3PB Employment Case Law Update – September 2018

By Sarah Clarke

3PB Barristers

An employee can still rely on the victimisation legislation even where the allegations were untrue AND there was an ulterior motive for making the allegations, according to the EAT's decision in Saad v Southampton University Hospitals NHS Trust UKEAT/0276/17/JOJ

Facts: The Claimant was a Specialist Registrar, who was training to become a Cardiothoracic Consultant. He was referred to the Cardiothoracic Unit ("the CTU") in December 2003. This involved a rigorous training programme. It did not proceed smoothly, and in 2006, he was referred to the Professional Support Unit by the Programme Director, Mr T, as he was not making sufficient progress. He was assigned a case manager, Ms L, to provide him with support. He raised with her what he perceived to be unfair treatment towards him within the CTU, but made clear he did not want to take any action at that stage. In April 2011 he raised with Ms L that he felt bullied by Mr T but he did not want to make a complaint but wanted an independent review of his progress. Ms L told him carefully to think about raising a grievance as she felt he should focus on his training.

In July 2011, it was recommended by the then training Director, Mr O, that he should not pass his training. By this stage, Mr O had spent 6 months with the Claimant and had raised various concerns about his performance. The Claimant was due to undergo a final assessment on 22 July. However on 21 July he raised a grievance about the behaviour of Mr T, including an allegation that back in 2007 Mr T had made a comment describing him as a *"terrorist looking person"* and that he had likened him to *"the doctors who carried out the terrorist attack in Glasgow airport".* He requested to be moved to a different deanery.

In October 2011 he brought claims of victimisation (s27(3) EQA) on the grounds of race, and a detriment claim on the basis of having made a protected disclosure (when it was still a requirement for the latter that the disclosure be made in good faith). The Respondent agreed

that the comments he raised constituted a protected act and disclosure of information and the only issue was whether it was made in good faith.

The ET held that:

(i) there were no reasonable grounds for his believing the allegation to be true, although it accepted that he had subjectively believed that it was; and

(ii) the reason for raising the grievance was that the Claimant had intended this would mean the assessment - which he knew would go badly for him - would be postponed and his wish to be moved to a different deanery in order to save his career.

The whistleblowing claim was therefore dismissed. As regards the victimisation claim, the ET found that due to their findings on the whistleblowing claim, this claim also failed. In particular, they found that the fact that his belief was unreasonable and that he had an ulterior motive meant that it was a false allegation and not made in good faith.

The Claimant appealed on the basis that, given that the ET had found that he subjectively believed the truth of the allegation, it was not made in bad faith, regardless of the ulterior motive.

EAT: appeal allowed. The ET had erred in simply reading across from its finding of bad faith in respect of the whistleblowing claim when the two statutory contexts were different. The whistleblowing legislation requires the disclosure to have been made in good faith AND that the employee had a reasonable belief in the specified matters. S27(3) EQA provides that "*Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith*". In determining bad faith under s27(3), the primary focus was on the employee's honesty and not motive. The finding that the Claimant had subjectively believed that the allegation was true was sufficient to counter the suggestion that he acted in bad faith.

The issue of good faith within the whistleblowing context was considered by the Court of Appeal in **Street v Derbyshire Unemployed Workers' Centre** [2005] ICR 97 in which it was found that an employee had a subjective belief in the truth of the disclosures made, but had been motivated to make them due to personal antagonism towards her manager. The CA found that good faith meant not only that the disclosures had to be honestly made. If that were the case, the addition of the words 'good faith' would be otiose given the reasonableness of the belief requirement. Auld LJ held that "*good faith is a question of*

*motivation, and as a matter of general human experience, a person may well honestly believe something to be true, but, as in the instant case, be motivated by personal antagonism when disclosing it to somebody else…**The primary purpose for the disclosure of such information by an employee must, I think, be to remedy the wrong** which is occurring or has occurred; or, at the very least, to bring the section 43B information to the attention of a third party in an attempt to ensure that steps are taken to remedy the wrong."*

Auld went on to say however that the good faith requirement should not be construed in the same way across all legislation because each provision is *'conditioned by their context'*.

