Time limits and the correct approach to the reasonable practicability of lodging ET claims when the previous fees regime was in place

By Craig Ludlow

Mr G Wray v Jewish Care (UKEAT/0193/18/JOJ)
(Slade J - Judgment handed down on 17th April 2019)

The Facts

1. C was dismissed by R for alleged gross misconduct on 6th March 2017. He commenced ACAS EC on 24th April 2017 and the certificate was issued on 7th June 2017. C contacted the CAB around 10th June 2017 but was not given an appointment until 13th July 2017. C lodged claims for unfair dismissal and breach of contract on 6th September 2017. He presented his claims prima facie out of time, the time for presenting the claims expiring on 18th July 2017.

2. C was advised by his legal advisor on 13th July 2017 that the time for limitation had expired on 6th July 2017. Whilst the ET proceeded initially on the same assumption, following an application for reconsideration in light of the EAT judgment in **Luton Borough Council v Mr M Haque (UKEATPA/0260/17/JOJ)** it was accepted that limitation in fact expired on 18th and not the 6th July 2017.

3. C did not attend the preliminary hearing but he was legally represented and provided a written statement for that hearing. He put forward in his statement a number of reasons for the delay in presenting his claims, which can be summarised as follows:

    a. Lack of knowledge of time limits;

    b. Delays due to ACAS and time to get appointment with CAB;

c. Only became aware fees had been 'abolished' in early August 2017;

d. 'lack of funds' - he was saving up to fund the case and pay the £250 tribunal fee plus his lawyers' fees and it was only in early August 2017 that he learnt that the tribunal fees had been abolished.

The relevant statutory provisions

4. Employment Rights Act 1996

Section 111

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A) ….section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).

…

207B

(3) In working out when a time limit set by a relevant provision expires the period beginning with [the date the applicant complies with the statutory obligation to contact ACAS before instituting proceedings] and ending with [the date the applicant receives the relevant certificate from ACAS] is not to be counted."

5. The statutory provisions regarding the limitation periods under the ERA 1996 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 applicable to contract claims in the ET are materially indistinguishable.

ET's Decision

6. The EJ considered the material she had before her and held that C had not made out that it was not reasonably practicable to bring his claim in time, because there was information reasonably available to him that he could reasonably be expected to have been aware of the time limits (i.e. ACAS' email to him on 27th April contained a link to the ACAS booklet on early conciliation and had he accessed the link the time limits would have been clear to him) and because the EJ was not satisfied that he did not have the money to present a claim in time. In respect of the 'lack of funds' argument the EJ stated:

> *"The difficulty for the claimant with relying on lack of money and the applicability of the fees regime during the period from the end of the conciliation period until the expiry of the limitation period, is that I do not have the evidence before me to satisfy me that the claimant did not have funds even to present a claim. Indeed, his evidence is that he had been saving up to fund the case and pay tribunal fees and lawyer's fees. On the basis that this is the only evidence before me I cannot say that it was not reasonably practicable for the claimant to present his complaint within the applicable time limits for this reason either"*.

7. The EJ further held, in any event, that a delay of 2 months after the expiry of the extended limitation period was not reasonable.

Grounds of Appeal to EAT

8. C appealed to the EAT on various grounds. It was submitted that the existence of fees for starting and pursuing ET proceedings detrimentally affected C's ability to proceed with his claim. Reference was made to **R (on the application of Unison) v Lord Chancellor [2017] IRLR 911** and it was submitted that the EJ erred in law by focusing on the impact the fees regime had on C rather than on its general impact on access to justice. It was further advanced (in the alternative) on C's behalf that it was 'self-evident' from his written statement that a core reason for him delaying issuing a claim was because he was saving up to pay the ET issuing fee of £250 and that he did not have the required fee at the time the claim should have been issued. Counsel for R submitted that the EJ did not err in finding that there was no evidence before her that C did not have funds to present a claim and that the evidence in his statement was that he was saving up to pay for items in addition to the issue fee of £250.

EAT Decision

9. The EAT held that the EJ did not err in law or reach a perverse decision and dismissed the appeal. In respect of the argument that 'the mere existence' of the unconstitutional and unlawful fees regime made it not reasonably practicable for C to issue his claim in time was not accepted. The EAT affirmed that:

> *"A claimant must establish why he did not present his complaint in time. A potential claimant may not present a claim in time for a variety of reasons. The existence of the fees regime may have been entirely irrelevant to such decisions. Adopting the argument advanced on behalf of the Claimant would result in it not being reasonably practicable for a millionaire to present a claim in time if the limitation period had expired while the fees regime was in place."*[1]

10. In respect of the alternative argument that C had adduced evidence that he was unable to pay the £250 issue fee which thus rendered it not reasonably practicable for him to have presented his claim in time, the EAT likewise upheld the EJ's judgment. C accepted before the EAT that he had not produced any evidence of his means to the EJ and his statement clearly made reference to saving up not just for the tribunal issue fee but also to fund the case and for lawyers fees. Thus the EJ's finding that she did not have the evidence before her to satisfy her that C did not have funds to even present a claim could not be criticised.

Comment

11. This case highlights that a claimant cannot simply rely on the fact that limitation expired at a time when the (now unlawful) tribunal fees were in place so as to circumvent the usual principles to be applied in terms of seeking an extension of time. Each case will be looked at on its own facts and how the previous fees regime actually impacted upon a particular claimant's ability to present his or her claim in time. This case further serves as a useful reminder of the importance of having clear evidence from the claimant themselves as well as adducing documentary evidence to corroborate their position as far as possible as to precisely why they were unable to present their claim in time (because of the fees regime or otherwise). The assessment depends not only on what

[1] Paragraph 44 of the EAT Judgment.

the claimant knew about the time limit, but also what he reasonably ought to have known[2].

