to conduct sessions with private patients whilst off sick and in receipt of sick pay from her employer, and was dismissed for gross misconduct. The employment tribunal considered that there were reasonable grounds to believe that Brito-Babapulle was guilty of gross misconduct and went on to say that once gross misconduct is found, the dismissal must always fall within the range of reasonable responses available to a reasonable employer for the

purposes of whether there is an unfair dismissal. Before the employment tribunal she therefore lost her case for unfair dismissal. But she appealed, arguing that the tribunal was wrong in law to say that gross misconduct automatically falls within the range of reasonable responses. She argued that the tribunal had failed to give any consideration to mitigating factors, such as the length of her exemplary service and the consequences of dismissal from the NHS for her future career. The EAT agreed. Jumping from a finding of gross misconduct immediately to the proposition that dismissal must inevitably fall within the range of reasonable responses gave no room for considering mitigation.

Therefore the conclusion to be drawn from this case is that even when the facts are very serious, and may amount to gross misconduct, it is always important that the employer considers any mitigation put forward by the employee, including all the circumstances of the case, before deciding on the appropriate sanction which could well be, but is not necessarily, dismissal.

The EAT has considered another case in this area in ***Burdett v Aviva Employment Services Limited.*** Here, the EAT had to consider whether an employment tribunal had been correct to hold that an employee with a paranoid schizophrenic illness had been dismissed fairly for gross misconduct and whether the dismissal was objectively justified in the context of discrimination arising from disability.

Burdett worked in insurance and was a senior approval specialist. Following sick leave due to stress and depression he was referred to Occupational Health and it was confirmed he was suffering from a paranoid schizophrenic illness and required anti-depressant and antipsychotic medication. He was disabled within the meaning of section 6(1) of the Equality Act 2010.

A year later he discontinued his medication on medical advice but was readmitted to hospital following hallucinations and having sexually assaulted members of the public. He received a police caution but did not disclose this, or the facts of the sexual assaults, to his employer.

A year later he again stopped taking his medication, this time without medical advice. Then he sexual assaulted two female employees and threatened to assault a security guard at his place of work. Before leaving the office building he assaulted a female member of the public and attempted to assault another. He was subsequently arrested and detained under the Mental Health Act 1983 and faced criminal charges in respect of the assaults.

Mr Burdett was suspended and subjected to disciplinary proceedings. He admitted stopping his medication without medical advice and admitted the assaults concerned. The employer concluded that the only sanction available was that of dismissal.

In the employment tribunal his claim for unfair dismissal was rejected. As he had admitted to the assaults and to discontinuing his medication, the tribunal concluded immediately that the dismissal fell within the band of reasonable responses to misconduct of this nature and was not unfair. The question of the claimant's disability also arose and the question whether his treatment was contrary to section 15 of the Equality Act 2010, which outlaws discrimination arising from disability where an employer treats an employee unfavourably because of something arising inconsequence of that person's disability and, finally, the employer cannot show that the treatment is objectively justified as a proportionate means of achieving a legitimate aim. Here, too, the employment tribunal found against Mr Burdett. It considered that the dismissal was objectively justified. It considered the dismissal was clearly a proportionate and necessary means of allowing Aviva to achieve its legitimate business aim of maintaining appropriate standards of conduct in the workplace and safeguarding its employees.

In the EAT, the tribunal's decision was overturned. First, in the context of the unfair dismissal claim, the EAT pointed out that conduct was different from culpability. Mr Burdett had committed the conduct in question but it did not necessarily follow that this was wilful or grossly negligent. The tribunal should have considered whether Mr Burdett's decision to stop taking his medication could be considered wilful behaviour or gross negligence, thereby making him culpable for his misconduct. This was not clear from its decision. The EAT further considered whether dismissal was the correct sanction in these circumstances. It relied upon *Brito-Babapulle v Ealing Hospital NHS Trust*. The tribunal did not have any regard to mitigating circumstances or considered why Mr Burdett had stopped taking his medication. The EAT considered this was not a case where dismissal plainly fell within the band of reasonable responses.

Secondly, the EAT considered that the tribunal had correctly identified the legitimate aim of the employer to require adherence to appropriate standards of conduct in the workplace. However the employer should have carried out a balancing exercise, weighing up the discriminatory impact on the employee of the method chosen, against the other available means. The tribunal had failed to assess how the employer had carried out the balancing act. The EAT concluded that the tribunal's reasons did not show that it had considered the alternative of homeworking (to counter future risk) or whether it had otherwise considered the alternative means available to Aviva in achieving its legitimate aim.