Relying on **Street**, Eady J concluded as follows:

What is significant, however, is the fact that subsection 27(3) EqA (as was also the case in the legacy statutes) has no prior stage where the ET has first to determine whether the employee believes in what they are saying (the evidence or information they are giving or the allegation they have made). The ET is simply required to find whether that evidence, information or allegation is true or false; if false, it must then determine whether it was given or made by the employee in bad faith. And that must mean that it has to determine whether the employee has given the evidence or information or made the allegation honestly: to paraphrase Auld LJ in Street, absent other context, bad faith has a core meaning of dishonesty. In this context (and, again, as Auld LJ observed in Street), it has to be at the bad faith stage that the ET turns its attention to the question whether the employee has made the allegation honestly or not. Unlike the good faith formerly required for a qualifying disclosure to be protected, whether the employee has an honest belief in what they have said will not have been tested at any prior stage.

As regards an ulterior motive, Eady J found that there were good policy reasons for exercising caution when having regard to the existence of a collateral motive in the context of a claim of unlawful victimisation under the EqA. One might have a genuine complaint but be reluctant to raise it. If their own conduct is later called into question, such a complaint may become relevant in order to deflect criticism, but it does not necessarily follow that it is made in bad faith.

Commentary: a useful reminder that the same phrases do not always carry the same interpretation when used in different legislation, and that the context of the legislation must be considered. Given that the purpose of the whistleblowing legislation is to protect those who wish to right wrongs, a malicious or ulterior motive in making a disclosure is not what

Parliament intended should be protected. However in the context of the discrimination legislation, the good faith requirement should be considered on the basis of the honesty of the allegation itself, and an ulterior motive will not necessarily lead to a finding of bad faith.

Can a lengthy notice period constitute affirmation of the employment contract? Yes, say the High Court in Brown & another v Neon Management & another [2018] EWHC 2137

Facts: The claimants worked in insurance/underwriting in the financial market. They had been headhunted by the defendants in 2015 because of their successful track record. The defendants were a loss-making syndicate at that time. The claimants therefore wished to ensure that their profit commission (PC) would be ring-fenced, and based on actual losses rather than estimates, and believed that this had been agreed. The claimants signed contracts of employment and restrictive covenant agreements. In early March 2018, they were given new employment contracts and the PC was replaced by a discretionary bonus. The defendants calculated the PC for 2016 on an assumed loss figure, rather than an actual loss figure. Since the claimants' team had suffered no losses, this resulted in the bonus pool being £150,000 rather than £500,000. The defendants refused to pay the new discretionary bonus, or agreed pay rises, until the claimants signed the new employment contracts. The claimants resigned on notice in March 2018, their notice periods being 6 and 12 months respectively. The defendants subsequently accused the first and second claimants of misconduct for sending confidential information to their private email accounts, reported them to their regulator, and removed their work from them. As a result, the first and second claimants resigned with immediate effect on 1 May 2018.

It was argued by the Defendant that by resigning on notice, the Claimants affirmed their contract and waived any previous breaches [the Claimants alleged that there were ongoing breaches following their resignation but that is not relevant in respect of the affirmation argument].

High Court: it was held that "*In my judgment, it is clear that by resigning on notice on 16 March, Mr Brown and Ms Bhoma affirmed their contracts of employment. It is well-established that in the face of a repudiatory breach of contract the employee must not leave it too long before resigning otherwise he will be taken to have affirmed: see Western*

Excavating v Sharp [1978] QB 761 (CA) at 769C–D, per Lord Denning MR. In the present case, whilst Mr Brown and Ms Bhoma did reserve all their rights, they clearly indicated that they would be working out the entirety of their notice periods, which, in Mr Brown's case, involved a further year of employment. It would be unconscionable to keep one's right to discharge a repudiated contract alive for that length of time in the absence of any further breaches of contract".