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[2] Paragraph 39 of the EAT Judgment.

s.26 Harassment: The correct approach

Br Craig Ludlow

Mr F Ahmed v The Cardinal Hume Academies (UKEAT/0196/18/RN)

(Choudhury P - Judgment handed down on 29th March 2019)

The Facts

1. C is a qualified "Teach First" teacher and has dyspraxia which causes difficulties with reading, comprehension speed and handwriting. In particular, he has difficulty writing for more than a few minutes due to pain in his hands. Concerns were raised about his ability to cope with the demands of the role. At a meeting with the headteacher, Mr Rowland, remarks were made about C's difficulty in writing which C perceived to amount to harassment related to disability. C was later suspended and required to stay at home until the issues raised were considered further. Around the same time, C raised this issue at another meeting alleging that it may have breached anti-discrimination legislation. Upon returning from his suspension, it was suggested to him to change to an alternative teaching scheme which was more supportive, albeit less prestigious. C raised a grievance regarding the insensitive questioning by Mr Rowland and that his suspension was without reasonable grounds. He subsequently resigned claiming that he had been the victim of direct disability discrimination, discrimination arising from disability (which was not appealed), and harassment.
2. Section 26 EqA 2010 ('the EqA'), so far as relevant, provides:

   (1) A person (A) harasses another (B) if—
   (a) A engages in unwanted conduct related to a relevant protected characteristic, and
   (b) the conduct has the purpose or effect of—
   (i) violating B's dignity, or
   (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b)

[...]

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are— [...]
disability

3. Guidance as to the application of this provision is set out in the judgment of Pemberton v Right Reverend Inwood [2018] ICR 1291, [2018] IRLR 542, in which the Court of Appeal considered whether the ET had been correct to conclude that the revocation of a Canon's Permission to Officiate at services, and the withholding of an Extra Parochial Ministry Licence, following the Canon's marriage to his same-sex partner did not constitute harassment within the meaning of section 26 EqA. Underhill LJ, having referred to the predecessor provisions to section 26 EqA and the judgment of the EAT in Richmond Pharmacology v Dhaliwal [2009] IRLR 336, which considered those provisions, stated as follows:[3]

"...I would now formulate it as follows. In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the Claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating

[3] Paragraph 25 of the Judgment.

the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so".

ET's Decision

4. The harassment claims related to the meeting with the headteacher and being suspended. The ET accepted that the remarks made by the headteacher were unwanted, but that it would not be reasonable to hold these as amounting to harassment. In relation to the suspension, the minority of the tribunal considered that it would be reasonable for C to feel it had violated his dignity and that therefore his complaint of harassment should succeed, but the majority did not. Rather the majority concluded that it was not reasonable to regard C's sending home on suspension as amounting to harassment within the meaning of section 26(4)(c) EqA. Also by a majority, the constructive dismissal claim was dismissed.

5. C appealed to the EAT. Firstly, in relation to harassment, he argued that the ET had erred in regarding reasonableness of whether the conduct had had the proscribed effect under s.26(1)(b) as determinative instead of recognising that it was one of three factors that were to be considered: perception, circumstances and reasonableness.

6. Secondly, in relation to direct disability discrimination, the ET had erred in failing to give effect to its own finding that C was disabled by reason of his handwriting. Further, that the ET had erred in relation to his claim of direct disability discrimination in failing to give effect to its own finding that the reason for the C's suspension was his disability, namely his difficulty in handwriting. Further, it had also failed to consider how C's comparators and/or a hypothetical comparator would have been treated.

EAT Decision

7. The harassment point was narrow and can be summarised as follows: the new statutory formulation of s.26 under the EqA means that it would be possible to find conduct having had the proscribed effect, notwithstanding it might not be reasonable to have had that effect. Whereas, under the previous provisions, conduct would be regarded as having the proscribed effect only if having regard to all the

circumstances, including the perception of that other person, it should reasonably be considered as having that effect. Therefore C argued that the ET was wrong to regard reasonableness as determinative, as opposed to a factor to be taken into consideration.

8. Choudhury J rejected this argument. If this proposition was correct, section 26 EqA would have intended to have made a "substantive difference". But Underhill LJ, in **Pemberton v Right Reverend Inwood [2018] ICR 1291**, albeit in obiter remarks, expressed a clear view that this was not the case. At paragraph 88, Underhill LJ expressly considered the changes that ought to be made to the guidance he gave in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** when considering cases of harassment.

9. In **Pemberton** Underhill LJ had specifically considered why the change came about and expressed the view that it was probably "simply a matter of the 2010 Act having its own drafting style". In the absence of Hansard references to suggest a material change, or specific examples where conduct may have the proscribed effect without it being reasonable to have that effect, the EAT stated it is "effectively determinative". He confirmed that the approach as set out in paragraph 88 of **Pemberton** is the correct approach and that if it was not reasonable for conduct to be regarded as violating C's dignity or creating an adverse environment for him, then it should not be found to have done so.

10. The EAT also dismissed the argument that the suspension was also because of the disability. The ET's conclusion was that C had been suspended because of his difficulties with handwriting. That was a finding that treatment was because of the adverse effect of an impairment or of something arising from disability; it was not a finding that the treatment was because of the disability – whether dyspraxia or some other unspecified physical or mental impairment – itself.

Comment

11. There are frequently cases before ETs where conduct does have the proscribed effect, yet it is not considered to be reasonable to have had that effect. In these situations, it is frequently s.26(4)(b) EqA relating to 'circumstances' which will become key to establishing the context of a particular remark or act. Thus claimants and employers must adduce evidence in their witness statements or otherwise

highlighting other circumstances of the case which might be relevant to the section 26 test. Underhill J (as he then was) recognised this in **Dhaliwal** when he highlighted the importance for employers and tribunals to be "*sensitive to the hurt that can be caused by racially offensive comments or conduct*", but equally, he stated that it is "*important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*"

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Criminal & Employer Investigations, Interim Injunctions & Mutual Trust and Confidence

By Craig Ludlow

North West Anglia NHS Foundation Trust v Andrew Gregg [2019] EWCA Civ 387

(Court of Appeal – LJJs Lewison, Jackson, Coulson - 19th March 2019)

The Facts

1. C, a consultant in anaesthetics, was appointed by the Trust in 2003. In June 2013 a patient in the care of C died. No concerns were raised at that time. In January 2016 another patient in his care died and concerns were expressed about the circumstances of that patient's death. Following an investigation, R opened disciplinary proceedings against C and initiated the process in Maintaining High Professional Standards in the NHS ('MHPS'). It also notified the police. C was suspended on full pay. The CPS decided that there was insufficient information to charge C in relation to one patient's death, but its investigation into the second patient's death was ongoing. The GMC suspended C's registration to practice and R stopped his salary.

