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Employment Law BULLETIN

Welcome to our May employment law bulletin.

This month marks the beginning of mandatory early conciliation before a claimant can make an employment tribunal claim. Early conciliation was launched on a voluntary basis on 6th April 2014. As from 6th May 2014 an employment tribunal claim cannot be made before lodging a request for early conciliation with ACAS and without a certificate from ACAS confirming that the early conciliation requirements have been met under the legislation. According to ACAS around 1,000 people have contacted ACAS about early conciliation since its launch in April. 98% of those who have contacted ACAS about early conciliation have decided to use the service and 100 employers have contacted ACAS to try out early conciliation. This initiative is almost certainly likely radically to change the landscape of employment tribunal litigation.

In the Employment Appeal Tribunal we cover some interesting cases on unfair dismissal. The band of reasonable responses test was robustly applied in *Whittington Hospital NHS Trust v Nduka*. In *Tew v T* the EAT criticised the employment tribunal for simply mis-reading an employer's disciplinary and grievance procedures. And in *Kids City Limited v Gayle* the EAT considered that the employment tribunal had gone wrong by substituting its own view for that of a reasonable employer.

In *Saha v Viewpoint Field Services Limited* the EAT considered the case of a telephone market researcher engaged on an ad hoc basis and concluded that the employment tribunal was right in deciding that her engagement was not under a contract of employment. In *Glasson v London Borough of Bexley* the EAT considered that, when an honorarium paid to an employee for additional duties was absorbed into the rate for a new job, the entitlement to the honorarium ceased. On its cessation there was therefore no unlawful deduction from

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

1: ACAS early conciliation now in force

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From 6th May 2014 it is now obligatory for anyone wanting to make an employment tribunal claim to notify ACAS first in order to trigger the early conciliation process. Tribunal claims will not be accepted by the employment tribunal office unless the complaint has been referred to ACAS and a conciliation certificate issued. That certificate confirms that the early conciliation requirements have been met under the legislation.

The early conciliation notification form is available on the ACAS website. Alternatively ACAS can be contacted by telephone and ACAS will complete the details.

This is then acknowledged, and contact made with the claimant and the employer. Early conciliation is intended to be for up to one calendar month but can be extended, if both parties agree, by a further 14 days. If, after this period, the matter is still not resolved, the conciliator will bring early conciliation to a close and the claimant will be free to make an employment tribunal claim. The number on the early conciliation certificate must be quoted in the ET1 application to the employment tribunal. ACAS has published a guide to the early conciliation process which may be accessed here.

2: Unfair dismissal and the band of reasonable responses

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In unfair dismissal law, an employer's decision to dismiss is generally not substantively unfair unless the decision to dismiss was outside the band of reasonable responses. The

EAT in Whittington Hospital NHS Trust v Nduka recently applied this principle. In this case, the claimant was employed at a hospital as a grade 5 staff nurse. Over the weekend of 25 to 27 June 2011 she was working night shifts and was the most senior nurse on duty on the ward. Three disciplinary complaints were made against her, namely that she had administered medication (morphine) to a patient later than prescribed; that she had signed for medication that a patient did not receive; and that she had failed to follow the hospital's controlled drug policy. It was accepted by the employment tribunal that the late administration of medication to one patient, who was undergoing a sickle cell crisis, caused distress to the patient, who was experiencing extreme pain, and to other patients on the ward. That was the most serious of the charges. The employer, following a disciplinary process, dismissed.

The employer took the view that if the claimant could not cope with her duties she should have escalated the problem to two site managers who could have arranged support. Furthermore, the employer took the view that it was wrong for the claimant not to apologise for the delay in administering medication to the patient, with consequent distress to that patient.

The employment tribunal found that the hospital had reasonable grounds for its belief that the matters complained of took place and that there was a full investigation and fair procedure. However, it found the dismissal unfair due to the failure of the hospital to take into account the claimant's clean six and a half year record of service and that she could have been retrained. And, finally, the tribunal disputed the hospital's position that the claimant had failed to apologise.