Commentary: There was limited discussion on this issue in the judgment and no consideration of the case law on notice and affirmation. Of course, section 95(1)(c) ERA makes it clear that one can be constructively dismissed even if notice was provided and so simply giving notice in itself is clearly insufficient to constitute affirmation. The EAT in **Cockram v Air Products plc** [2014] IRLR 672 considered the position if an employee gave *more* notice than their contract required. In that case, the claimant decided in good time to resign in response to the employer's alleged mishandling of his complaint *but* when resigning gave seven months' notice, whereas the contract only required three months. The ET held that on the facts this was for his own financial purposes, not for any altruistic reason, and on that basis dismissed the claim for constructive dismissal on the ground that he had affirmed the contract. On appeal, the EAT held that the ET was entitled to come to this decision. Whilst on the face of it, it may appear that giving longer notice constitutes continued performance, surely the reason behind this must be relevant? For example, in **Buckland v Bournemouth University** [2010] IRLR 445, the Court of Appeal found that there was no affirmation because the academic there delayed his resignation (5 months' notice was given) so as not to prejudice his students. However in the present case there was no discussion as to the reasons behind why the Claimants were willing to work out their notice period, which seems to be an important omission. I am unaware of any case in which giving one's contractual notice period was enough to constitute affirmation. No doubt the fact that both Claimants had unusually long notice periods is what swayed the High Court. However the decision does open the door for an argument that working one's contractual notice period is sufficient in itself to constitute affirmation, although of course each case will be fact dependent.

Non-working days are nonetheless to be counted when determining whether a claim has been issued in time, notwithstanding ET rule 4(2): Miah v Axis Security Services Ltd UKEAT/0291/17/LA

Facts: the Claimant's ET1 (alleging unfair dismissal) was received by the ET on Monday and the last day for presenting his claim was Sunday, the day before. He claimed that it had been posted by recorded delivery on the Thursday, thus would have deemed to have been presented to the ET on the Saturday (his solicitors later suggested that it had in fact been posted on the Friday). The ET accepted that, had the claim been sent by recorded delivery post on 26 January 2017 then, in the ordinary course of the post, it would be taken to have arrived on Saturday 28 January 2017, but there would have been no one in the office to sign for it as the office was closed. In those circumstances, the ET accepted it would not have been practicable to present the claim in time. The ET was, however, not satisfied that the claim had been posted, whether by recorded delivery or otherwise, on 26 January 2017 (due to the inconsistent evidence on this issue), and accordingly found that it had been reasonably practicable to present the claim in time but that had not been done. The claim was thus lodged out of time and the ET considered it had no jurisdiction to hear it.

The Claimant requested a reconsideration on the basis that Rule 4(2) ET Rules extended time to the next working day if the last day of the time limit landed on a non-working day.

Rule 4(2) of the 2013 ET Rules provides that:

(2) If the time specified by these Rules, a practice direction or an order for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day. "Working day" means any day except a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday …

The ET rejected this argument on the basis that rule 4(2) related specifically to time limits set down by the Rules themselves and not a deadline set by a statute. The Claimant appealed this decision.

EAT: appeal dismissed. HHJ Eady QC distilled the following applicable principles to be derived from the case law on time limits:

(1) The use of the word "presented" in s111(1) ERA means that to come within the time limit in subsection (2), the claim must be *received* by the ET; it is not enough that it is posted within the period in question, although if a claim is posted to arrive at the ET office in good time but is held up in the post, that may be a good ground for the ET to extend the time limit under subsection (2).

(2) Presentation is a unilateral act; a claim is validly presented if it is delivered to the ET after office hours but before midnight on the last day of the limitation period; there is no requirement that the complaint has to actually have been put into the hands of a member of the ET staff.

