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MARCH 2014

Employment Law BULLETIN

Welcome to our March employment law bulletin.

Among the developments we report this month, readers should note that, where the effective date of termination of employment falls on or after 6th April 2014, new limits for unfair dismissal compensation claims will apply.

From the EAT we discuss cases on TUPE relating to service provision change and harmonisation of terms and conditions. We also consider a number of unfair dismissal cases, including dismissals for misconduct, and issues concerning the admissibility of covertly recorded evidence of the deliberations of a disciplinary hearing panel. The Court of Appeal has also considered the scope of vicarious liability for an unprovoked assault by an employee on a customer.

Finally, our client briefing this month is on the subject of redundancy and alternative employment.

May I also remind you of our forthcoming events:
Click any event title for further details.

Settlement Agreements and the Law
- Breakfast Seminar, 1st April 2014

Effective Sickness Absence Management
- HR Workshop, 13th May 2014

and in conjunction with ACAS in the North East:

Understanding TUPE: A practical guide to business transfers and outsourcing
- Full Day Conference, 11th April 2014

Dr John McMullen, EDITOR **john.mcmullen@wrigleys.co.uk**

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

1: New limits on Tribunal compensation

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As from 6 April 2014, the limits on the maximum compensation that will be awarded in the Employment Tribunal will increase as follows:

Compensation limit	Current figure	**From 6 April 2014**
Maximum compensatory award for unfair dismissal	£74,200	**£76,574***
Maximum limit on a week's pay	£450	**£464**
Maximum basic award for unfair dismissal	£13,500	**£13,920**
Minimum basic award for certain unfair dismissals (dismissals for reasons of trade union membership or activities, health and safety duties, pension scheme trustee duties or acting as an employee representative)	£5,500	**£5,676**

The new limits are applicable where the effective date of termination of employment falls on or after 6 April 2014.

* or 52 weeks pay, whichever is the lower.

2: Early Day motion to annul new TUPE

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The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 are not without controversy. In certain areas, it has been suggested they are in conflict with European law. In other areas, the diminution of employment rights where these are derived from collective agreements has aroused hostility. The Labour opposition has filed an Early Day motion to annul the Regulations. However this is unlikely to go much further. Early Day motions are rarely debated and even more rarely, carried. This motion has just 17 signatures. The exercise is more to draw attention to the deficiencies in the new Regulations and to provoke further debate.

3: Was a supermarket vicariously liable for an assault by a petrol station assistant on a customer?

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No, said the Court of Appeal, on the facts in *Mohamud v Morrison Supermarkets*.

In March 2008 a customer visited a Morrisons supermarket and petrol station in Small Heath in Birmingham. The customer entered the service kiosk and asked a Morrison's employee, Mr Khan, if it was possible to print off some documents which were stored on a USB stick that the customer was carrying. Mr Khan responded in an abusive fashion, including racist language. He then proceeded to follow the customer into his car, punch him to the head, and thereafter subjected him to a serious attack involving further punches and kicks whilst the customer was curled up on the petrol station forecourt.

The customer sued Morrisons claiming they were vicariously liable for their employee's actions. The trial Judge held

they were not.

The Court of Appeal agreed. The question was whether there was a sufficiently close connection between the wrongdoing (the assaults) and the employment so that it would be fair and just to hold the employer vicariously liable.

The trial judge had however found that the assault had taken place at a time when Khan's supervisor had told him not to follow the customer out of the premises. It was found that for "no good or apparent reason" Khan had carried out the attack "purely for reasons of his own".

As such, these acts were beyond the scope of Khan's employment. The case could be distinguished from cases involving vicarious liability where the employee's duties included exercising authority and keeping order (such as a night club doorman). Mr Khan's duties included no element of keeping order over customers.

4: TUPE: Court of Appeal decides harmonisation exercise was unfair

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In *Hazel and Another v The Manchester College*, Manchester College successfully bid for contracts to provide offender learning in prisons. It took a TUPE transfer of about 1,500 staff in addition to 2,000 already employed in offender learning and about 3,000 in the rest of the organisation.