2. C's lawyer advised him not to participate in a disciplinary hearing as he would risk prejudicing himself in the criminal investigation. R refused to adjourn the hearing. In addition, it considered convening a separate hearing under schedule 19 to C's employment contract, by which R could dismiss C for his lack of registration. The police had no objection to the continuation of R's disciplinary process.

3. C applied for an interim injunction preventing the Trust from continuing with its investigation until the police investigation was complete.

The High Court Decision

4. The High Court found that the Trust was or would be in breach of contract:

   (a) For failing to pay C's salary during the period when he was the subject of an interim suspension;

   (b) For proposing to hold a hearing to discuss the termination of C's contract of employment on the grounds of his failure to hold the requisite registration during the period of suspension; and

   (c) For pursuing their own internal disciplinary process in parallel with an investigation by the police, rather than delaying it until the police investigation was completed and a decision made by the CPS as to whether or not to charge C with any criminal offences.

5. Accordingly, it granted C an injunction and R appealed against the judgment that it had breached C's contract of employment.

The Court of Appeal Decision

6. The principles to be derived from the cases on parallel proceedings are as follows:

   (a) An employer considering dismissing an employee does not usually need to wait for the conclusion of any criminal proceedings before doing so: **Harris (Ipswich) Ltd v Harrison [1978] ICR 1256**; **Harrison & Another v Courage (Eastern) Ltd [1981] ICR 496**

   (b) An employer does not usually need to wait for the conclusion of criminal proceedings before commencing / continuing internal disciplinary proceedings, although such a decision is clearly open to the employer: **Secretary of State for Justice v Mansfield (UKEAT/0539/09/RN)**

   (c) The court will usually only intervene if the employee can show that the continuation of the disciplinary proceedings will give rise to a real danger (and not merely a notional danger) that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene: **Jefferson v Bhetcha [1979] 1 WLR 898**; **R v BBC ex parte Lavelle [1983] ICR 99**[4]

[4] Paragraph 107 of the Judgment.

7. In **Chhabra v West London Mental Health NHS Trust [2013] UKSC 80**, the Supreme Court upheld the granting of an injunction which prevented a Trust from investigating various confidentiality concerns against the claimant as matters of gross misconduct. The Supreme Court found that the findings of fact and evidence, even when taken at their highest, were not capable of supporting a charge of gross misconduct. In addition, a named individual continued to take part in the investigatory process in breach of an undertaking which the Trust's solicitors had given in writing. These and other irregularities, when taken together, justified the grant of an injunction.[5]

8. **Chhabra** illustrates that the court will ordinarily require strong justification before it considers granting injunctive relief in these circumstances. That can also be seen in **Al-Mishlab v Milton Keynes Hospital NHS Foundation Trust [2015] EWHC 3096 (QB)**, in which Green J refused to grant an injunction restraining a forthcoming disciplinary hearing. He said:

"16. First, in an employment context there is a power vested in the employer to manage employees, which includes establishing relevant facts and deciding how these facts affect future relations. Even where internal procedures are detailed the purpose of those procedures is to facilitate the employer's managerial power. Where detailed procedures are silent on the matter then the fallback is that it is a managerial discretion for the employer to decide upon in relation to that gap...

17. Secondly, it is accepted that there are implied terms in the Applicant's contract that neither party will without reasonable and proper cause act in a manner that is calculated or likely to destroy or seriously damage the relationship of trust and confidence and that the defendant will in any event act fairly in the conduct of an internal disciplinary or similar process. It is therefore accepted that implied terms constrain the exercise of the employer's discretion. But it is also submitted that the discretion remains broad...

18. Thirdly, it is submitted that the court should not engage in micro-management of employment procedures...

19. Fourth, there is a public interest in allowing internal processes to run their course and courts should be slow to interfere if disputed issues can be sorted out an resolved within the framework of the internal procedure itself.

[5] Paragraph 109 of the Judgment.

20. Fifthly, there is a public interest that matters which need to be taken of a substantive nature, (which would in my view include a decision upon the capability of a practitioner to work within the NHS) should be taken by the mandated expert panel...".

9. Coulson LJ giving the judgment of the Court said that he would not have granted an injunction to delay R's disciplinary hearing until after the police had concluded their own investigation. He did not consider that the facts justified the court's interference with R's management of its own employees. In his view, the decision to prevent the ongoing disciplinary process and to await the outcome of the police investigation amounted to micro-management by the court of R's employment procedures[6].

10. The CA held that the High Court Judge had applied the wrong test and that she repeatedly equated the implied term of trust and confidence with a more generalised obligation to act fairly.

11. Firstly, there was no proper analysis of the 'severe test' required to demonstrate any breach of the implied term of trust and confidence.

12. Secondly, the Judge did not ask herself the 2 questions that were identified in **Stevens v University of Birmingham [2015] EWHC 2300 (QB)**, namely whether the conduct "is calculated to destroy or seriously damage the relationship" and then, even if it was, whether there was "reasonable and proper cause" for that conduct[7].

13. Accordingly, R had not breached the implied term of trust and confidence, and its conduct had not been calculated to destroy or seriously damage its relationship with C. There was no evidence that the internal disciplinary process would have any effect on the criminal investigation, let alone give rise to a real danger of a miscarriage of justice. The injunction had therefore been wrongly granted (save for in respect of R's decision to deduct pay).

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[6] Paragraph 111 of the Judgment.
[7] Paragraph 116 of the Judgment.

S.15 Disability Discrimination based on mistaken belief

By Craig Ludlow

IForce Ltd v E Wood (UKEAT/0167/18/DA)

(HHJ Eady QC – published 19th March 2019)

The Facts

1. C was employed by R to work in its warehouse. She was a disabled person for the purpose of the Equality Act 2010 ('the EqA') by reason of suffering from osteoarthritis. It was her perception that her symptoms worsened in cold and damp weather. When R changed its working practices with a view to improve its productivity, and asked that C (and other warehouse workers) be prepared to move between benches, including those situated nearest the loading doors, C refused because she believed this would require her to work in colder, damper conditions and exacerbate her symptoms. R's investigations showed that this was an erroneous belief – in fact, the temperature and humidity levels were not materially different throughout the warehouse – and R considered C's refusal to obey the instruction as unreasonable and issued her with a final written warning (subsequently downgraded on appeal to a written warning).

