3PB Employment Case Law Update – November 2018

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1. Harassment – Evans v Xactly Corporation Ltd UKEATPA/0128/18LA

Background: The employee, E, appealed against a decision of the ET which rejected his claim for a number of breaches of the EqA 2010 by reference to the protected characteristics of race and disability.

E had been employed as a sales representative from 4 January until 16 December 2016 when he was dismissed for poor performance. He claimed that the dismissal was an act of race and disability discrimination.

The race discrimination complaint was founded on E's association with the travelling community. E relied on two impairments in support of his contention that he was disabled within the meaning of s.6 EqA 2010: type 1 diabetes; and, an underactive thyroid. It was contended by E that there was a link between his health conditions and his weight.

E had produced evidence before the ET that merely raises the possibility of a causal link between weight gain and diabetes and hypothyroidism. The ET found that the evidence did not establish that causal link in relation to the facts of this case.

The ET rejected these claims and accepted that the employer's reason for dismissing E were genuine.

E also brought a claim of harassment based on four specific allegations, that he had been referred to (on one occasion) as a "*fat ginger pikey"* and (occasionally) a "*salad dodger", "fat yoda"* and *"gimli".*

The ET also rejected these complaints.

Outcome: The EAT rejected E's appeal at a Rule 3(10) hearing. The EAT found that the ET was best placed to make the findings of fact about the context and office culture which it did. The ET was fully entitled to conclude that the comments complained of did not amount to harassment as defined in s.26 EqA 2010.

The EAT noted that the ET had accepted that on the face of it the "*fat ginger pikey"* comment is a derogatory, demeaning, unpleasant and potentially discriminatory and harassing comment to make. It also noted that the ET had rightly considered the context and the overall relationship and behaviour of the parties, so that it could properly understand whether the behaviour that was found to have occurred amounted to harassment.

The EAT found that the ET was fully entitled to come to the conclusion that:

1. The comments were not unwanted since E was such "*an active participant of the culture of banter (for want of a better word for it*)".

2. They did not have the purpose of violating E's dignity or creating an intimidating environment for him,

3. Nor did they have the effect of violating E's dignity or creating an intimidating environment for him, as he was not offended.

4. in any event, it would not have been reasonable for him to have considered his dignity violated etc given the particular circumstances and all the context and material facts relevant to the claim.

Note: This decision highlights the importance of a detailed analysis of the context within which some inappropriate comments are made. The word "banter" is often too readily used in an attempt to explain away ill-advised and offensive language. However, there are occasions when defending such a claim is justified.

2. Whistleblowing: Timis & Sage v Osipov [2018] EWCA Civ 2321

Background: Osipov ("O") was employed by an oil exploration company ("IPL") as its CEO. Two of IPL's directors were Timis ("T") and Sage ("S"). T, with agreement from S, decided that O should be summarily dismissed.

The ET found that the principle reason for O's dismissal was that he had made protected disclosures. It held that he had been unfairly dismissed by IPL, contrary to s.103A ERA 1996. That decision was not challenged.

The ET also found that, by their conduct in relation to his dismissal, T&S had subjected O to a detriment or detriments, contrary to s.47B ERA 1996. The ET found that IPL were jointly and severally liable with T&S to compensate O for his losses, quantified at around £2million. That decision was upheld by the EAT.

The principle issue on appeal was whether it was open to the ET to award O compensation against T&S for the losses occasioned by his dismissal. Their case was that compensation could only be awarded by way of compensation for unfair dismissal and, thus, only against IPL.

Outcome: The Court of Appeal upheld the EAT's decision.

T&S argued that s.47B(2) expressly provides that there is no claim for detriment where the detriment amounts to a dismissal. The recommendation that O be dismissed, and the dismissal itself, was a distinction without a difference. Thus, there could not be a claim against T&S as their recommendation amounts to a dismissal.

