3PB Employment Breakfast Briefing Notes

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In our latest employment case law update, Matthew Curtis reviews

1. Tribunal fees – the latest position
2. Suspension – the risks
3. ACAS Early conciliation – the latest skirmishes in an ongoing war (*De Mota v ADR Network & anor* UKEAT/0305/16)
4. Presidential guidance – pensions and Vento
5. Burden of proof in discrimination claims

1. Tribunal fees - *R (Unison) v Lord Chancellor* [2017] UKSC 51

Everyone knows the outcome of the case: the Employment Tribunal Fees order was unlawful *ab initio*. Three key issues for practitioners:

i) How to get money back if you've paid a fee

The answer: *"We are putting in place arrangements to refund those who have paid the fees in the past, and we will announce the practical, detailed arrangements shortly"* – Dominic Raab, Minister of State at MOJ, 5 September 2017

In short: we will hopefully know more soon (perhaps this month).

Options for government: automatically refund to claimants; automatically write to claimants to inform them of entitlement to refund; advertise entitlement to refund (without writing to anyone).

At the breakfast club we discussed the difficulties with identifying who paid the fee (the attendees had examples of HMCTS not knowing who to send fees back to, or not knowing what case a cheque sent from the HMCTS related to)

ii) What if the Claimant didn't bring, or continue, a claim due to fees?

"If there were potential claims that should have been made but were not, anyone who was unable to bring a claim can submit to the employment tribunal to have their case heard outside the usual time limits. The judiciary will consider those applications case by case" Dominic Raab again.

At the time of the breakfast briefing I had heard of one claim of an extension being granted on just and equitable grounds (via social media). That claim has since been debunked (see Daniel Barnett email dated 13 September – *Dhami v Tesco Stores*).

My view is that we will have to await appellate authority on the point; in the meantime Claimants will no doubt give the argument a go and we are likely to see inconsistent decisions until there is some further guidance.

iii) What if a Claimant had a case struck out for non-payment

The guidance on reimbursement of fees should deal with cases which were struck out for non-payment

This is clear from the Case Management Order (No 2) of the President of the Employment Tribunals dated 18 August which states:

> *"4. So far as is necessary, applications for the reinstatement of claims (of whatever kind) rejected or dismissed for non-payment of fees shall be made in accordance with administrative arrangements to be announced by the MOJ and HMCTS shortly"*

2. Suspension - Agoreyo v London Borough of Lambeth [2017] EWHC 2019 (QB)

The appellant ("A") was a teacher at a primary school, teaching a year 2 class, dealing with children of the age five/six. There were 26-29 children in the class including Z and O, who were difficult to control.

Three incidents: 19 November, 3 December and 5 December, involving Z and O in which A had considered it was necessary to use a degree of force to secure behavioural compliance.

Incidents investigated, two by A's line manager. On 14th December A was given a letter suspended her, including:

> *"The purpose of the suspension is to allow the investigation to be conducted fairly."*

A asked whether she could resign; head teacher agreed. A resigned same day as suspension letter

A brought breach of contract claim:

High Court found: Suspension was a breach of implied term not without reasonable cause to act in a way which was likely seriously to damage or destroy the relationship of trust and confidence.

Important factors in this case:

1) Line manager had investigated two incidents and not considered them worthy of disciplinary action

2) Only a few days before suspension C was told that a scheme of support would be put in place to assist with problems with the two difficult children

Important guidance for employers (para 26 of judgment)

Consider the following before suspending:

i. How serious are the allegations? Do they merit suspension?

ii. Should further initial investigations be undertaken (speaking to witnesses, and at least giving C the opportunity to say something before being suspended)

iii. What are the risks of C remaining at work? Both to the company (damage to reputation or repeat of misconduct) and to the investigation (influencing witnesses or destroying evidence)

iv. What's C's history? Disciplinary record, length of service

v. Alternatives to suspension

vi. Proper explanation in the suspension letter

And above all, avoid suspension as a "knee-jerk" reaction (para 30)

3. ACAS early conciliation

First, a recap of the rules:

- S.18A ETA:
    - C must provide prescribed info to ACAS before presenting a claim
- Employment Tribunals (EC: Exemptions and Rules of Procedure) Regulations 2014

- EC form must contain: prospective C's name and address; prospective R's name and address (C can provide on the form or over the phone)
- "Prospective R" means the person who would be the R on the claim form which C is considering presenting

- ET rules – rule 12(2A):
  - Judge shall reject the claim if the name of R on the claim form is not the same as the name of the prospective respondent on the EC certificate UNLESS:
  - J considers that C made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim

So what is a "minor error"?

