3PB Employment Case Law Update – 18 May 2018

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1. In what circumstances can damages for breach of contract be assessed by reference to the sum that the claimant could hypothetically have negotiated in return for releasing the defendant from the obligation it failed to perform? *Morris-Garner and another v One Step (Support)* [2018] UKSC 20 (18 April 2018)

The facts: the case concerned a business providing rented accommodation and support services to local authorities to enable vulnerable individuals to live in the community as independently as possible. The company was owned by the first defendant and Mrs Costelloe, who were directors; D1 and Mr Costelloe ran the business. The second defendant performed a managerial role. Over time however the working relationships deteriorated and the parties agreed a buy-out. D1 sold her shares, resigned as a director, and agreed with the claimant company to be bound for a period of three years by confidentiality, non-competition and non-solicitation covenants. D2, as part of the same transaction, terminated her employment with the claimant company and agreed to be bound by similar covenants against competition and solicitation.

D1 and D2 incorporated another company, "Positive Living", which began trading in competition with the claimant. The claimant's company experienced a significant downturn, threatened to bring proceedings for an injunction, but did not pursue the matter further at that time. The three year period of restraint specified in the covenants expired, and the defendants sold their shares in Positive Living. The claimant company then issued the present proceedings, seeking an account of profits or alternatively such sum as it might reasonably have demanded as a quid pro quo for releasing the defendants from the covenants, or, as a further alternative, damages for the loss it had suffered by reason of the defendants' breach of those covenants. In relation to the breach of confidence, it sought an account of profits or alternatively damages. The claimant relied on evidence from forensic accountants attempting to quantify the loss which the claimant had allegedly suffered in consequence of the alleged breach of the covenants, the benefits obtained by the defendants, and the hypothetical release fee.

The Supreme Court was concerned with the question, in what circumstances can damages for breach of contract be assessed by reference to the sum that the claimant could hypothetically have negotiated in return for releasing the defendant from the obligation it failed to perform? Such damages have been described as *Wrotham Park* damages after the case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 but Lord Reed in his judgment preferred to use the expression "negotiating damages" introduced by Neuberger LJ in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430.

The Supreme Court held that the judge at first instance had erred in considering that the claimant had a right to elect how its damages should be assessed, and mistaken in supposing that the difficulty of quantifying the claimant's financial loss, such as it was, justified the award instead of a remedy which could not be regarded as 'compensatory' in any meaningful sense. Common law damages for breach of contract are intended to compensate the claimant for loss or damage resulting from the non-performance of the obligation in question. The Court of Appeal was also mistaken in treating the deliberate nature of the breach, and the difficulty of establishing precisely the consequent financial loss, as justifying the award of a monetary remedy which was not compensatory. The idea that damages based on a hypothetical release fee are available whenever that is a just response, that being a matter to be decided by the judge on a broad brush basis, is also mistaken. The basis on which damages are awarded cannot be a matter for the discretion of the primary judge. The substance of the claimant's case was that it suffered financial loss as a result of the defendant's breach of contract, the effect of which was to expose its business to competition which it would otherwise have avoided. The nature result of that competition was a loss of profits and possible goodwill. The loss is difficult to quantify, but nevertheless it is a familiar type of loss for which damages are frequently awarded. It is possible to quantify it in a conventional manner, as demonstrated by the forensic accountant's report.

2. If an employee is dismissed on written notice posted to his home address, when does the notice period begin to run? *Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood* [2018] UKSC 22 (25 April 2018)

If an employee is dismissed on written notice posted to his home address, when does the notice period begin to run – is it when the letter would have been delivered in the ordinary course of post, when it was in fact delivered to that or address, or when the letter comes to the attention of the employee and he has read it or had a reasonable opportunity of doing so? As Lady Hale commented in her judgment on this matter, it is perhaps surprising that this question has not come before the higher courts before now. In *Gisda Cyf v Barratt* [2010] UKSC 41, the Supreme Court held that the effective date of termination for the purpose of unfair dismissal claims under the ERA 1996 was the date on which the employee opened and read the letter summarily dismissing her or had a reasonably opportunity of doing so; but the Court was careful to limit that question to the interpretation of the statutory provisions in question – the common law contractual position might be quite different.