The College then set about some restructuring proposals. The impetus arose from a number of factors. First the general economic situation facing the further education sector was challenging. Secondly, there were particular problems with these offender learning contracts because of hidden costs. Finally, employees in offender learning were on very different terms and conditions of employment from other staff and, as a result, the College had to deal with no fewer than 30 sets of terms and conditions. This was unmanageable and also there was a risk of equal pay claims. The cost savings package was planned to achieve savings of £5million.

Against this background, there were redundancies and proposals to ask all staff to sign new contracts of employment. If they did not agree, they would be dismissed and offered re-engagement on new terms. Those employees who were not made redundant but were asked to sign new terms and conditions and refused, and were dismissed, brought unfair dismissal claims.

It was held by the Employment Appeal Tribunal that these dismissals were automatically unfair. First (and this is important) it was conceded that the dismissals were "in connection with" the transfer. As such, under the provisions of regulation 7(1) of TUPE 2006 (before its amendment in 2014), the dismissal could only be rendered not automatically unfair if there were an economic, technical or organisational reason entailing changes in the workforce. It was held, following long-standing authority, that a change in terms and conditions of employees who are continuing in employment cannot be a change in the workforce for this purpose. A change in the workforce means a change in the number or composition of the workforce. Such was not the case here. Nor could the reason for dismissing people who had refused to sign new contracts be associated, necessarily, with the reason for dismissing people who were redundant. Each dismissal had to be looked at on its own facts. Here, the reason for dismissing people who would not sign new contracts was connected with the transfer and could not be an economic, technical or organisational reason entailing changes in the workforce.

The Court of Appeal agreed. Furthermore, the tribunal's decision that reengagement was an appropriate remedy was also upheld. The fact that the employees who were dismissed had (reluctantly) accepted the new contracts did not disbar them from making unfair dismissal claims in connection with their previous contracts. Unfair dismissal is predicated on termination of a contract, not of an employment relationship. Re-engagement was ordered, this being the most effective way of enforcing employee rights on a TUPE transfer.

This case will not help us understand whether the result would be the same under the new rules on transfer related dismissals made by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014. It was, in this case, expressly conceded by counsel that the dismissals were connected with the transfer. Whether the transfer was the sole or principal reason for the transfer (the post January 2014 test) would depend entirely on an assessment of the facts in a future case.

5: Dismissal by employer despite findings of appeal panel could still be reasonable

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In *Kisoka v Ratnpinyotip* the EAT has considered whether a dismissal could be reasonable despite the decision going against the views of an independent appeal panel.

The employee in question, a worker in a children's nursery, was dismissed for gross misconduct as the employer believed she was responsible for attempting to start a fire in the office of the nursery. She appealed the decision. Given the small size of the employer's business, there was no manager of an appropriate level who had not already been involved in the case, so an independent body arranged and held the appeal meeting; however, it was not made clear between the employer and the independent body who should have the final decision as to whether or not to uphold the dismissal.

The appeal panel considered there was insufficient evidence to have justified the dismissal. However, the employer was of the view that the panel had made too many assumptions in their decision, and felt the need to investigate further – the further investigations suggesting the employee had not been accurate in her account of events. The employer decided to dismiss, notwithstanding the appeal panel's views.

The employee argued she had been denied an effective right of appeal and her dismissal was therefore unfair. The EAT declined to put any gloss on the statutory wording in relation to unfair dismissals. The overall procedure must be fair, but there is 'no fixed or inflexible rule' which applies to determine what is fair. In addition, the Acas Code of Practice allows the size and resources of the employer to be taken into account. The EAT considered that the ET was entitled to conclude that the overall procedure in this case was not unfair and the ultimate decision to dismiss was not unreasonable.