2. C brought ET proceedings, complaining that this amounted to disability discrimination contrary to section 15 EqA.

The ET Decision

3. The ET upheld C's section 15 EqA claim, finding that R subjected C to a detriment in issuing her with a final written warning which was unfavourable treatment because of something, her refusal to comply with a management instruction, which arose in consequence of her disability of osteoarthritis. R appealed.

The EAT Decision

4. The EAT allowed R's appeal and set aside the ET's judgment.

5. It restated that the correct approach to section 15 was considered by the CA in **City of York Council v Grosset [2018] EWCA Civ 1105**, where Sales LJ provided the following guidance:

"36. On its proper construction, section 15(1)(a) 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 B's disability.

37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something"...

38. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something"..."

6. Specifically, the CA had rejected R's argument that it was necessary to show that the employer knew of the causal link between the "something" and the employee's disability.

7. The EAT went on to state that the case law makes plain that the causal connection required for the purposes of section 15 EqA, between the "something" and the underlying disability, allows for a broader approach than might normally be the case. The connection may involve several links: just because the disability is not the immediate cause of the "something" does not mean to say that the requirement is not met – it Is, after all, something that only needs to arise "in consequence" of the disability and that is a very broad concept[8].

8. Moreover, providing that R knows of the underlying disability, it does not matter that it does not accept the link between the disability and the "something". The test is an objective one[9].

9. Here, the ET did not find that there was an impairment in C's judgement arising in consequence of her disability, nor, significantly, was it part of C's case. The most the ET might be said to have found was that C's belief was based upon her GP's earlier

[8] Paragraph 35 of the Judgment.
[9] Paragraph 36 of the Judgment.

confirmation that colder temperatures impacted upon her symptoms. That, however, could only go to C's belief in the link between cold and damp conditions and the exacerbation of her symptoms[10].

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[10] Paragraphs 45 and 46 of the Judgment.

Discrimination arising from disability/knowledge of dismissing officer and appeal officer

By Sarah Clarke

Baldeh v Churches Housing Association of Dudley & District Limited
UKEAT/0290/18/JOJ
HHJ Shanks, 11th March 2019

The facts

1. The Claimant was employed as a support worker for the Respondent Housing Association, who provided housing for vulnerable young people. She had a six-month probationary period. Various concerns were raised regarding her performance in the lead up to her probationary review. She was advised in advance of this meeting that the following matters were to be discussed:

- Breach of professional boundaries by lending a service user money
- A complaint from a service user regarding the tone of a text message she had sent
- Two incidents of not maintaining confidentiality of service user information
- Failing to consult with senior staff regarding an instruction left for her
- How you relate with your colleagues

2. The probationary meeting took place on 5 June 2015. She was advised on 17 June 2015 that she had not made satisfactory progress during her probation period and that her employment was being terminated with effect from 18 June 2015. By letter dated 24 June 2015, the Claimant appealed this decision. No mention was made in this letter of depression or disability. However during the appeal hearing, which was chaired by Mrs Greenidge, the Claimant clearly raised the fact that she suffered from

depression and explained that she had had a breakdown in the past. The appeal was rejected and in the letter setting out the reasons for this, it stated that:

'during your appeal hearing you describe that your behaviour can be unusual and that you can say things unguarded and at this point you offered information about your mental health….'

3. It was also noted that the Claimant had described how she would respond aggressively to others while suffering a depressive episode, and that such an episode would affect her short-term memory. This was potentially relevant to the issue regarding loss of private data of clients as the Claimant's position was that she had simply forgotten to put away sensitive documents.

4. She brought a claim of discrimination arising from disability contrary to section 15 of the Equality Act 2010 in relation to her dismissal.

ET decision

5. It was accepted that the Claimant was disabled by reason of her depression at all relevant times. It was found as a fact that there was no reason to find that the Respondent knew or ought to have known about the disability prior to the appeal hearing. It was argued on behalf of the Respondent that the material time for the purposes of the claim was when the original dismissal decision was made and thus whether or not the Respondent could reasonably have been expected to know that the Claimant was disabled as at the appeal hearing was not relevant. The tribunal agreed with this and thus found that the Respondent did not have the requisite knowledge at the material time.

6. As regards the issue as to whether or not the concerns raised regarding the Claimant's communication with her colleagues was 'something arising from her disability', the tribunal concluded that there was no evidence to support this assertion.

7. As regards the question as to whether the 'something arising from her disability' materially influenced the dismissal, the tribunal concluded that it did not. The reason

for her dismissal were the reasons as set out in the invite letter. The Claimant asserted that her communication with colleagues may have been something arising from her disability. However they concluded that *'we have no doubt that each of the other 4 reasons why the claimant's behaviour was unsatisfactory would have caused the employer to have concerns and considered her unsuitable to continue in their employ'.*

8. In other words, the four issues which were not (allegedly) disability-related would have led to her dismissal in any event such that it could not be said that there was sufficient causation between her disability and the dismissal.

9. The Respondent also relied upon a justification defence, their legitimate aim being the need to maintain standards required of individuals working with vulnerable people and maintain a workforce where staff can work amicably in a pressured environment. It was found that this was made out, with reliance being placed on the lack of knowledge of the disability and the fact that she was dismissed for 'something other than her mental health issues'.

10. The claim was therefore dismissed and the Claimant appealed, arguing that the tribunal had erred in each step.

EAT decision (HHJ Shanks)

11. HHJ Shanks disagreed that there was no evidence of any link between the concerns raised regarding the Claimant's behaviour and her disability, concluding that such evidence came directly from the Claimant herself. It was clear from the appeal outcome letter that the Claimant had made a specific link between her depression and her behaviour/loss of memory such that the tribunal's reasoning was simply not supported.

12. As regards the issue as to whether the dismissal was materially influenced by the 'something arising from disability', HHJ Shanks found that it was not simply the communication issue which could be linked to disability, but the data protection/memory issue. In any event, he concluded that all that is required is that

the 'something' only has to have a '**significant influence'** in the unfavourable treatment; it does not have to be the sole or principal reason.

