3PB Employment Breakfast Briefing Notes

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Guidance of whose motivation will be taken into account in determining the "Employer's" reason for dismissal: Royal Mail Limited v Kamaljeet Jhuti [2017] EWCA Civ 1632

Facts: Ms Jhuti was employed by the Royal Mail ('RM') and within her trial period raised concerns with her line manager Mr Widmer as to incentives offered by her colleagues to existing clients which she considered was a breach of OfCom guidance. In short it was established that such concerns amounted to protected disclosures and that as a result Mr Widmer had subjected Ms Jhuti to detriments which included criticisms of her performance. Ultimately Ms Jhuti was dismissed by Ms Vickers for unsatisfactory performance resulting from Mr Widmer's criticisms and that dismissal was upheld on appeal by Ms Madden both of whom it was found had dismissed Ms Jhuti genuinely and reasonably on the information they had before them as to her performance which had (albeit unknown to them) been manipulated by Mr Widmer.

Ms Jhuti presented claims for whistleblowing detriment (s.47B ERA 1996) and for automatic unfair dismissal (s.103A ERA 1996). She did not have sufficient service in order to present a claim of ordinary unfair dismissal (s.98 ERA 1996).

Decision of ET

(1) Whilst upholding the s.47B (detriment) claim, the s.103A (automatic unfair dismissal) claim was dismissed as the PDs were not the reason for Ms Jhuti's dismissal because they did not affect the mental processes of Ms Vickers or Ms Madden and Ms Vickers must herself be motivated by the PDs in order for such a claim to succeed.

(2) However as the proven unlawful detriments of Mr Widmer under s.47B had inevitably caused Ms Jhuti's eventual dismissal she could nonetheless recover compensation for that dismissal as such was consequent upon or flowed from those acts of detriment.

In sum RM appealed in respect of (2) on the basis that s.47B(2) precluded such an award being made and Ms Jhuti cross-appealed in respect of (1).

Decision of EAT

Whilst Mitting J held that in the great majority of cases the only relevant mind or motivation under consideration will be that of the person who takes the decision to dismiss he went on to find that *"there is no binding statement in the authorities that the mind of that person must in all circumstances be equated with that of the employer"* and referred to Co-Operative Group v Baddeley [2014] EWCA Civ 658 in support of his conclusion that:

"It is not only the mind of Ms Vickers which needs to be examined to discern the Respondents' reasons for dismissal. The reason and motivation of Mr Widmer must also be taken into account. Once it was, as the ET found, it was inevitable that dismissal would occur and it did occur on the ET's findings by reason of the fact that the Claimant had made prohibited disclosures principally to Mr Widmer."

In light of Mitting J upholding Ms Jhuti's cross-appeal it was agreed that the appeal of RM 'fell away' and so was not formally decided by him. RM appealed to the CA.

Fundamental Issues

In essence the fundamental issues which arise (summarised by myself) were as follows:

(a) Can the motivation of a person who does not take the decision to dismiss be taken into consideration in determining the employer's reason for dismissal under s.103A ERA 1996? And if so in what circumstances?

(b) Can a Claimant recover losses resulting from a dismissal where the dismissal itself is not unfair under s.103A ERA 1996 but was nonetheless the inevitable consequence of other proven acts of detriment under s.47B ERA 1996? Or is such 'compensation for dismissal consequent on detriment' prohibited by s.47B(2) ERA 1996?

Decision of Court of Appeal

In short the CA allowed RM's appeal in the factual circumstances of this case and furthermore declared that Ms Jhuti was not precluded in the way she had presented her claim before the ET from advancing a claim for loss occasioned by her dismissal as compensation for the unlawful detriments found under s.47B ERA 1996.

In respect of the First Issue:

It is important to note that whilst the CA found for RM in this case on these particular facts, they have far from closed the door on the fundamental issue as to whether an alternative and unlawful motivation of another person (who does not take the decision to dismiss) can be attributed as the employer's reason for dismissal, despite the dismissing officer having a separate and innocent reason. However the CA took the first step in providing important guidance on such cases of 'manipulation' within Paras 60 to 63 of their Judgment which I would recommend that all practitioners should bear reference to in future cases of this sort setting out a number of scenarios which can be summarised as follows:

A) Where the 'manipulator' is **a colleague who has no relevant managerial responsibility** for the victim then the motivation of that person cannot be regarded as that of 'the employer' and thus the employer will not have acted unfairly;

B) Where the 'manipulator' is the **victim's line manager but does not himself have responsibility for the dismissal** (i.e. such as the present case) then again (and following the majority decision in Orr) the motivation of that person cannot be regarded as that of 'the employer' and thus the employer will not have acted unfairly;

C) Where the 'manipulator' is not the actual decision-taker but is a manager with some responsibility for the investigation, such as **the disciplinary investigation manager** then there would be a strong case for attributing to the employer both the motivation and knowledge of that person even if they are not shared by the actual dismissing officer;

D) Where the 'manipulator' was someone near **the top of the management hierarchy such as the CEO**, whilst not having formal responsibility for making the dismissal decision, would by virtue of their seniority, make it an unattractive proposition if their motivation could not be attributed to the employer and therefore there *'may well be an argument for distinguishing the case of a manager in such a senior position'*.