On appeal, the EAT reversed the decision. Given the neglect of the patient and the pain and suffering which the patient suffered, even balancing the claimant's length of unblemished service and an apology, if it were given, it could not be said that dismissal fell outside the band of reasonable responses. Some reasonable employers might have imposed a penalty short of dismissal, such as a final warning or retraining. But another group of reasonable employers could equally have concluded that dismissal was the appropriate sanction on the facts of the case.

3: Unfair dismissal: an employment tribunal mis-read an employer's disciplinary and grievance procedure

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An employment tribunal found an employee's dismissal unfair because it was in breach of the employer's disciplinary and grievance procedures. But this was wrong, as the employment tribunal had simply mis-read the employer's procedures. So held the EAT in Tew v T.

In this case, the claimant worked a desktop project manager. A female member of staff who reported into him raised a ten page written grievance about his conduct towards her. Specifically she alleged four acts of sexual harassment. Her grievance was submitted to T's manager. An arrangement was made for T to meet with the manager to discuss the grievance but T did not keep the appointment and refrained from attending work. The manager then suspended T on full pay pending an investigation, having decided, with the agreement of the complainant, not to proceed to a stage 1 grievance hearing but instead, to take the disciplinary route with T. Thereafter a disciplinary investigation was carried out, a hearing took place and the disciplinary panel concluded that T was guilty of

inappropriate sexual behaviour.

An employment tribunal found that the dismissal was unfair. It considered that, under the terms of the employer's policies, a disciplinary investigation could not take place until the grievance was followed through. However, the EAT considered that this was a mis-reading of the employer's policies. Under the employer's policies as read by the EAT, the employer was not required to proceed to a stage 1 hearing of the grievance. It had a discretion whether to proceed directly to a disciplinary investigation. And it was entitled to do so because the complainant did not want a grievance hearing. Where, asked the employer, was the unfairness in doing so to the claimant? Proceeding to a disciplinary investigation was clearly within the range of reasonable responses open to the employer's manager under the employer's procedure. Absent of any breach of the procedure, therefore, the basis of the tribunal's finding of unfair dismissal fell away and the dismissal was fair.

An interesting aspect of the decision of the EAT is that, at a time when the role of lay members in the employment tribunal and in the EAT is under threat, His Honour Judge Peter Clark praised the input of the lay members on the appeal and considered that the contribution of his industrial colleagues was invaluable. It confirmed his view that the finding of unfair dismissal in the present case could not stand both as a matter of law and of 'industrial common sense'.

4: Unfair dismissal: the employment tribunal substituted its own view

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In Kids City Limited v Gayle an employment tribunal wrongly substituted its own view for that of a reasonable employer. The claimant worked for a charity which provided holiday camp types of care for local disadvantaged children in various locations at schools. He had been employed for one and a half years as a play worker when in August 2011 a complaint was made by the mother of a vulnerable 8 year old who had been attending one of the employer's camps at which the claimant was working. The claimant was interviewed and he made a partial admission. In later interviews he qualified this admission, but was less than consistent. He was invited to a disciplinary hearing. During the course of that hearing he admitted that he had previously tweaked the noses of children he had been looking after at other sites and he may have inappropriately interacted with the child on the occasion in question. The employer carried out a disciplinary hearing and then dismissed the claimant, arguing there was a breach of trust. It found that the claimant had behaved inappropriately and had given untruthful answers during a disciplinary meeting.

The claimant claimed unfair dismissal (this was at a time when only one year's service for an unfair dismissal claim was required). The employment tribunal accepted that the employer had an honest belief that the claimant had misconducted himself. But it found that not only were there procedural defects but this was a case where the penalty was "completely outside the range of reasonable responses". The employer appealed, arguing that the employment tribunal had fallen into the "substitution mind-set" i.e. that it had (impermissibly) substituted its own view for that of a reasonable employer (see Small v London Ambulance NHS Trust [2009] IRLR 563).