13. The main focus of the appeal was the issue as to whether it was only the dismissal itself which was in play and not the appeal decision. The Respondent argued that this was the correct approach given that the claim raised was that the dismissal was an act of discrimination and there was no reference in the list of issues to the appeal. However the Claimant had been a litigant-in-person (although she was represented at the EAT by Ms Moss). HHJ Shanks took the view that the outcome of an appeal against a dismissal is integral to the overall decision to dismiss. As such, it was incumbent on the tribunal to have considered the appeal as part of their overall decision. Given the fact that there was clearly an argument that by the appeal stage that the Respondent had actual or constructive knowledge of the disability (as the Claimant had clearly raised this in the appeal hearing), and the fact that the Claimant linked her behaviour to her disability, it could not be said that the claim would have been lost and so the case was remitted.

14. In relation to the justification defence, it was found that there were a number of errors. In particular, the tribunal did not engage with the legitimate aim described or whether it was a proportionate means of achieving that aim as there was no balance between the prejudice to the Claimant in losing her job against the need to achieve the legitimate aim.

Commentary

15. This case is a helpful reminder that when considering a section 15 claim, a claimant does not need to show that the 'something' was the sole or principal cause of the unfavourable treatment relied upon, it only has to have a 'significant' influence upon such treatment, such that it is no bar to such a claim that there may be other factors contributing towards the alleged unlawful treatment.

16. More importantly, a dismissal can be found to be discrimination on the grounds of disability even where the Respondent and dismissing officer had no actual or constructive knowledge of the disability at the time of the dismissal. One can see the reasoning behind such a conclusion as of course the appeal officer will have the

power to overturn a dismissal. It would seem wholly unfair to an employee if, at the appeal stage, an appeal officer, fully aware of the disability and the fact that there was/could be a connection between that disability and the reason for the dismissal, could be permitted to simply ignore that and uphold the dismissal on the basis that the dismissing officer was unaware of the disability.

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Employee Suspension: Necessity or Reasonable and Proper cause?

By Sarah Clarke

The Mayor & Burgesses of the London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322

(Court of Appeal – LJJs Irwin, Jackson, Singh - 5th March 2019)

The Facts

1. C was a teacher who had around 15 years' experience of teaching. She was employed at Glenbrook Primary School in South London ('the School') as a Year 2 teacher. She had worked previously with children with special educational needs, but had no specific training as to how to deal with behavioural issues.

2. In the early weeks of her teaching at the School, 3 incidents took place involving 2 children (known as O and Z) who had behavioural, emotional and social difficulties ("BESD"). It was documented that there was a "fraught/physical relationship" between the two of them and at one point the head teacher had considered separating them. Entries in the school's "Behaviour Book" showed incidents such as: breaking an object and throwing it, wiping spit from a tissue onto another child, and swearing and screaming at other children. C made several requests for help and assistance and expressed that she had had no training on how to deal with the children.

3. The 3 incidents all involved the use of a degree of force by C to secure behavioural compliance:

   (1) Z was dragged on the floor out of the classroom door by C in the presence of another member of staff and the rest of the children, and that child was heard to cry "help me".

(2) C was seen to drag O "very aggressively" a few feet down the corridor whilst shouting at him.

(3) O was told to leave the classroom after being unable to follow instructions. When he refused, C was heard to shout "if you don't walk then I will carry you out!", after which she proceeded to pick up the child, who kicked and screamed in the presence of all the class children.

4. C claimed that she was not told before she accepted the offer of employment at the School that she would be teaching a class in which there were 2 pupils with BESD. C also expressed her need to receive additional support in the teaching of those children, but, after 5 weeks of being employed at the School, she was suspended pending investigation into the incidents. C resigned the same day as she was suspended, and subsequently commenced proceedings for breach of contract against R. She claimed that she had been entitled to resign as a response to what was a repudiatory breach of contract by R.

The County Court decision (HHJ Wulwik)

5. HHJ Wulwik at 1st instance found that R had not breached the implied term of trust and confidence between the parties, having considered both the specific act of suspension and R's conduct in the round. He said that R was "*entitled and indeed bound to suspend the Claimant after receiving reports of the allegations…*" and that R "*clearly had reasonable and proper cause to suspend the Claimant*". He went on to say that R had an overriding duty to protect children pending a full investigation of the allegations. C's claims were dismissed and she appealed.

The High Court decision (Foskett J)

6. Foskett J allowed C's appeal, finding that R had been in repudiatory breach of contract, having breached the implied term of trust and confidence in both respects.

7. In his view, the School did not consider any alternatives to suspension. The first two incidents were not regarded as worthy of disciplinary action and the suspension was

a "knee-jerk" reaction to the way the third incident was reported. Further, C was suspended soon after being told (after several requests for help) that a further scheme of support would be implemented. He concluded that either, or both, would constitute a repudiatory breach of contract. He therefore substituted judgment in C's favour. R appealed.

The Court of Appeal decision

8. The question whether there has been a repudiatory breach of the implied term of trust and confidence in a contract of employment is both a question of fact and is "highly context-specific": **Tullett Prebon plc v BGC Brokers LP [2011] EWCA Civ 131; [2011] IRLR 420**, at paras 19 – 20 (Kay LJ)[11].

9. Foskett J was not entitled to interfere with the findings of fact by the County Court[12].

10. In essence the question for the court was to assess whether the way in which R had responded to reports received of possible misconduct by C was reasonable and proper, so that matters could be investigated. If that response was reasonable and proper it could not be said that R had breached the implied term of mutual trust and confidence. Bearing in mind that the context was one in which R had to safeguard the interests of very young children, the trial judge was entitled to reach the conclusion that R had reasonable and proper cause for the suspension[13].

11. Paragraph 8 of the Acas Code of Practice on Disciplinary and Grievance Procedures (2015) states: '*In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action*'.

12. The CA stated that it could see nothing in the terms of the Acas Code of Practice which says that suspension is a "neutral act". It does not say that. What it does say

[11] Paragraph 61 of the Judgment.
[12] Paragraph 74 of the Judgment.
[13] Paragraph 83 of the Judgment.

is that it should not be considered a disciplinary action and this should be made clear to the employee[14].