The Court of Appeal found that a construction of s.47B(2) which prevented a claimant from bringing a claim against an individual co-worker based on the detriment of dismissal would produce an incoherent and unsatisfactory result and is accordingly unlikely to conform to Parliament's intention. To prevent individual co-workers from being held liable in a case where the detriment amounts to dismissal would produce obvious anomalies:

(a) that co-workers whose unlawfully motivated acts short of dismissal cause the claimant to be dismissed will be liable for those acts while an individual with the same motivation who decides on the actual dismissal escapes scot-free; and

(b) that there is no such bar to individual liability in the case of a claimant who is a worker rather than an employee and who has his or her contract of employment terminated, even though the two situations might be thought to be substantially identical.

The Court of Appeal concluded:

(1) it is open to an employee to bring a claim under s.47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under s.47B(1B). All that s.47B(2) excludes is a claim against the employer in respect of its own act of dismissal.

(2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, s.47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and quantification of such losses will apply.

Note: This decision will cause obvious concern for individuals in managerial positions. Although the case may be of limited practical significance in some cases, where employers have deep pockets, that is not always the situation. Further, this case may be of significance in so-called "tainted information" cases (such as *Royal Mail v Jhuti* and *CLFIS v Reynolds*). In such cases, a dismissal may be fair provided the decision-maker has no improper motivation. Following *Osipov*, a claimant could claim against the individual victimisers (and thus, potentially, against the employer under s.47B(1B)), for the full financial loss suffered as a result of losing their job.

3. Unfair Dismissal: Hawkes v Ausin Group (UK) Ltd UKEAT/0070/18/BA

Background: Mr Hawkes ("H"), a member of the Royal Marines Reserve, worked for his employer ("AG") for less than two years. AG knew that H needed to carry out 28 days' military training a year – his contract provided for one week's unpaid holiday per year to go towards meeting the reservist commitments. H signed up for a seven-week (training) deployment. He informed AG that he needed seven weeks' leave. After some enquiries, AG discovered the deployment was not mandatory and did not want him to go ahead as it could not accommodate the absence. When AG realised H had chosen to go, they invited him to a meeting and dismissed him.

The ET concluded that the reason for dismissal was that H was going to be absent from work for a period of seven-weeks at a crucial time for the business and that AG could not sustain such an absence. This was found to be some other substantial reason. However, the ET also found that the reason was connected with H's membership of a reserve force. Pursuant to s.108(5) ERA 1996, the ET concluded it did have jurisdiction to consider the complaint of unfair dismissal, notwithstanding the fact that H had less than two years' service.

The ET found that the dismissal was fair. It considered whether AG ought to have held a meeting before deciding to dismiss. The ET found that it would not have made any difference. H had already decided that he would be deploying on the exercise. The parties had reached an impasse. A parting of ways was inevitable. The ET also took into account the way in which H had approached the issue with his employers. He had not discussed the matter with AG before putting his name down. He first informed AG in passing and conveyed it as something which he had to do rather than as something he had chosen to do. He then committed to the exercise without having sought and obtained permission. Thus, the dismissal was fair.

Outcome: The EAT upheld the decision and dismissed the appeal.

The EAT considered that the ET had in mind the correct test (s.98(4) ERA 1996) when considering the question of fairness and had applied that test correctly. It had not asked itself the impermissible question (per *Polkey*) as to whether the taking of the requisite procedural steps (in this case, the prior notice of the meeting at which H may be dismissed and the

holding of such a meeting prior to the final decision to dismiss) would have made any difference to the outcome.

Instead, the EAT found that the ET had asked itself the correct question as to whether the failure to hold a meeting rendered the dismissal unfair. This was not a misconduct case where it would usually be considered necessary to hold a meeting to consider an employee's explanations. This was a dismissal for some other substantial reason, that being that AG could not sustainably permit H to take seven weeks' leave. In that context, an earlier meeting would not have changed that position because of H's firm commitment to the exercise.

Note: this is a case that demonstrates there are some (limited) circumstances in which it may be appropriate to dismiss an employee without first holding a meeting. But tread carefully!

4. Direct Discrimination – Lee v Ashers Baking Company Ltd and others

Background: Mr Lee ("L") is a gay man associated with an organisation called QueerSpace, a volunteer organisation for the lesbian, gay, bisexual and transgender community in Northern Ireland. L placed an order for a cake with Ashers baker with the QueerSpace logo and the words *"Support Gay Marriage"* printed on it. The order was initially accepted but then later refused on the basis that the bakery was a Christian business and could not print the slogan requested.