The EAT recognised that this was a case were the employment tribunal plainly had

sympathy for those involved, for the employer, operating in a difficult climate on the one hand and, on the other, for the claimant, a young man with a clean disciplinary record and a relatively short lived employment history and an ill-advised choice of representative for what appears to have been his first disciplinary hearing.

However, the tribunal should have looked at the steps taken by the employer from the perspective of a reasonable employer in those circumstances. The circumstances here included: an allegation of injury to a vulnerable child in the employer's care; evidence as to how that injury arose from the child herself, consistently given directly to the employer and through her interview with a social worker; photographic evidence of the injury; and an evasive and inconsistent response from the employee. Given the need for trust between employer and employee and given the particular difficulties facing the employer, where it had to make a judgement on an allegation made by a vulnerable child, the decision to take into account the claimant's evasive and unhelpful responses could not have been outside the range of reasonable responses for a reasonable employer. The employment tribunal decision was therefore overturned and a finding of unfair dismissal reversed.

5: Telephone market researcher was not an employee

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In Saha v Viewpoint Field Services Limited Viewpoint provided fieldwork to market research companies. The claimant worked in its telephone unit. The amount of work in the telephone unit would depend on particular projects which the employer took on. The claimant was therefore a member of a number of retained ad hoc telephone unit staff. She worked on an ad hoc basis between 7 and 43 hours almost every week. The documentation regarding her engagement was sparse. But it was clear that she was not obliged to work any week when she did not want to and the employer was not obliged to offer her any work. If any work was available it was allocated according to individual availability. The claimant's availability happened to be good, hence the hours that she worked.

The employment tribunal found that she was not an employee. Because the employer was under no obligation to offer work and because the claimant was not obliged to accept any work and indeed was entitled to refuse any work she had already accepted, there was no mutuality of obligation, which is a fundamental requirement of an employment contract. The claimant appealed.

The EAT declined to overturn the employment tribunal's decision, based as it was, on clear findings of fact of the employment judge as to lack of mutuality of obligation. There was no umbrella contract covering the sum of her assignments with the employer. Nor was there an accumulation of individual employment contracts on each assignment.

It is notable that the EAT had sympathy with the claimant and considered that she deserved compensation. But it had to apply the law as it currently stands. His Honour Judge Shanks however said that "there can be no doubt that this is an area which is crying out for some legislative intervention, not least because, as Elias J said nearly six years ago, the "exercise in these cases, so far as tribunals are concerned, is highly artificial".

6: Absorption of honorarium into the rate for a new job meant there was no unlawful deduction from wages

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A complaint can be made by an employee under part II of the Employment Rights Act 1996 of unlawful deduction from wages. But for this to happen there must be a deduction in wages "properly payable" to the employee. In Glasson v London Borough of Bexley the employee was employed under terms and conditions with the local authority which provided for payment of additional allowances for "acting up". That was where an employee was asked to take responsibilities of a higher grade post or undertook more onerous duties. The employer's procedures stated that these were temporary payments and might be withdrawn at the discretion of the employer. Mrs Glasson was awarded an honorarium effective from 15th April 2007 on the basis that she had been asked to undertake additional duties. This payment was made on a monthly basis and was always recorded as an honorarium on her payslips.

Upon a restructuring Mrs Glasson was assimilated into a new role, which included those additional duties within her job description for her new role. Her new role was also subject to a job evaluation, arising from which she was entitled to be paid against the relevant pay grade. After this happened, the honorarium continued to be paid, albeit now in error.