However as that issue did not arise on the facts before the CA, LJ Underhill expressly stated that he preferred not to express a definitive view on this scenario.

In respect of the Second Issue:

The eagle-eyed will note that the secondary aspect of the CA's finding appears to be addressing a point which is slightly different to the second fundamental issue I outlined above. That is because in actual fact during the CA hearing the basis presented by RM in respect of the second point was quite different to the broader more fundamental issue outlined above (in fact RM were advancing a case that a claimant could in principle recover such loss so as to bolster their submission in respect of the first issue).

RM rather, in actual fact, were arguing that Ms Jhuti could not recover such loss in this particular case as she had not sufficiently presented such a case in her originating application to the ET. In short the argument advanced by the RM and the decision of the CA I do not consider is of great interest or requires further consideration. However in respect of the more fundamental second issue outlined above the CA stopped short of giving a concluded view and rather seems to have left the door wide open on this point stating:

"In principle losses occasioned by a claimant's dismissal may be recoverable as compensation for an unlawful detriment which caused the dismissal. The real issue is whether a claim on that basis is inconsistent with the terms of section 47B(2). What the sub-section does is preclude a claim under the operative parts of the section where the detriment which is the subject of the complaint to the tribunal – what in other contexts would be called the cause of action – 'amounts to dismissal' and it is clearly arguable that in this kind of case the relevant detriment is the prior treatment complained of, the dismissal being only a consequence of that detriment. But it may be that that distinction is not as straightforward as it seems"

Observations:

The CA has evidently removed *some* of the confusion and concern which the EAT judgment in this matter caused employers and gives us some valuable guidance. However the CA has still left us with uncertainty as regards the fourth scenario and indeed whether compensation which is consequent on dismissal is indeed recoverable under s.47B or is debarred as a matter of principle by s.47B(2).

For my part I am of the view that the CA hints at the fact that s.47(B)(2) will not debar such a claim and my personal view is that in such cases as Ms Jhuti's where the 'manipulator's'

motivation cannot be attributed to that of the employer such that a s.103A claim fails but equally it can be causatively proved as a fact that such actions resulted in the dismissal that the purposive intention behind the legislation providing protection for whistleblowers would not be served by a finding that s.47B(2) debars such recovery. Until therefore a finding to the contrary it seems sensible that advisors should proceed cautiously on the assumption that recovery of dismissal losses can indeed be made in such circumstances.

In respect of attributing the ‘very senior manager’s’ motivation as being the employer’s reason to dismiss (i.e. the CA’s ‘fourth scenario’), whilst one can readily see circumstances in which it may seem only fair and appropriate to allow such motivation to be attributed, personally I am of the view that this should not be permitted. I hold this view because primarily I believe that the ‘injustice’ that may otherwise arise can be adequately addressed through the award of dismissal compensation for the unlawful detrimental act(s) as addressed above. Secondly in terms of practical application I consider it is likely to cause uncertainty and confusion for all parties involved in such litigation – how senior does the individual need to be, for example? Third and finally I consider that following the rationale of the CA’s judgment and the wording of the legislation, that to allow such an exception for such ‘very senior managers’ would be to add an unnecessary gloss to the statutory wording.

EAT find that relying on previous instances of misconduct, for which no sanction had been applied, does not render a dismissal unfair: NHS 24 v Pillar UKEATS/0005/16/JW

Facts: The claimant was employed as a Nurse Practitioner. She answered calls from the public and triaged them, taking a decision on a clinical route, for example giving advice or making a call for an ambulance if it was an emergency situation. A complaint was made following a Patient Safety Incident (PSI) which occurred in December 2013. A man had called the triage line, complaining of chest pain, weakness in the arm, pain in the breast bone, feeling cold and sweaty and being out of breath. These symptoms were consistent with a heart attack. The claimant had directed him to an out of hours GP service where he did indeed have a heart attack.