13. That said, it seemed to the CA that the question whether suspension is to be viewed as a neutral act is ultimately not a relevant question, nor a particularly helpful one. The crucial question is whether there had been a breach of the implied term of trust and confidence. In the context of suspension that in turn requires consideration to be given to the question whether there was reasonable and proper cause for that suspension. That is a highly fact-specific question. It is not a question of law. Whether or not suspension is described as a "neutral act" is unlikely to assist in resolving what is the crucial question[15].

14. An act of suspension can constitute a breach of the implied term where it, by itself or in combination with other acts or omissions, meets the test imposed by Lord Steyn in **Malik v BCCI [1998] AC 20**, that is to say there has been conduct by the employer which:

    (1) Destroys or seriously damages the relationship of trust and confidence; and
    (2) Is without reasonable and proper cause[16].

15. There is no test of necessity[17].

16. There can be no doubt that, in some cases, the act of suspension will not be reasonable and so may amount to a breach of contract. The court may consider the wider circumstances beyond the fact and manner of suspension, including events preceding the suspension and the extent to which the suspension was a "knee-jerk" reaction: **Gogay v Hertfordshire County Council [2000] EWCA Civ 228; [2000] IRLR 703**, paras. 53 – 58[18].

17. Accordingly, the appeal was allowed and the County Court's judgment restored.

[14] Paragraph 92 of the Judgment.
[15] Paragraph 93 of the Judgment.
[16] Paragraph 97 of the Judgment.
[17] Paragraph 98 of the Judgment.
[18] Paragraphs 99 and 100 of the Judgment.

Comment:

18. The Court of Appeal has reaffirmed the test of '*reasonable and proper cause'* when considering breach of the implied term of trust and confidence. Understandable though it is in many circumstances to 'knee-jerk' in response to allegations of misconduct, particularly in relation to allegations involving children and / or the elderly and / or infirm, this decision highlights the importance of avoiding that reaction. Employers should properly consider the individual's response to allegations, the policies and handbooks that are in place and what they specifically say about suspension, and real thought should be given to alternative positions within companies rather than suspending such as moving employees to a different workspace, altering their routine or hours, or even working under supervision. A system of reviewing the suspension should also be put in place.

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Compensatory rest break need not be an uninterrupted 20-minute period, even if such a break was in fact possible to provide

By Sarah Clarke

Network Rail Infrastructure Ltd v Crawford [2019] EWCA Civ 269
(Court of Appeal, LJ Underhill, Lord Sales and LJ Asplin 5 March 2019)

The facts

1. The Claimant was a railway signalman working on single manned boxes on eight-hour shifts. He provided relief cover (i.e. standing in for absent colleagues) for a group of 5 signal boxes. He had no rostered breaks but was expected to take breaks when there were naturally occurring breaks in work whilst remaining 'on call'. Although none of the individual breaks lasted 20 minutes, in aggregate they lasted substantially more than 20 minutes. He claimed that he was entitled to a 20-minute uninterrupted rest break under reg. 12 of the Working Time Regulations 1998 ('WTR') or compensatory rest under reg. 24.

2. Regulation 12 provides that:

> ***12 Rest breaks***
> *(1) Where [a worker's] daily working time is more than six hours, he is entitled to a rest break.*
>
> *(2) The details of the rest break to which [a worker] is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.*
>
> *(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of*

not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

3. In Gallagher v Alpha Catering Services Ltd [2004] EWCA Civ 1559, the Court of Appeal set out that the effect of regulation 12 is that the worker is entitled to a rest break which:

   (i) is uninterrupted;
   (ii) lasts at least 20 minutes;
   (iii) may be spent away from the work station; and
   (iv) is a break which the worker knows at the start of the rest break that they will have 20 minutes' uninterrupted rest.

4. Regulation 24 provides that:

   24 Compensatory rest
   Where the application of any provision of these Regulations is excluded by regulation 21 or 22, or is modified or excluded by means of a collective agreement or a workforce agreement under regulation 23(a), and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break—

   (a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and

   (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety.

5. In other words, where a worker is not given an entitlement to an uninterrupted 20-minute break for a reason as is permitted under regulation 21 they are entitled to a compensatory break. Regulation 21(f), which applies to railway workers, provides:

   Subject to regulation 24, regulations 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker—

(f) where the worker works in railway transport and—

(i) his activities are intermittent;

(ii) he spends his working time on board trains; or

(iii) his activities are linked to transport timetables and to ensuring the continuity and regularity of traffic].

6. Guidance produced by NR proceeded on the basis that signallers' work was 'intermittent' such that the relevant entitlement was to compensatory rest under reg. 24. The Guidance provided as follows:

"At single-manned locations breaks must be taken between periods of operational demand where there are opportunities for 'naturally occurring breaks'. These are times where there is no operational activity which requires immediate attention or response. At such locations the 20 minute break may be an aggregate of shorter breaks over the course of the 3rd, 4th and 5th hours. In this instance at least one of the naturally occurring breaks should be of sufficient length to allow the individual to take a personal needs break and to take refreshment (Note: 5 minutes is the recommended minimum time)."

7. The Claimant raised a grievance in February 2014 and an investigation was conducted which concluded that there were at all of the boxes sufficient naturally occurring breaks to enable workers to take compensatory rest.

The tribunal decision

8. The tribunal found that reg. 12 did not apply - because the Claimant worked in an excluded sector (reg. 21) which meant that he was only entitled to compensatory rest under reg. 24 - and that the employer's arrangements were compliant with reg. 24. He had been permitted, indeed encouraged, to take compensatory rest breaks which in aggregate lasted more than 20 minutes and the ET rejected the Claimant's argument that there had been a refusal to allow him to take breaks as he had not requested breaks. In relation to NR's alternative argument that, if the Claimant was unable to take equivalent compensatory rest, it was held that it would have been possible for NR to organise a relief signaller to go between signal boxes, giving

signallers the opportunity to take a 20-minute break. However that finding was not relevant given the finding regarding reg. 24.