In this case, the letter arrived at the employee's address whilst she was away on holiday. The employer contended that notice was given when the letter was delivered to the employee's address (deemed to be when the letter would be delivered in the ordinary course of post unless the contrary is shown); the employee contended that notice is not given until the letter comes to the attention of the employee and she has had a reasonable opportunity of reading it. Much turned on it because on the employer's case, notice expired before the employee's 50th birthday, when she would have been entitled to a much more generous pension.

There is nothing to prevent the parties to a contract of employment from making express provision as to how notice may or must be given and for when it takes effect, but that was not done in this case. The question for the court was the content of a term that must be implied into the contract of employment.

By a majority of three (two dissenting) the Supreme Court held that where there are no express terms in the contract of employment, written notice does not take effect until the employee has read it or had a reasonable opportunity of doing so. Lady Hale explained her view on the basis that this is the approach consistently taken by the EAT, which is an expert tribunal which must be taken to be familiar with employment practices as well as the general merits in employment cases, and that there is no clear and universal common law rule in non-employment cases. Further, there is no reason to believe that the EAT's approach has caused any real difficulties in practice. For example, if large numbers of employees are being dismissed at the same time, the employer can arrange matters so that all the notices expire on the same day, even if they are received on different days. If an employer does consider that this implied term could cause problems, it is always open to it to make express provision in the contract, both as to the methods of giving notice and the time at which such notices are (rebuttably or irrebuttably) deemed to be received. Statute lays down the minimum periods which must be given but not the methods. Further. It is very important for both the employer and the employee to know whether or not the employee still has a job; this consideration is not quite as powerful in dismissals on notice as in summarily dismissals, but the rule should be the same for both.

3. Does asking a Moroccan Muslim employee whether he "still supported Islamic State" amount to direct discrimination nor harassment related to race or religion: *Bakkali v Greater Manchester Buses (South) Limited T/A Stage Coach Manchester UKEAT/0176/17/RN (10 May 2018)*

The claimant worked as a bus driver and identified himself as being of Moroccan origin and Muslim. In the course of a conversation with a colleague, Mr Cotter, the Claimant told Mr Cotter about a report made by a German journalist who went to Syria and spoke to Islamic State ("IS") fighters, and quoted some of the comments made by the journalist which included the opinion of the journalist that:

"... Mosul ... was a "Totalitarian State", and that they (IS), are trying to enforce law and order upon its subjects, and that they are confident and proficient fighters, ..." Approximately 2-3 weeks later the Claimant and Mr Cotter were in the seating area of the works canteen and Mr Cotter said to the Claimant., "Are you still promoting IS/Daesh" and the Claimant got angry.

In dealing with the claim of direct discrimination the ET considered whether the conduct of Mr Cotter on 19 October 2015 was because of his race and/or religious belief, and found that Mr Cotter made the remark because of the previous conversation; there was no evidence that Mr Cotter made the remark because of the claimant's race or religion. If the comment had been made without the context, and Mr Cotter knew the claimant was Muslim, it would have appeared that Mr Cotter was linking the claimant's religion to the possibility of him promoting ISIS. However, the context in which Mr Cotter made the remark was that it followed a conversation where the claimant had informed Mr Cotter about positive sounding comments from a German journalist about ISIS. Mr Cotter had understood that, by making these comments, the claimant was promoting ISIS. ET concluded that, given the context, the claimant had not proved facts from which the ET could conclude that the respondent treated him less favourably because of his religious belief.

In deciding whether this remark constituted unlawful *harassment*, the ET relied upon their conclusion at paragraph 20 of their Judgment that it did not constitute direct discrimination. The Claimant appealed on the basis that the Tribunal had not considered the wider test in s.26 of the EA 2010 as compared with s.13. The EAT agreed that the test in s.26 is wider, but held that the same facts were relied on in support of the harassment and direct discrimination claims, the ET had not erred in referring back to its findings of fact, and it had referred to the test applicable under s. 26 i.e. whether the remark was *related* to race or religious belief.