The claimant had two further PSI's on her file, neither of which had been the subject of disciplinary action. The first occurred in August 2010, when it was alleged that she had failed to thoroughly explore “red flags” which were cardiac symptoms and that she ought to have made a 999 call. No disciplinary action was taken, but she was placed on an 8-week

Development Plan. The respondent did not make the claimant aware that a repeat by her of similar conduct would be likely to be considered as gross misconduct. The second PSI occurred in July 2012. The circumstances were very different to the earlier PSI but it raised concerns about her decision making, and she was again put on a Development Plan.

Following the incident the claimant was put on another Development Plan. She was not advised that any further action was going to be taken other than this. However following the completion of the plan, disciplinary proceedings were commenced. Information regarding both of the PSIs was included in the investigation report. At the disciplinary hearing, it was accepted by the claimant that she ought to have called 999. She was dismissed for gross misconduct, part of the reasoning being that she had carried out 'very similar conduct' in August 2010.

ET: The Tribunal concluded that it was reasonable for the respondent to consider the claimant's conduct to be gross misconduct. It was found that, on the material before the dismissing officer, which included the information on the previous incidents, given the potential risk to patient safety, the decision to dismiss was within the band of reasonable responses. However they went on to find that the investigation was not within the band of reasonable responses such that the dismissal was unfair. It was held that:

The Tribunal accepted the claimant's' representative's submission that it was not appropriate to include these previous matters in the Management case, where those matters had not themselves been the subject of disciplinary proceedings. The information on training, coaching and support provided to the claimant following those previous incidents is relevant to the investigation into her conduct in the December 2013 PSI. Information on the training and coaching provided to the claimant could have been set out in the Management Case without reference to the details of the previous incidents. That would have been reasonable and would have served the purpose of providing the relevant information to the decision maker. It was not reasonable to include in the Management Case the information on the claimant's conduct in the other incidents. The inclusion of the detail of the previous incidents in the Management case was material to the decision to dismiss. The Tribunal concluded that the investigation was not within the band of reasonableness. A reasonable investigation onto the claimant's conduct in the December 2013 PSI would not have included investigation of the claimant's conduct in previous incidents which had not themselves been the subject of disciplinary proceedings. Following Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, applying the objective standard of the reasonable employer, it was plainly reasonable to make material reference to incidents in the past which had not been the subject of

disciplinary procedure. It could not be said that the investigation was reasonable in all the circumstances

It was also found that the fact that the claimant had been given the impression that the outcome for her was set out in the Development Plan, and that she had been given no indication that this may be considered to be gross misconduct until after the successful completion of her Development Plan aims, constituted a procedural flaw.

EAT: the decision was overturned. In respect of the assertion that the investigation was too thorough, it was held that '*While I do not rule out that there may be cases where an overzealous or otherwise unfair investigative process could fall foul of the test, the starting point is that the Burchell test insofar as it relates to the investigative stage is directed at the sufficiency of that investigation'*

Reference was made to the Court of Appeal case of Airbus Ltd v Webb [2008] IRLR 309, which considered how expired warnings should be treated. It was found that the fact that a warning had expired did not mean that it could not be considered as being a relevant factor to take into consideration. The conclusion reached was that:

It was both inconsistent and perverse for the Tribunal to conclude that material acknowledged as relevant to the investigation should have either been excluded from the report sent to the dismissing officer or redacted such that the details of previous PSIs were removed, while at the same time finding that a dismissal based on that information was within the band of reasonable responses. Exclusion of the relevant material by the investigating officer would have been a serious omission given the background of risks to patient safety. It was for the dismissing officer to decide how to treat that background information and to decide whether it would be fair to rely on it, to any extent, in deciding whether to dismiss the claimant. Mr Smith argued that if it is clear that the pattern is important, then the employer cannot rely on something never treated as misconduct. That argument ignores the difference between the investigative stage and the decision to dismiss. The investigating officer was not relying on the previous incidents with a view to supporting a decision to dismiss. The purpose of the investigation was to gather all relevant material so that the officer making the decision to dismiss could decide all factors pertinent to the issue of dismissal. Whether to rely to any extent on past conduct was a matter for the dismissing officer who required to make that decision based on the material before her. In the absence of any challenge to the reasonableness of her decision and the extent to which she relied on the information provided about past incidents, it is irrational to nonetheless find the dismissal to be unfair due to the comprehensive nature of the material with which she was provided. In

other words, unless it could be said that the previous incidents should never have been a factor in the decision to dismiss, there was no rational basis to exclude details of them from the investigation report. As a subsidiary point, the Tribunal's reasoning on this first issue is a little unclear. While the decision illustrates obvious unease with the inclusion of previous incidents in the investigative report because the claimant had not been disciplined for them, such unease is in my view an insufficient basis on which to base a decision that an investigation was unfair in the ***Burchell*** *sense. The Tribunal fails to articulate clearly why the details of previous incidents constituting relevant information for the dismissing office to deal with as she saw fit should have been withheld from her.*