9. The factual findings were that the only positive tasks the Claimant had to perform was when a train came through, which at the busiest site could be six times an hour, the tasks taking no more than a minute or two. Between those episodes there was always the possibility of unexpected events, which might involve a risk of injury to passengers or others, which the Claimant would be responsible for dealing with and he would need to be alert to such issues. It did not require constant screening, but being available for immediate action of notified of a problem by a phone call or alarm.

10. The tribunal found that there was sufficient evidence to support NR's assertion that there were numerous opportunities to take discontinuous breaks that aggregated to well in excess of 20 minutes a day. In other words, they considered that discontinuous breaks aggregating to 20 minutes was capable of satisfying regulation 24(a). The Claimant appealed.

The EAT decision (HHJ Shanks)

11. The Claimant appealed the finding that a discontinuous period of 20 minutes was sufficient to amount to compensatory rest under reg. 24, relying on the case of Hughes v Corps of Commissionaires Management Ltd [2011] IRLR 915, which held that a period of compensatory rest must so far as possible ensure that the period which is free from work is at least 20 minutes (i.e. a continuous break).

12. HHJ Shanks allowed the appeal, relying on the case of Hughes. LJ Elias in the Court of Appeal in that case concluded that:

"We would accept that if a period is properly to be described as an equivalent period of compensatory rest, it must have the characteristics of a rest in the sense of a break from work. Furthermore, it must so far as possible ensure that the period which is free from work is at least 20 minutes. If the break does not display those characteristics then we do not think it would meet the criteria of equivalence and compensation. In this case the arrangements plainly did meet those criteria, as the EAT found. Indeed, since the rest break begins again following any interruption,

many would say that this was more beneficial than a regulation 12 Gallagher break would be."

13. HHJ Shanks quoted this passage, and specifically relied on the statement that the employer must so far as possible ensure that the period which is free from work is at least 20 minutes". HHJ Shanks regarded himself as bound by Hughes to hold that a period of rest could not be "equivalent" for the purpose of reg. 24 unless it was an uninterrupted period of at least 20 minutes.

The Court of Appeal decision

14. NR argued that the EAT was wrong to hold that it was bound by Hughes to decide that a period of compensatory rest under reg. 24 must be an uninterrupted period of 20 minutes. They argued that their research in fact indicated that a number of shorter breaks were in fact more beneficial, as a longer break during which the signalman did not do anything (coupled with the fact that a lot of their working time did not in fact require actual work to be done) might impair their concentration as they would be inactive for such a long period. The Claimant also sought to uphold the decision of the EAT on additional grounds, namely that given that the ET had found that it *was* possible for a continuous period of 20 minutes compensatory rest to be provided (by the use of a relied signaller to go between boxes), the ET had not given adequate consideration for its conclusion that an equivalent period of compensatory rest had been provided.

15. LJ Underhill concluded as follows:

The starting-point must be that regulation 24 is only engaged because the WTR, following the Directive, provides that in the case of the kinds of work identified in regulation 21 an employer is not required to afford workers rest breaks satisfying the requirements of regulation 12. That being so, the description of the compensatory rest required under regulation 24 (a) as "equivalent" cannot be intended to import the identical obligation that would have applied under regulation 12. Rather, the intention must be that the rest afforded to the worker should have the same value in terms of contributing to his or her well-being. That is what Lady Smith says at para. 13 of her judgment in Hughes (see para. 36 above), with which I agree (subject to one

immaterial caveat2): it should be noted that she was sitting with (highly-experienced) lay members, and the views of the EAT on matters of this kind should be respected wherever possible. Although on the appeal only one aspect of the EAT's reasoning was formally in issue this Court certainly endorsed its view that the requirements of regulation 12 and regulation 24 cannot be identical. Indeed at para. 23, albeit in a part of the judgment dealing with a different issue, Elias LJ said in terms (p. 918):

"… the concept of an equivalent period of compensatory rest under regulation 24(a) cannot be a period identical to a regulation 12 break. It is something given in place of that break."

44. Whether the rest afforded in any given case is "equivalent", in the sense explained by Lady Smith, must be a matter for the informed judgment of the (specialist) employment tribunal. There is no basis in principle for the proposition that only an uninterrupted break of twenty minutes can afford an equivalent benefit in that sense; and the provision for a collective or workforce agreement to make some different arrangement would be meaningless if that were so. I can see no reason why a single uninterrupted break of 20 minutes will always be better than, say, two uninterrupted breaks of 15 minutes one third and two-thirds through the shift.

16. He went on to say that Hughes was not authority to a contrary proposition, and that the observation relied upon simply meant that the break had to be at least 20 minutes in total, not uninterrupted.

17. It was argued on behalf of the Claimant that since NR's case was that it was impossible to provide uninterrupted breaks of at least 20 minutes between trains coming through, the matter fell under reg 24(b) ("in exceptional cases") and not 24(a) ("wherever possible"). That being the case, given that the ET had found that it was possible for NR to employ a signalman to enable the workers to take 20 minute breaks, NR's argument must fail. However that argument was predicated on the basis that a 20-minute uninterrupted break was required. As it was not, then the case falls within reg. 24(a) as it was indeed "possible" to allow the Claimant to take an equivalent period of compensatory rest.

Commentary

18. No doubt this case provides some welcome certainty for employers within the exempt sectors as it clarifies that compensatory rest breaks under reg. 24 need not in every

case comprise an uninterrupted 20 minutes. If that were correct, then the requirements under reg 24 would be the same as those under reg 12 and so would not in fact be providing an exception to the general rule. This is so even if a 20-minute uninterrupted break would in fact be possible to arrange, as was found here. The key question is whether the rest afforded to the worker has the **same value** in terms of contributing to his or her well-being; on the facts of this case, it did. The tribunal had noted that the evidence relied upon by Network Rail suggested that several shorter breaks, aggregated across the working day, would be more beneficial than a single, longer break at a certain point in the shift. It is important to bear in mind that that what constitutes an equivalent rest break will vary widely depending on the nature of the work carried out and an employer should gather evidence specific to their particular industry/area of work.