L brought a discrimination claim alleging unlawful discrimination on the grounds of sexual orientation, and political opinion, and religious belief. These claims succeeded at first instance in the County Court and before the Northern Irish Court of Appeal. The County Court held that the owners of bakery directly discriminated against L on the grounds of sexual orientation, political opinion, and religious beliefs by refusing to make a cake decorated with the words "*Support Gay Marriage"* because of their own religious beliefs. The Court of Appeal upheld the decision. It found that "*this was a case of association with the gay and bisexual community and the protected characteristic was the sexual orientation of that community*."

A number of issues were appealed to the Supreme Court. This (brief) note will focus on the question as to whether the bakery directly discriminated against L on the grounds of sexual orientation by refusing to make the cake with the index wording.

Outcome: The Supreme Court held that Ashers did not directly discriminate against L on the grounds of sexual orientation. The Court also rejected the argument that this was associative direct discrimination, i.e. because L was likely to associate with the gay community.

The Court rejected the approach adopted by the Court of Appeal to "*associative discrimination"*. Simply because the reason for the less favourable treatment has something to do with the sexual orientation of some people, that did not mean that the less favourable treatment is "*on the grounds of"* sexual orientation.

There must, in the judgment of the Supreme Court, be a closer connection than that, a connection that it declined to find on the facts of this case. In particular, the Supreme Court disagreed with the Court of Appeal's view that "*the benefit from the message or slogan on the cake could only accrue to gay or bisexual people"*. It could also accrue to the benefit of the children, the parents, the families and friends of gay people who wished to show their commitment to one another in marriage, as well as to the wider community who recognise the social benefits which such commitment can bring. As the Supreme Court found, "*In a nutshell, the objection was to the message and not to any particular person or persons*."

The Supreme Court went on to find that the objection to the message engaged human rights issues and that Ashers were entitled to refuse to produce a cake iced with a message with which they profoundly disagreed. The principle would hold regardless of what that message was and the fact that manufacturing the cake could not really be construed as in any way promoting or supporting the cause.

Note: There is an interesting "postscript" in the judgment that appears to import the American "compelled speech" doctrine in what appears to be an attempt to confine the scope of its ruling. There is, according to the postscript, a "clear distinction" between refusing to produce a cake conveying a particular message, for <u>any</u> customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of <u>that</u> customer's characteristics. The Court states that "*one can debate which side of the line particular factual scenarios fall. But in our case there can be no doubt. The baker would have refused to supply this particular cake to anyone, whatever their personal characteristics. So there was no discrimination on the grounds of sexual orientation".* To

what extent this will give businesses the right to opt out of supplying services if it disagrees with the message a customer wants to convey remains to be seen.

In other news…

Employment Tribunal statistics

- The latest quarterly statistics published by the MOJ for the period April to June 2018 show:
    - There has been an increase of 165% in the number of single employment tribunal claims presented to the tribunal compared to the same period in 2017.
    - The number of single claim receipts was 10,996.
    - The number of claims disposed of during this period was 10,891 – a rise of 13% on the same period in 2017.
    - During the period of operation of ET fees (July 2013 to July 2017) receipts were relatively stable at around 4,300 per quarter.
- In 2017/2018, 536 cases received compensation for Unfair Dismissal. The average award was £15,007.
- In 2017/2018, there were 136 discrimination cases where compensation was awarded. Disability discrimination claims received the largest average award at £30,700.

Consultation Paper on reforming employment law hearing structures

- On 26 September 2018, the Law Commission issued Consultation Paper 239 on reforming employment law hearings. The consultation closes on 11 January 2019.

- It is seeking view on a range of issues, including:
    - Extending limitation periods in employment tribunals, generally to 6 months;
    - Allowing employment judges to sit in the civil courts when hearing civil court discrimination claims, or creating an ‘employment and equalities’ list of judges;

- Increasing, or removing altogether, the £25,000 limit for breach of contract claims, and allowing tribunals to hear breach of contract claims while the employee remains employed.

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