In relation to the procedural issue, it was found that '*The problem with the Tribunal's approach in this case is that it regarded the inclusion of relevant background material in the investigative report and the concern that the claimant had not been told early enough that the December 2013 PSI may be regarded as gross misconduct as sufficient to render the dismissal unfair without any analysis of the seriousness or otherwise of the perceived lack of transparency in terms of prejudice to the claimant. Separation of the procedural argument from the substantive reason for dismissal resulted in the Tribunal omitting to consider its own finding that the decision to dismiss was within the band of reasonable responses in deciding whether the identified procedural defects were sufficiently serious as to render the whole process unfair. The Tribunal correctly identified the potential risk to patient safety as a central issue that resulted in the decision to dismiss being reasonable having regard to the available material on the PSIs in which the claimant had been involved. This is not a case in which the consequence of a defective procedure denied a claimant of putting important mitigatory material before the dismissing officer or where an allegation of bias in the procedure has been made out. In failing to address the issue of procedural unfairness in the context of everything that occurred, the tribunal erred.*

Comment: In a misconduct matter, it can be difficult to know what can be referred to in the investigation report or in the hearing. In recent years we have seen other cases determining when expired warnings may be taken into account. Clearly a balance has to be struck between fairness to the employee, and not punishing them for historic issues that have long been laid to rest, and the ability of the employer to consider what in fact might be highly relevant material. In cases such as this, in which the health and safety of individuals may be placed at risk if employment continues, it is easy to see why that balance should come down in favour of the employer, as previous incidents of conduct of a similar nature rightly gives rise to a concern of future repetition. To fail to consider such information could open up organisations to criticism or sanction from their regulator, and in some cases, could lead to

legal action (if for instance on a future occasion a patient with various symptoms died because they were not properly referred to hospital). It is no doubt reassuring for employers that including such information does not render the dismissal unfair. However the very fact that this argument had been successful before the initial Employment Tribunal, highlights that one has to be careful when including information about previous historic incidents. If the previous incidents had been fully investigated and the employee had been entirely exonerated, in my opinion this would be an important factor militating against the inclusion of such information in the investigation.

The case is also a helpful reminder that not every procedural flaw renders a dismissal unfair. There must be a connection between the procedural flaw and the dismissal such that the flaw has had an influence on the dismissal (such as the failure to interview key witnesses or allow the employee the opportunity to put their case which may have made a difference to the outcome).

Subjecting men and women to the same detriment can be 'less favourable treatment': HM Chief Inspector of Education, Children's Services and Skills v The Interim Executive Board of Al-Hijrah school [2017] EWCA Civ 1426

Facts: Al-Hijrah School ('the School') is an Islamic faith school that for religious reasons (like many others not just of the Isalmic faith) believes in the segregation of boys and girls from Year 5 (age 9) until they reach the age of 16 and the School carried out this segregation policy in their school. There was no question as to any difference in the standards of teaching or facilities afforded to girls or boys during this period of segregation.

Ofsted raised concerns about segregation in 2016 and an inspection was performed by one of Ofsted's regional directors. Students of the school were questioned as to their opinion on the question and in short they were critical of the policy. Rather amusingly the CA quotes one female Year 10 pupil in the following terms, *"Thinks [segregation] is 'dumb' because when girls go to college they will mix with boys, and at the moment she doesn't know how to have any relationship / friendship with boys. Finds that school isn't helping her get ready. Says some benefits as boys don't always behave well."*

In short Ofsted provided an inspection report in 2016 to the School following this inspection / investigation stating (as amended) that *"The School's segregation policy does not accord with fundamental British values and amounts to unlawful discrimination and…does not give*

due regard to the need to foster good relations between the genders and means girls do not have equal opportuntes to develop confident relationships with boys and vice versa."

In consequence of this report the School sought Judicial Review seeking an interim remedy that Ofsted be prevented from publishing any such report and as a final remedy that the report be quashed and Ofsted prevented from publishing it.

JR Judgment

The Judge allowed the claim for Judicial Review by the School on a number of grounds and fundamentally (for our purposes) held the following:

- At least in principle the denial of choice to seek the society and interaction with the opposite sex and of the educational benefits which might flow from the exercise of that choice is capable of amounting to the denial of a 'benefit' or 'facility' for the purposes of section 85(2)(d) EA 2010…and possibly as a better fit, the subjection of pupils to a 'detriment' for the purposes of s.85(2)(f).