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TUPE transfer/sole or principal reason for dismissal/proximity of transfer

By Sarah Clarke

Hare Wines Ltd v Kaur [2019] EWCA Civ 216
(Court of Appeal, LJ Underhill and LJ Bean 22nd February 2019)

The facts

1. The Claimant was employed as a cashier in a wine wholesale business which had been run by various different entitles during the course of her 13 years of employment. By 2014 she was employed by H&W Wholesale Ltd ("H&W"). During this period Mr Hare and Mr Windsor were directors or shareholders. The Claimant had a strained working relationship with a colleague, Mr Chatha, of which neither was entirely to blame, and which had led to friction and difficulty.

2. Towards the end of 2014 it was decided that H&W would cease trading and that Hare Wines Ltd would take over. Mr Windsor (who was at that stage was a director of H&W) held meetings with all of the employees on 9 December 2014. It was the Claimant's case that during this meeting, Mr Windsor advised her that Hare Wines did not want to take her on, that there was a long discussion about Mr Chatha and that Hare Wines did not want him to manage her. Mr Windsor said that it was the Claimant who had said she did not wish to work for Hare Wines due to the difficulties she had with Mr Chatha, and that she was concerned that Mr Windsor would have no further involvement in the business as she had got on well with him. His position was thus that she objected to the transfer. There was a dispute as to the point at which it was decided that Mr Chatha was to become a director of Hare Wines and have managerial responsibilities over the Claimant, Mr Hare indicating that this did not take place until after Christmas.

3. Following the meeting Mr Windsor wrote to the Claimant stating that *'due to unforeseen circumstances concerning the business, I must inform you that our business will now cease to trade. As a result we will unfortunately have to terminate your employment from today'.*

4. It was accepted that a TUPE transfer took place on 9 December 2014 from H&W to Hare Wines as a going concern. The Claimant brought claims against both companies for redundancy and notice pay and later amended this to add in a claim of automatic unfair dismissal by reason of the transfer. Hare Wines asserted that the Claimant had never been employed by them and that they were under the impression that she did not wish to continue to work for the new company as she did not turn up for work and were unaware as to the content of the meeting with Mr Windsor.

ET decision

5. It was found as a fact that it had been decided prior to 9 December 2014 that Mr Chatha was to become a director of Hare Wines and that as it was foreseen that there were likely going to be relationship difficulties between the Claimant and Mr Chatha, a decision was taken to terminate the Claimant's employment. It was not found that the Claimant objected to the transfer. As such, her employment automatically transferred over to Hare Wines and she was automatically unfairly dismissed.

6. Hare Wines appealed the finding that the Claimant's contract had transferred over to them and that the dismissal was automatically unfair. Their argument was that given that the tribunal had found that the Claimant had been dismissed because of the difficult working relationship with Mr Chatha, the tribunal had erred in law in concluding that the principal reason for the dismissal was the transfer and that the tribunal had assumed that the proximity of the transfer meant that any dismissal would be by reason of the transfer.

EAT decision, Choudhury J

7. It was noted that the amendment to the wording of Regulation 7(1) of the TUPE Regulations in 2014 had altered the law in this regard, the previous wording providing that the transfer needed only be merely connected with the dismissal in order to

found a claim, as opposed to the more stringent wording which provided that the transfer must be the 'sole or principal reason' for the dismissal. However the tribunal had not made nay reference to the old wording of 'mere connection' and had found in terms that the dismissal was because of the transfer.

8. Further, it must be borne in mind that the Regulations are designed to protect workers' rights and one must be very careful about expanding or introducing what might be appear to be new categories of defence. Further it is clear that the proximity of the dismissal to the transfer is an important factor to take into account, and here there was a short gap of only 2 days. Lastly, Choudhury J relied on the fact that the relationship difficulties had been ongoing for some time and were likely to continue, yet no action had been taken prior to that stage and H&W only sought to deal with this at the time of the transfer. This indicated that it was the transfer that was the reason for the dismissal.

Court of Appeal decision, LJs Underhill and Bean

9. It was pointed out that a serious difficulty in Hare Wine Ltd's argument was that the reason the transferor provided as to why the Claimant's employment had ended (her objection) was a false one. The reason for a dismissal is clearly within the employer's knowledge as only they will know what was operating in their mind at the point of dismissal. It is for them to prove what that reason is.

10. Clearly dismissing the Claimant on the same day as the transfer is strong evidence in her favour. Similarly, the fact that the poor relationship had apparently endured for some time without H&W seeking to terminate her employment assists the Claimant. They only did so at the request of the transferee immediately before the transfer, and so the inference that the dismissal was due to the transfer was very strong indeed.

11. It was argued on behalf of Hare Wines that TUPE is not a "but for" jurisdiction. This was accepted by the Court of Appeal- the question is what is the sole or principal reason- and the tribunal in this case did not simply apply a "but for" test.

12. Lord Justice Bean held that:
Once it was found that Ms Kaur had not objected to the transfer the central question became whether (a) she was dismissed because she got on badly with Mr Chatha

(who was about to become a director of the business) and the proximity of the transfer was coincidental, or (b) she was dismissed because the transferee did not want her on the books, the reason for that being that she got on badly with Mr Chatha. Which of these two was the sole or principal reason was a question of fact and the employment judge was entitled to prefer the latter to the former. Although the crucial paragraph 29 of the judgment expresses her conclusions briefly they are in my view Meek compliant. The judge found that the transferee company anticipated that there would be ongoing difficulties in the working relationship between the Claimant and Mr Chatha. It therefore decided that it did not wish her contract of employment to transfer and communicated that wish to the transferor. That was why she was told that she was not wanted. The reason for the dismissal was the transfer

Commentary

13. Employers should act with caution if dismissing someone around the time of a TUPE transfer (unless there is a genuine economic, technical or organisational reason for the dismissal) given the strong inference that proximity to the transfer means that the dismissal was because of the transfer. However the mere fact that the dismissal is around the time of the transfer does not dictate that the principal reason for the dismissal is the transfer, but it is persuasive. I.e. if there is no other good explanation for the timing of the dismissal, it is likely that a Tribunal will conclude there is a link with the transfer. The closer the dismissal is to the transfer date, the greater the risk will be of an automatically unfair dismissal. Even if it can be shown that there was a genuine reason for the dismissal (such as a problem employee who was repeatedly late), if the dismissal is at the behest of the transferee because they do not want to take on such an employee, the reason for the dismissal is likely to be found to be the transfer.

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