In May 2012 the employer informed Mrs Glasson that the honorarium would need to be addressed and would withdrawn. She objected, but the employer asserted that this was paid at the employer's discretion and was subject to withdrawal and it was stopped with effect from 31st October 2012. Mrs Glasson claimed unlawful deduction from wages under part II of the ERA 1996. The employment tribunal, with which the EAT agreed, held these were discretionary payments, the power to pay them existing only for as long as there were additional duties. That power ceased when, upon a restructuring, she was assimilated into the new role which included her previously additional duties within the job description for her new role.

Therefore, the decision by the employer to cease paying the honorarium did not amount to unauthorised deduction from wages as it was no longer a payment "properly payable".

7: Share acquisition led to TUPE transfer

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It is common knowledge that acquisition of the shares in a limited company by a purchaser is not a TUPE transfer. This is because, for a TUPE transfer, there must always be a change of employer, that is to say, a transfer from one person to another person. On the acquisition of shares in a company, there is no change of employer, simply a change in the ownership of the share capital of the corporate employer. However, it has been held that if, following a share sale acquisition, there is then an effective takeover of all functions of the acquired company by a parent company, a TUPE transfer can take place after that share sale acquisition. So held the Court of Appeal in the Print Factory (1991) Ltd v Millam [2007] ICR 1331. This will not be a commonplace thing but it can occur, depending on the facts.

In Jackson Lloyd Ltd and Mears Group Plc v Smith, Jackson Lloyd Ltd was a company

engaged in the repair and maintenance of social housing. It had a number of contracts with the providers of social housing in the North West of England and North Wales. Jackson Lloyd got into financial difficulties and was taken over. The way it was taken over was that Mears Ltd (ML) a subsidiary company of Mears Group Plc (MG) purchased 100% of the shares in Jackson Lloyd. The employment tribunal's finding of fact was that this was a genuine share sale and was not, of itself, a TUPE transfer.

However, after the acquisition, the Jackson Lloyd board resigned and were replaced by MG nominees. MG also announced to Jackson Lloyd's workforce that it had acquired Jackson Lloyd and was going to put in an intensive programme of integration. That began immediately with a team of integration managers and support staff arriving from MG on the Jackson Lloyd sites in order to implement the integration. MG also appointed an "integration consultant" to manage the integration of Jackson Lloyd into MG. Upon his appointment he was effectively the manager on site at Jackson Lloyd and he reported into MG. At all times he followed the instructions and strategy set out by MG. Jackson Lloyd's chief executive was removed from office and its contracts director also removed (these individuals were described as the 'controlling minds' of Jackson Lloyd before the acquisition). The employment tribunal found that, as from the date of the acquisition by its subsidiary, MG imposed major changes on Jackson Lloyd through the integration team. Outwardly, the appearance was that Jackson Lloyd was autonomous, separate and even in competition with MG. But in reality it was not. The tribunal found that, by this stage, Jackson Lloyd was 'nothing other than a trading name'. Everything was controlled by MG and its systems were imposed on Jackson Lloyd without any reference to any personnel at Jackson Lloyd. The employment tribunal held that there was a genuine share sale acquisition on the takeover of Jackson Lloyd by ML. But, over time, MG in effect acquired the business of Jackson Lloyd making this a subsequent regulation 3(1)(a) TUPE transfer.

Claims were brought by a recognised trade union UCATT and also by individuals in their own names for failure to inform and consult under TUPE, which were upheld by the employment tribunal.

On appeal, it was argued that the employment tribunal had failed meticulously to set out the multiple factors concerning a regulation 3(1)(a) transfer which are contained in the EAT decision in Cheesman v R Brewer Contracts Ltd [2001] IRLR 144. However the EAT considered that whether there is a TUPE transfer is essentially a question of fact and it is not necessary to go through each single criterion set out in the Cheesman decision. The employment tribunal had correctly weighed the evidence. Nor had the employment tribunal gone wrong in assessing whether there was a TUPE transfer following the share sale acquisition and on who was the actual transferee (MG, rather than ML). The original share sale acquisition by ML was not a TUPE transfer but the effective takeover by MG thereafter was and MG, not ML was, hence, the transferee.