(3) Where there can be no actual receipt by the ET office - for instance, because the time limit expires on non-working day and the office is closed - if presentation can still be made (for example by posting the claim through the letterbox of the closed office) then the time limit will not be extended, see **Swainston v Hetton Victory Club Ltd** [1983] 1 All ER 1179.

(4) If, however, there are no proper means in fact for presentation (where, for example, there is no letterbox) then the limitation period may be extended to the next working day, again see **Swainston**.

HHJ Eady then set out the principles enunciated by the Court of Appeal in **Consignia plc v Sealy** [2002] EWCA Civ 878, namely:

(1) If a complainant chooses to present a complaint by sending it by post, presentation will be assumed to have been effected, unless the contrary is proved, at the time when the letter would be delivered in the ordinary course of post (see, by analogy, section 7 of the Interpretation Act 1978).

(2) If the letter is sent by first class post, it is now legitimate to adapt the approach contained in CPR 6.7 and conclude that in the ordinary course of post it will be delivered on the second day after it was posted (excluding Sundays, Bank Holidays, Christmas Day and Good Friday, being days when post is not normally delivered).

(3) If the letter does not arrive at the time when it would be expected to arrive in the ordinary course of post, but is unexpectedly delayed, a tribunal may conclude that it was not reasonably practicable for the complaint to be presented within the prescribed period.

(4) If a form is date-stamped on a Monday by a Tribunal Office so as to be outside a three-month period which ends on the Saturday or Sunday, it will be open to a tribunal to find as a fact that it was posted by first-class post not later than the Thursday and arrived on the Saturday, alternatively to extend time as a matter of discretion if satisfied that the letter was posted by first class post not later than the Thursday.

(5) This regime does not allow for any unusual subjective expectation, whether based on inside knowledge of the postal system or on lay experience of what happens in practice, to the effect that a letter posted by first class post may arrive earlier than the second day (excluding Sundays etc: see (4) above) after it is posted. The "normal and expected" result of posting a letter must be objectively, not subjectively, assessed and it is that the letter will arrive at its destination in the *ordinary* course of post. As the present case shows, a complainant knows that he/she is taking a risk if the complaint is posted by first class post on the day before the guillotine falls, and it would be absurd to hold that it was not reasonably practicable for it to be presented in time if it arrives in the ordinary course of post on the second day after it was posted. Nothing unexpected will have occurred. The post will have taken its usual course.

At the EAT, the Appellant argued that Rule 4(2) should be seen as providing a procedural mechanism to address the practical difficulties with the presentation of a claim when time expires on a non-working day, where the inability to physically present the claim at the ET office might otherwise mean that the time limit was effectively shortened. Eady J acknowledged that the practical difficulties of presenting a claim on a non-working day have not been dismissed as irrelevant in the case law, and recognised the Appellant's argument that this rule would give both clarity and consistency to the approach to be taken in determining whether a claim has been presented in time for section 111(2) purposes when the relevant time limit expired on a non-working day. However she concluded that rule 4(2) should not change the approach to be taken, bearing in mind that the wording of the rule was clear.

Eady J held that:

"The starting point is that the claim must be presented to the ET. That is a unilateral act and the claim is presented when it arrives at the ET office; it does not require any active participation on the part of the ET; see ***Consignia****. Where, therefore, an ET office date stamps the ET1 as received on a Monday (or a Tuesday following a bank holiday), it is open to the ET to find as a fact that it was actually presented - so physically delivered - to the*

office on the Saturday or Sunday (or the Monday, if that was a bank holiday). But that is a matter of fact for the ET to determine; see ***Consignia****). If Rule 4(2) ET Rules applied in these circumstances, the approach would be substantively modified: where time expired on a non-working day, then - provided it was accepted that the claim was presented on the next working day - it would necessarily be held to be in time; this would mean that the time limit for unfair dismissal cases would automatically be extended in these circumstances. That would not simply provide guidance as to how an ET should approach the determination of the question when was the claim presented; it would serve to extend the time limit in those cases. That, however, is not what section 111(2) ERA provides, and Rule (4)(2) ET Rules does not and could not purport to change that position."*

Comment: This is a stark reminder to claimants to ensure that their claims are made well within time, especially if they are intending to use the post. If limitation is looming, a safer option may be to make a claim online, or physically deliver the ET1 to the tribunal offices, utilising a letter box during non-work hours.