5: TUPE: Information and consultation

In ***LLDY Alexandria Limited v (1) UNITE the UNION (2) Peopleforwork Limited*** a distillery (LLDY) decided to outsource part of its drink handling activities to Peopleforwork and the questions were whether LLDY had given all of the reasons for its deciding to outsource this work; whether LLDY had provided the information long enough before the transfer to enable it to consult UNITE representatives and finally, whether the employment tribunal had erred in law in deciding that LLDY had a duty to consult, which was not a question before it.

It was common ground that the decision to outsource triggered the provision of regulation 13 of TUPE requiring information to and consultation with UNITE as a recognised trade union in the undertaking.

Prior to the decision to outsource, LLDY and the union had been in discussion about a pay claim. The negotiations did not run smoothly. An impasse was reached. The evidence was that LLDY's managing director said that he was "fed up" and was left with no option but to subcontract the work. LLDY then informed employee representatives of the proposed transfer, as it was required to do under Reg 13(2) of TUPE.

It was, in this process, required, inter alia, to state the reason for the transfer. LLDY stated that there were economic factors, worsened by the minimum pricing of alcohol due the following year and that there was a need to reduce operating costs.

UNITE claimed breach of regulation 13(2) of TUPE in two ways. First, that LLDY had breached its duty to inform the union of the reasons for the transfer by failing to inform the union that the real reason was the making good of a threat made by the managing director to subcontract the work in the light of the failed pay claim negotiations. Secondly, the information provided in the letter to the union was delivered only 10 business days before the TUPE transfer. This was, said the union, not long enough to enable proper consultation.

The employment tribunal found, as a fact, that the refusal to accept the company's pay offer was one of the reasons for the outsourcing. This had not been stated in the TUPE information letter. As this was a question of fact, and it was not contended that the employment tribunal had acted perversely in so finding, the tribunal's finding was accepted by the EAT.

As to whether the information had been delivered in sufficient time, the tribunal approached the issue following the authority of Cable Realisation Limited v GMB [2010] IRLR 42 in which the EAT held that even if there was no legal duty to consult (for example where no measures are envisaged) nonetheless, the transferor is under a duty to provide information long enough before the transfer to enable it to engage in voluntary consultations.

The EAT held the employment tribunal was correct. It did not find that the company had a duty to consult and there was no allegation before it that the company had failed to consult as provided for by regulation 13(6) (compulsory consultation where measures are proposed). But what the employment tribunal correctly found was that in accordance with Cable the company had a duty to provide information long enough before the transfer to allow consultation, even if that consultation were voluntary. Whether the information was provided long enough before the transfer was a question of fact (see I Lab Facilities v Metcalfe [2013] IRLR 605). In the present case, the tribunal's finding of fact would not be disturbed. 10 days notice was not enough.

6: What are the rules relating to remoteness in damages claims for psychiatric injury?

In ***Yapp v Foreign and Commonwealth Office*** Mr Yapp was appointed British High Commissioner in Belize. A year later he was withdrawn from the post and suspended, pending investigation of allegations of misconduct. He then received a written warning. His suspension was lifted, but he developed a depressive illness and had to undergo heart surgery. He did not in fact receive any other appointment in the Foreign and Commonwealth Office until his retirement.

He commenced proceedings against the FCO complaining of the withdrawal of his post and the way the disciplinary process was conducted. He said the resulting stress had caused his depressive illness, which both constituted damage in itself, and led to pecuniary loss.

The trial Judge found that the withdrawal of the claimant from his post was both a breach of contract and a breach of the duty of care which the FSO owed him at common law (but dismissed the claims in relation to the disciplinary process).

The FCO appealed against the finding of liability. It further contended that, even if it were in breach, the claimant was not entitled to recover damages for his depression and its consequences on grounds of causation and/or remoteness.

The Court of Appeal (lead judgment: Underhill LJ) dismissed the FCO's appeal against the findings of breach of contract and causation. But it allowed its appeal on the issue of remoteness of the claim for psychiatric injury. There is a masterly survey of the authorities on remoteness at para 79-133. And the judgements are rich in the analysis of the law in this area generally.

In contract, the question is: was the damage in question of kind which was "not unlikely" to result? In tort, was the damage "reasonably foreseeable"? The former test requires a higher degree of

likelihood of damage occurring than the latter. It therefore made more sense to start with the claim for the breach of the common law duty of care, since the tortious test of remoteness was more favourable to the claimant.