6: The '*Johnson* exclusion zone' and curing breaches of contract

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In *Gebremariam v Ethiopian Airlines Enterprise* the EAT has considered the so-called '*Johnson* exclusion zone' in a recent constructive dismissal case. In common law claims for wrongful dismissal, compensation cannot be claimed for losses flowing from the employer's breach of the implied term of mutual trust and confidence where such breaches are related to the manner of the dismissal (*Johnson v Unisys Ltd* [2001] UKHL 13). This is to avoid overlap with the compensation which is available for statutory unfair dismissal claims.

In this case, the employer was in breach of contract by giving notice of redundancy without proper consultation, but subsequently withdrew the notice of redundancy on appeal. The employee nonetheless resigned, claiming constructive dismissal. The EAT considered that in these circumstances, the employer's breach did not lead directly to the dismissal so the case fell outside the *Johnson* exclusion. Ultimately, however, the exclusion argument could not apply in any event in this case as it was a claim for statutory unfair dismissal.

The EAT also confirmed that where an employer had committed a breach of contract, this could not be 'cured' by e.g. allowing an appeal or withdrawing a notice to dismiss. The employee would be entitled to resign and claim constructive dismissal, unless they had 'affirmed' the contract. What counted as affirmation was not clear-cut. Making use of the employer's appeal process does not necessarily affirm the contract, but the facts in this case had not been sufficiently discussed, and it was remitted to the employment tribunal for further consideration.

7: TUPE: Service provision change and tasks of short-term duration

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There were two points in *Robert Sage Limited t/a Prestige Nursing Care Limited v O'Connell* (UKEAT/0336/13/TA). The first was whether a contract awarded to a new provider in that case was with the intention that this be carried out as a task of short-term duration. If it were, by Reg 3(3) (a) (ii) of the TUPE Regulations, the service provision change rules under TUPE would not apply, and there would be no TUPE transfer. Secondly, was the relevant employee assigned to an organised grouping of employees dedicated to providing the service concerned?

The facts in this case were that X was a vulnerable adult for whom a care package had been arranged by North Somerset Council. This was outsourced to Allied Healthcare Group Limited who provided the care concerned. The claimants were employed by Allied. Then, because of Allied's perceived difficulties in providing care, it decided to give notice to terminate its contract with the Council. It ceased providing services on 28th February 2012.

The Council decided that an application to the Court of Protection would be needed to approve changes to X's care plan. In the meantime, the Council engaged Prestige to care for X pending the approval from the Court of Protection to the changes. Prestige declined to take over the employees formerly working for Allied and pleaded that there was no service provision change because it was, they said, the intention of the client (the Council) to contract for a task of short term duration (the period until the Court of Protection had made its decision).

However, this turned out to be protracted process. Documents were sent to the court on 13th March 2012 and the matter was only resolved in December 2012. It had clearly been the hope or the wish of the Council that the contract with Prestige was a short term one. But the question was whether it had intended the contract to be of short-term duration. The employment tribunal, with which the EAT agreed, decided that a "hope or a wish" that the contract is short-term is not the same as an "intention" that it is short-term. In the words of the EAT "a hope and a wish are not an intention". The Council had no control over the length of the time it would take to go through the legal process or indeed whether the Court of Protection would give its approval to the planned change in X's care plan. The EAT gave the example of a person hoping to run a marathon. Thus: "it is meaningless to say he intends to do so if he has never run more than a mile". Accordingly, a hope and a wish could not constitute an intention and the exception to TUPE in regulation 3(3) (a) (ii) did not apply.

There was an organised grouping of employees immediately before the service provision change providing the service on behalf of the Council. The question was whether one employee, a Mrs Truman, was assigned to it. It was part of her contract that she was to work solely for X. But Mrs Truman was suspended on full pay on 18th October 2011 and was informed that it would be inappropriate for her to return to the package looking after X. Allied had also received a specific request from the Council that she was not to be placed with the service user going forward.