3 x cases:

1. Mist v Derby Community Health Services NHS Trust [2016] ICR 543

- HHJ Eady Q.C. – requirement for name and address of prospective R "is not for the precise or full legal title; it seems safe to assume (for example) that a trading name would be sufficient. The requirement is designed to ensure Acas is provided with sufficient information to be able to make contact with the prospective respondent... I do not read it as setting any higher bar"

2. Giny v SNA Transport UKEAT/0317/16

- C named "Mr Shaknoor Nadeem Ahmed" as the prospective respondent.
- Mr Ahmed was a director of the company.
- C gave the company address.
- EJ rejected the claim, as the error was more than a minor error
- EAT: can't challenge the EJ's finding. The difference between a natural and a legal person will not always be more than a minor error; each case will depend on its own facts.

3. Chard v Trowbridge Office Cleaning Services UKEAT/0254/16

- C named "Allister Belcher" as the prospective respondent.
- Belcher was controlling shareholder and director.
- EJ rejected claim.

- EAT allowed appeal on other grounds, but then considered whether the error was "minor"
- EAT emphasised that what is "minor" is always a question of fact and degree
- In this case the error was "minor". Important factors:
- There was no other shareholder over and above Belcher
- The address on the EC certificate was the same as the company address
- There had been a letter before claim which demonstrated that the claim would be brought against the company, so there was no prejudice to R by the error on the EC certificate (it was addressed to Mr Belcher, MD, Trowbridge Office Cleaning Services Ltd)
- Claim was properly constituted in every other way and was not lacking in merit

Summary of the current position:

- Difficult to reconcile *Chard* with *Giny.*
- Useful quote for Claimants: "An error will often be minor if it causes no prejudice to the other side beyond the defeat of what would otherwise be a windfall limitation defence, in a case such as this where, subject to the error, the claim was issued in time" (Kerr J in *Chard)*.
- A fourth EAT case has been handed down since the breakfast briefing: *De Mota v ADR Network & anor* UKEAT/0305/16 – it again emphasises the desire to avoid satellite litigation and applies the judgment in *Mist*.

4. Presidential guidance – Pensions and Vento bands

Pension loss guidance

New guidance for calculating pension losses (handy, as the old guidance was withdrawn in 2015 following *Griffin v Plymouth Hospital NHS Trust* [2015] ICR 347, with nothing to replace it!)

Runs to 153 pages (including appendices and worked examples). However, not as daunting as it seems – some is an explanation of the difference between "net" and "gross" pay

It has separate chapters explaining the approach for: loss of state pension (chapter 3); loss of defined contribution schemes (chapter 4), defined benefit schemes (chapter 5).

It anticipates a distinction between "simple cases" (broadly, where the losses are for a short period) and "complex cases"

Reducing 153 pages down to a pithy summary is not going to be possible. The guidance is essential reading for everyone who brings or responds to a claim in the ET. In short**: you will have to read it**!

Start with the presidential guidance, as that is essentially a 3-page introduction/summary of what the principles say.

Vento bands Guidance

New Vento bands:

Presidential guidance applies to cases **presented on or after 11 September 2017**

- Lower band (less serious cases) £800 to 8,400
- Middle band (cases that do not merit an award in the upper band) £8,400 to £25,200
- Upper band (the most serious cases): £25,200 to £42,000

The most exceptional cases are capable of exceeding £42,000

For cases presented before 11 September 2017 you can uplift for changes in RPI since Vento was first decided (when RPI was 178.5), plus add 10% for *Simmons v Castle*

5. Burden of proof in discrimination cases - Efobi v Royal Mail Group UKEAT/0203/16

Held that *Igen v Wong* no longer applies under EqA 2010 due to the different statutory wording

- *Old wording: "Where C proves acts from which the tribunal could conclude..."*
- *New wording: "If there are facts from which the tribunal could decide..."*

S.136 requires the ET to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not "there are facts etc"… Its effect is that if there are such facts, and no explanation from A, the ET must find the contravention proved.

The Key difference:

> *"If a Respondent chooses, without explanation, not to adduce evidence about matters which are within its own knowledge, it runs the risk that an ET will draw inferences, in deciding whether or not section 136(2) has been satisfied, which are adverse to it on the relevant areas of the case. Those inferences will then be part of the "facts" for the purposes of section 136(2)"*

Important practical effect:

- Rs cannot sit back and wait for C to prove his/her case
- If R is aware of relevant information then it ought to bring it forward, to avoid the tribunal drawing adverse inferences from R's lack of evidence on relevant issues

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