The Court came to the conclusion that it was wrong to find that it was reasonably foreseeable that the FCO's conduct in withdrawing the claimant from his post without having had the opportunity to state his case might lead him to develop psychiatric illness. According to the Court, it would be exceptional that an apparently robust employee, with no history of any psychiatric ill health, would develop a depressive illness as a result even of a very serious setback at work. The FCO could not have foreseen, in the absence of any sign of special vulnerability, that the claimant might develop a psychiatric illness as a result of its decision. It therefore followed if the losses were too remote to be recoverable in tort, they were also too remote to be recoverable in contract.

7: Cases to watch out for in 2015

We end this part of the Bulletin with some notable cases to watch out for next year.

- *Lyttle v Bluebird UK Bidco 2 Ltd and USDAW and Wilson:* European Court:

This case concerns whether the duty to collectively consult when multiple redundancies are proposed is triggered when 20 or more employees are dismissed at a particular establishment or, instead across the whole of the employer's organisation. The Advocate General's opinion in *USDAW* is expected on 5th February 2015.

- *Poclava v José Mar a Ariza Toledano:* European Court:

Whether the qualifying periods under national legislation are compatible with the fundamental right guaranteed by Article 30 of the Charter of Fundamental Rights of the European Union (protection against unjustified dismissal).

- *United States of America v Nolan:* Court of Appeal:

Whether the obligation to consult arises when an employer is proposing to make a strategic business or operational decision that will foreseeably lead to collective redundancies or only once the employer has made that strategic decision and is proposing consequential redundancies.

- *BT Management Services Limited v Edwards:* EAT:

Whether an employer had correctly decided that an employee on long term sick leave and in receipt of PHI was assigned to a part of the business for the purposes of a TUPE transfer.

8: Client Briefing: Disability discrimination and reasonable adjustments

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 explains what reasonable adjustments are in the context of disability discrimination and identifies when an organisation may need to make them.

What are the penalties for failing to comply with disability discrimination laws?

Discrimination legislation imposes a duty on organisations to make reasonable adjustments to premises or working practices where a disabled job applicant or employee is placed at a substantial disadvantage. Failing to comply with this duty is a form of disability discrimination. There is no limit to the amount of compensation that can be awarded for a successful disability discrimination claim.

When does the duty to make reasonable adjustments arise?

The duty can arise in three circumstances:

- Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison with individuals who are not disabled;
- Where a physical feature puts a disabled person at a substantial disadvantage in comparison with individuals who are not disabled;
- Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with individuals who are not disabled

What is a provision, criterion or practice?

The phrase "provision, criterion or practice" is wide ranging and includes:

- Recruitment criteria;
- Provisions in the employment contract;
- Employment policies;
- Informal practices.

What is a physical feature?

The physical feature must be part of the organisation's premises for the duty to arise. For example:

- Parking areas;
- Toilet and washing facilities;
- Building entrances and exits;

What is an auxiliary aid?

An auxiliary aid is something which provides support or assistance to a disabled person (for example, a specialist piece of equipment, such as an adapted keyboard or text to speech software).

What is a substantial disadvantage?

Discrimination legislation describes "substantial" as "more than minor or trivial". It is a relatively low threshold and, therefore, an employment tribunal is likely to find it easy to conclude that a claimant suffered a substantial disadvantage. Whether an employee is placed at a substantial disadvantage depends on the facts of the situation.

Taking steps to identify disability

An organisation is not expected to make reasonable adjustments if it does not know, or could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at a substantial disadvantage. Reasonable steps should be taken to put a system in place to help the organisation identify whether individuals are disabled and at a substantial disadvantage. If an organisation should have known about a disability, for example, if it would have been discovered from an Occupational Health assessment, then the duty to make reasonable adjustments will arise.

What is a "reasonable" adjustment?

Although each situation will be different, there are a number of factors which may be taken into consideration when deciding if the steps an organisation has taken were "reasonable", including:

- Whether the adjustment would actually solve a disadvantage identified;
- The practicability of the adjustment;
- The impact of the adjustment on the organisation as a whole;
- The financial and other costs of making the adjustment;
- The size of the organisation.

Adjustments an organisation may be required to make

The reasonable adjustments that an organisation may be required to make will depend on the facts of the individual situation. However, examples include:

- Making adjustments to premises (for example, by widening a doorway or providing a ramp);
- Providing information in accessible formats (for example, producing instructions and manuals in Brail or on audio tape);
- Reinstatement (for example reinstating an employee who resigned whilst depressed);
- Transferring a disabled employee to a new role (for example, moving them to an exiting vacancy);
- Altering the disabled person's hours of working or training (for example, permitting time working or different working hours to avoid the need to travel in the rush hour).

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