The employment tribunal regarded the matter as "essentially a contractual one" and considered that Mrs Truman was assigned. However, relying upon the cases of *Fairhurst Ward Abbots Ltd v Botes Building Limited and Others* [2003] UKEAT/1007/00/DA and *United Guarding Services Limited v St James Security Group Limited and another* [2004] UKEAT/0770/03/RN, the EAT considered that the contractual position was not wholly determinative. In *United Guarding Services* an individual was not allowed to work at her contractual place of work by the employer. Accordingly, the EAT held that the claimant in that case was not assigned to that place which was the part of the business transferred. This applied in the present case. Technically, under her contract, Mrs Truman could have been required to work on the care package for X. But the facts were that she would not have been required to care for X due to her suspension and the views of the Council. The employer had therefore prevented her from being assigned to the package concerned and Mrs Truman did not transfer under TUPE.

8: Dismissal for gross misconduct

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In *Eastland Homes Partnership Limited v Cunningham*, the EAT confirmed some of the points that an employment tribunal must consider in deciding whether a dismissal for gross misconduct can be fair. Misconduct is one of the potentially fair reasons for dismissal, but the tribunal must consider the reasonableness of the employer treating that as sufficient reason to justify dismissal.

In this case, the employer was a housing association providing accommodation for the elderly and the vulnerable. The employee was a caretaker on the site. The employer's policies restricted or prohibited employees from receiving gifts from residents. Despite this, the employee's wife was named executrix of a resident's will, and she and the employee

were joint beneficiaries of his entire estate. Contrary to the policies, the employee did not notify the employer that he had been named as a beneficiary at the time. He was summarily dismissed for gross misconduct, the employer taking the view that employees in a position of trust should have an exemplary standard of conduct. The employee claimed unfair and wrongful dismissal. The employment tribunal upheld these claims.

On appeal, the EAT held that the employment tribunal had not considered the question correctly, and restated the points for a tribunal to follow in gross misconduct cases. The fundamental question is 'whether in the circumstances ... the employer acted reasonably or unreasonably in treating [the employer's reason] as a sufficient reason for dismissing the employee'. The tribunal must consider whether the employee's conduct could reasonably be regarded as amounting to gross misconduct in the circumstances of the case. This particular tribunal had not done this. A generic description of gross misconduct was not enough and a more detailed consideration of the facts should have been made. This may favour employers if they wish to challenge a tribunal's decision on appeal; on the other hand, it confirms that an employer cannot simply rely on an action being described as gross misconduct in their policies to assume that it can justify summary dismissal, but must ensure they consider whether the conduct was capable of amounting to gross misconduct under the circumstances.

9: Covert recording of employer's private deliberations

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The issue of whether covert recordings can be used in evidence is raised from time to time in employment tribunals. There have been cases in which a covert recording by an employee of a disciplinary hearing has been admitted in evidence, but until this point covert recordings of the hearing panel's private deliberations have not been allowed.

In *Punjab National Bank (International) Ltd v Gosain*, the EAT permitted the use of the employee's covert recordings of private discussions around her disciplinary and grievance hearings in her claim for sex discrimination, sexual harassment, and constructive unfair dismissal. The reasoning was that the comments recorded were so inappropriate they were 'not part of the deliberations in relation to the matters under consideration'. They included comments suggesting the evidence was to be "skipped". They were not the sort of comments that might fall within the 'ground rules' of comments which might constitute 'the type of private deliberations which the parties would understand would take place in relation to the specific matters at issue at the grievance and disciplinary hearings'. The recordings were therefore admissible.

While employers may wish to prohibit recordings of grievance or disciplinary hearings in their policies, this case suggests that comments that go beyond deliberation of the matters might still be used in tribunals. Given that employees may be able to record covertly relatively easily on mobile phones, employers should take care that all discussions at and relating to hearings are appropriate and non-discriminatory.