Does Pastafarianism allow devotees to wear colanders on their heads in passport photos? Unsurprisingly, the answer is no, according to the High Council of the Netherlands (August 2018)

Facts: The Church of the Flying Spaghetti Monster was founded in 2005 in the USA as a response to Christian Fundamentalists advocating the teaching of creationism in schools. Bobby Henderson, the founder, in an open letter, demanded equal time in science classrooms for Flying Spaghetti Monsterism. Believers worship an invisible and undetectable god called the Flying Spaghetti Monster. They wear colanders on their heads in homage to their deity, revere pirates as the original Pastafarians and vow to reject "crazy nonsense", be nice to all sentient beings and eat lots of pasta. It is officially recognised by the New Zealand government, which approved it to conduct marriages in 2015. They follow 8 'I'd rather you didn't' commandments, which if followed, will allow followers access to heaven, which features a stripper factory and a beer volcano!

Ms De Wilde, a Dutch national, brought a claim alleging that she should be entitled to wear a colander in her passport and driving licence photo as a manifestation of her religion, to override the ban on headwear law in such photographs. Dutch law does permit the head to

be partially covered for identity photos, but only for genuine religious reasons. De Wilde acknowledged that her religion may look odd to those who did not believe, but argued that the same applies to most faiths. For instance, she finds it odd that people believe that someone could walk on water.

Dutch decision: Pastafarianism is not a genuine religion, as it lacked the '*seriousness and coherence'* required of a religion. They found that "*Pastafarianism has no obligations or restrictions. De Wilde has said she wears her colander because she sees it as duty but it is an individual choice"* and "*It is important to be able to criticize religious dogma freely through satire but that does not make such criticism a serious religion."*

Commentary: S10 EQA defines religion as 'any religion', including lack of religion, and 'belief' as 'any religious or philosophical belief'. The definitions are designed to be broad and in line with art 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights (ECHR). The House of Lords in **R (Williamson) v Secretary of State for Education and Employment** [2005] UKHL 15 made it clear that while it is the function of a court to enquire as to the genuineness of a belief, and to decide that as an issue of fact, this must be an enquiry essentially limited to ensuring 'good faith'. It is not the role of the court to enquire as to the validity of any belief or to test it by objective standards, as individuals are at liberty to hold beliefs, however irrational or inconsistent they may seem, and however surprising.

In **Grainger plc v Nicholson** [2010] IRLR 4, the EAT considered a case involving alleged less favourable treatment to Mr Nicholson on the grounds of his philosophical belief which was said to be that *'mankind is heading towards catastrophic climate change and therefore we are all under a moral duty to lead our lives in a manner which mitigates or avoids this catastrophe for the benefit of future generations, and to persuade others to do the same'.* The EAT upheld the decision of the tribunal, that the claimant's asserted belief is capable of being a 'belief' for the purposes of the Regulations. Burton J held that there must be some limit placed upon the definition of philosophical belief namely:

1. the belief must be genuinely held;
2. it must be a belief and not an opinion or viewpoint based on the present state of information available;
3. it must be a belief as to a weighty and substantial aspect of human life and behaviour;
4. it must attain a certain level of cogency, seriousness, cohesion and importance;

5. it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

Given the above requirements, it is perhaps not surprising that a satirical movement set up to poke fun at mainstream religions was found not to be covered by the legislation.

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Sarah Clarke
Barrister
3PB Barrister
0117 928 1520
sarah.clarke@3pb.co.uk

Chambers Director: Russell Porter
Telephone: 01865 793 736
Email: russell.porter@3pb.co.uk