4. *Addison Lee* courier was a worker: *Addison Lee Ltd v Gascoigne* UKEAT/0289/17 (11 May 2017)

The EAT concluded that the Tribunal reached an unimpeachable conclusion that there was a contract during the log-on periods with the requisite mutual obligations. The Claimant was a cycle courier with the Respondent. The ET upheld his claim that he was a 'limb (b) worker' within the meaning of Regulation 2 of the Working Time Regulations ("WTR"); and in consequence entitled to holiday pay thereunder. In doing so it held that the written terms of contract between the parties, describing G as an 'independent contractor', did not reflect the reality of the relationship; and that, during the period when G was 'logged on' to the Respondent's app, there was a contract with mutual obligations for 'jobs' to be offered and accepted. The Respondent appealed on two grounds. First, that on the facts as found by the ET, there was no basis to conclude that G was under any legal obligation to work, i.e. to accept jobs offered to him when logged on. His decision whether or not to do so (as with his entitlement to log on or off at will) was a matter for his whim and fancy. Accordingly the claim must fail for lack of the necessary mutuality of obligation.

Further or alternatively, that the ET's 'multi-factorial assessment' that G had the status of a 'limb (b) worker' was vitiated by factual error and should be remitted to another Tribunal. The EAT rejected both grounds of appeal.

5. Where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to unfavourable treatment because of something arising in consequence of disability under S.15 of the Equality Act 2010 even if the employer did not know that the disability caused the misconduct: *City of York Council v Grosset* [2018] EWCA Civ 1105 (15 May 2018)

G, a teacher, was employed by the respondent. He suffers from cystic fibrosis, a serious disease, and the respondent knew this when it employed him. Various reasonable adjustments were agreed to accommodate his disability. However, no proper record was kept of the position and it was lost sight of when a new head teacher took over at the school. The claimant was subjected to an increased workload which he found he could not cope with and he became very stressed. Whilst under this level of stress, he showed an 18-rated film (*Halloween*) to a class of 15-year-olds without obtaining approval for this from the school or the pupils' parents. In the consequent disciplinary proceedings, he accepted that showing the film was inappropriate but maintained it happened as a result of an error of judgment on his part arising from the high level of stress he was under at the time in consequence of his disability. The respondent did not accept that the showing of the film had arisen from an error of judgment brought on by stress, as there were severeal points at which the claimant might have stopped the film. It also felt that he did seem to feel that what he had done was serious and did not show remorse. It dismissed him for gross misconduct. The claimant brought tribunal claims of unfair dismissal and disability discrimination contrary to s. 15 EqA 2010.

The employment tribunal dismissed the claim of unfair dismissal but upheld the S.15 EqA claim. It found - on the basis of medical evidence that had not been available to the school – that the showing of the film had been the result of stress arising in consequence of the claimant's disability and also that the claimant's remorse was sincere and that there was no real risk of any repetition of such error of judgment if the undue level of stress to which he had been

subject was removed. It found that a formal written warning would have been sufficient to achieve the respondent's legitimate objective of protecting and safeguarding children and maintaining disciplinary standards. The Council appealed unsuccessfully to the EAT in relation to the S.15 EqA claim. The Council appealed further to the Court of Appeal.

The Court of Appeal dismissed the appeal. It rejected the Council's submission that the S.15 EqA claim could not succeed unless the Claimant could show that the school appreciated that his behaviour in showing the film arose in consequence of his disability. S.15 requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? and (ii) did that 'something' arise in consequence of the employee's disability? The first issue involves an examination of A's state of mind, to establish the reason for the treatment. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant 'something'. In this case, on the findings of the ET, there was such a causal link. It is not possible to read into S.15 EqA a further requirement that A must have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability. The Court of Appeal noted that this view had the support of a long line of authority in the EAT, and that it was consistent with Parliament's purpose in enacting S.15 in order to reverse the restrictive practical effect of the House of Lords' decision in London Borough of Lewisham v Malcolm. S. 15 EqA establishes a particular balance between a person suffering from a disability and a defendant. The risk of unfavourable treatment is cast onto the defendant rather than the claimant. If the defendant does not know that the claimant suffers from a disability, he has a defence. But if he does know that there is a disability, he would be wise to look into the matter more carefully before taking unfavourable action. He will also have a defence if he can justify the treatment.

The Court also dismissed the Council's appeal on the question of objective justification. A particularly strong factor underlying the ET's conclusion that the dismissal was not proportionate was its unchallenged assessment that, if the school had made reasonable adjustments by reducing the work pressure on the

claimant, he would not have been subjected to the same level of stress. In relation to the question of proportionality, the ET made its own assessment on the evidence it heard whether the claimant's remorse was genuine and it was entitled to do so for the purposes of applying the objective test under section 15(1)(b).

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