10: Client Briefing: Redundancy and alternative employment

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Organisations which make redundancies have a duty to look for alternative employment for any potentially redundant employees. A dismissal is likely to be unfair if, at the time of the dismissal, the organisation did not consider whether any suitable alternative employment existed within the organisation. This client briefing sets out the key issues organisations need to consider.

Extent and duration of the search

- An organisation is not obliged to *create* alternative employment for redundant employees where none already exists. However, the organisation should make a thorough search for alternative employment and document that search. This will enable the business to show the steps that it has taken if it has to produce evidence in defence of an unfair dismissal claim.
- Make sure the organisation continues to search for possible alternative employment until the date of an employee's dismissal takes effect.

Providing employees with sufficient information

Provide sufficient information about any vacancies to all potentially redundant employees, so they can make an informed decision on whether the position is suitable for them. An organisation should also highlight the financial prospects of any vacant alternative positions. Do not automatically assume an employee would not want to take a more junior role for less money.

Matching your vacant roles with potentially redundant employees

- If the organisation is dealing with more than one potentially redundant employee, ensure that all of them are made aware of any vacancies.
- When it comes to deciding which candidate to award a vacancy to, the organisation does not need to take the same rigorous approach that is required in a redundancy exercise, where the selection of employees must be based on objective criteria.
- Any potentially redundant employees on maternity or adoption leave should be offered any suitable alternative vacancies first. If there are other vacancies, the organisation is then entitled to undertake a competitive interview process and appoint the candidate it considers to be the best for the job even if this is based on a subjective view. The organisation simply needs to act fairly and reasonably.
- Be aware of the risk of discrimination when considering whether there are any suitable vacancies and (if relevant) the process for deciding which potentially redundant employee should be offered each vacancy.
- When the organisation has identified one or more possible alternative jobs, it will need to agree on the method for deciding which potentially redundant employees will be best suited for those roles.

- The amount of administration and time required is likely to increase as the number of potentially redundant employees increases. This, and the fact that an offer must be made before the termination of the employee's existing employment, should be taken into account when the organisation is preparing any timetable for a redundancy process.

Bringing vacancies to the attention of potentially redundant employees

- An organisation will need to decide how to alert potentially redundant employees to the existence of possible alternative jobs. For example:
    - For a small group of employees the organisation may want to speak to them as a group or individually to advise them of the existence of any opportunities and what each involves;
    - For a larger number of potentially redundant employees it may be more practicable to draw their attention to established methods of communicating vacancies (for example, the organisation's intranet or notice boards);
    - If the organisation uses internal methods of communication, ensure the information is provided separately to any affected employees without access to those methods of communication (for example because they are on sick leave or maternity leave);
    - It may also be useful to write to each potentially redundant employee confirming the information the business has provided in any meetings and providing details of the vacant roles;
- The organisation should offer (and provide sufficient information about) jobs of lower status compared with the job an employee has been dismissed from;
- Discuss the possibility for alternatives to redundancy with affected employees including:
    - Possible alternative vacancies; and
    - Contractual changes (such as a move to part-time working).
- In some cases it will be appropriate to consider and discuss whether an affected employee should be given another employee's job, with that employee being made redundant (this process is known as "bumping").

Allocating vacancies between potentially redundant employees

- Any potentially redundant employees on maternity (or adoption) leave have an automatic right to be offered any suitable vacancies first.
- All organisations will need to make arrangements for other potentially redundant employees to be considered for vacancies in which they are interested. For example, once the organisation has provided details of the available vacancies, it can set out a timetable for the applications to be made and for interviews to be held.
- Applications for vacant roles should be limited to potentially redundant employees and, where possible, appointments should be made from that pool of candidates.

If you'd like to contact us please email john.mcmullen@wrigleys.co.uk

Wrigleys Solicitors LLP, 19 Cookridge Street, Leeds LS2 3AG. Telephone 0113 244 6100 Fax 0113 244 6101 If you have any questions as to how your data was obtained and how it is processed please contact us.