Finally, as some of the claims for a protective award under TUPE were brought by individuals the question was whether they had locus standi to bring their claims. UCATT was the correct claimant on behalf of its members. But in respect of employees who were not subject to that bargaining unit their purported representatives had been members of a representative committee. However, representatives on the representatives committee had to be elected annually. They had been elected in 2009 but there was no re-election in 2010. Therefore their remit had expired and there were no elected employee representatives available to non-UCATT claimants and so the individual employees had standing to bring their claims for breach of the information and consultation requirements

under TUPE.

8: Client briefing: Bring your own device (BYOD)

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This client briefing highlights the potential risks and benefits for organisations of allowing employees to use their own personal mobile devices (such as tablets, smartphones, laptops or notebook computers) for work purposes.

What is "bring your own device" (BYOD)?

Many employees now own personal mobile devices (such as tablets, smartphones, laptops or notebook computers) that can be used for work purposes. Organisations are receiving an increasing number of requests to allow employees to use these devices at work.

BYOD benefits

BYOD can bring a number of benefits to organisations, including:

- Increased flexibility and efficiency in working practices;
- Improved employee morale and job satisfaction;
- A reduction in business costs as employees invest in their own devices.

BYOD risks

The boom in BYOD has been matched with an upsurge in activity by criminals trying to exploit the data and intellectual property stored on personal mobile devices. The use of personal devices for work purposes increases the risk of damage to an organisation's:

- IT resources and communications systems;
- Confidential and propriety information;
- Reputation.

Ownership of the device

Personal mobile devices are owned, maintained and supported by the user, rather than the organisation. This means that an organisation will have significantly less control over the device than it would normally have over a traditional corporately owned and provided device.

Securing data stored on the device

- An organisation is responsible for protecting the organisation's data stored on personal mobile devices. Organisations should consider implementing security measures to prevent unauthorised or unlawful access to the organisation's systems or data, for example:

- Requiring the use of a strong password to secure the device; or
- Using encryption to store data on the device securely; or
- Ensuring that access to the device is locked or data automatically deleted if an incorrect password is inputted too many times.

- The organisation should ensure that its employees understand what type of data can be stored on a personal device and which type of data cannot.

Mobile device management

Mobile device management software allows an organisation to remotely manage and configure many aspects of personal mobile devices. Typical features include:

- Automatically locking the device after a period of inactivity;
- Executing a remote wipe of the device (make sure employees are aware which data might be automatically or remotely deleted and in which circumstances);
- Preventing the installation of unapproved apps.

Monitoring use of the device

- If an organisation wants to monitor employees' use of personal mobile devices it must:
  - Make it reasons for monitoring clear; and
  - Explain the benefits the organisation expects will be delivered by monitoring (for example, preventing misuse of the device).
- The organisation must ensure that monitoring technology remains proportionate and not excessive, especially during periods of personal use (for example, evenings and weekends).

Loss or theft of the device

- The biggest cause of data loss is still the physical loss of a personal mobile device (for example through theft or by being left on public transport).
- Loss or theft of the device could lead to unauthorised or unlawful access to the organisation's systems or data. The organisation must ensure a process is in place for quickly and effectively revoking access to a device in the event that it is reported lost of stolen.
- Organisations should consider registering devices with a remote locate and wipe facility to maintain confidentiality of the data in the event of a loss or theft.

Transferring data

BYOD arrangements generally involve the transfer of data between the personal mobile device and the organisation's systems. This process can present risks, especially where it involves a large volume of sensitive information. Transferring the data via an encrypted channel offers the maximum protection.

Employees should be encouraged to avoid using public cloud-based sharing which have not been fully assessed. Organisations should consider providing guidance to employees on how to access the security of wifi networks (such as those in hotels or cafes).

Departing employees

An organisation needs to think about how it will manage data held on an employee's personal mobile device should the employee leave the organisation.

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