- However the key question is whether the denial of that opportunity to both sexes amounts to "less favourable treatment" for the purposes of s.13(1) EA 2010. In that regard the treatment of both groups is of equivalent nature and character with equivalent consequences for both sexes and so it cannot be said that one sex is being treated less favourably than the other.

In short the Judge was approaching the matter (as expressly stated in his Judgment) by viewing each sex as a group rather than between any of the boys or girls individually as there was no material difference between any of the boys and any of the girls and (in essence) the action of segregation was singular with simultaneous consequences and therefore it was appropriate to consider it simultaneously as both sexes were being denied the opportunity to interact / socialise / learn with or from the opposite sex.

Ofsted appealed to the Court of Appeal on a number of grounds but fundamentally the main thrust of its appeal was that the Judge had made a fundamental mistake in law by approaching the issue of discrimination by comparing the girls as a group with the boys as a group rather than looking from the perspective of an individual pupil

Court of Appeal

The CA upheld Ofsted's appeal on the ground that the Judge had been wrong in approaching the matter in the way that he did. The CA explained that s.13 EA 2010 specifies what is direct discrimination by reference to 'a person' and thus approaching the issue of 'less favourable treatment' by reference to the groups and considering the matter simultaneously as the Judge had done was wrong.

In essence, the correct approach, in simple terms, was as follows:

A girl pupil who wishes to mix or socialise with a boy pupil is precluded from doing so because of her sex, a protected characteristic; whereas if she did not have that characteristic, and was a boy pupil, she would be able to mix or socialise with other boys. Equally, if a boy pupil wishes to mix or socialise with a girl pupil, he is precluded from doing so because of his sex. In this way both the girl and the boy have been subjected to 'less favourable treatment' because of their protected characteristic, i.e. their sex.

Observations

Whilst this Judgement clearly has fairly widespread ramifications for a number of schools it is clear from the Judgement that a grace period should be afforded to allow schools to adjust their practices in light of this Judgement of the CA.

It is also to be noted that within the legislation explicit exception is made for admissions (so far as relating to sex) such that this judgment should not have any bearing on single sex schools (Para 1, Sched 11 EA 2010).

However as employment practitioners this judgement from the CA provides us with a salient reminder of broader principles of direct discrimination and the operation of s.13 EA 2010 which are just as applicable within the field of employment law as they were in this case. Namely that a single act can at the same time be an act of direct discrimination against both men and women as it could also be an act of direct discrimination against persons who have different protected characteristics to each other. Fundamentally each claim must be viewed separately from the perspective of the individual person in question.

The Advocate General has ruled that employees may qualify for protection from pregnancy discrimination *before* informing employer about their pregnancy: Guisado v Bankia SA (Case C-102/16)

Facts: Ms Guisado (G) worked for the Spanish company Bankia SA (B) from 2006. In 2013, B started a period of consultation with its workers representatives, consulting on collective redundancy. She was selected for redundancy in accordance with a collective redundancy agreement, having achieved a score that placed her among the lowest scores in the province in which the collective redundancy situation had arisen. G was sent a dismissal letter in November 2013, giving her notice of termination of her contract. G was pregnant when she was dismissed, although B alleged it had not been aware at the time of the dismissal.

This case involved the interplay between the EU Maternity Directive and the EU Collective Redundancies Directive. The former is concerned with the protection of the health and safety of pregnant workers and those on maternity leave. It includes a requirement on Member States to ensure that they prohibit the dismissal of a worker during the period from the beginning of the pregnancy to the end of the maternity leave, save in exceptional circumstances. Member States can determine the exceptional circumstances in which a pregnant worker can be dismissed, provided the dismissal is not pregnancy related. The latter regulates collective redundancy dismissals, which are defined as "dismissals effected by an employer for one or more reasons not related to the individual workers concerned.

G argued that article 10 of the Maternity Directive applied. This provides that:

Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent

However article 2 defines a pregnant worker as '*a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'.*

First instance: G challenged her dismissal in the local court, but the decision was in favour of B. G appealed to the Tribunal Superior de Justicia de Cataluna, which referred questions regarding the dismissal, the Maternity Directive and the Collective Redundancies Directive to the CJEU.

Advocate General's decision: B submitted that the Maternity Directive is not applicable to G, as she had not informed it of her pregnancy, and article 2 specifically defines a pregnant worker as one who has informed their employer of this fact. The AG pointed out that Art.10 of the Maternity Directive contains *"an unequivocal prohibition on dismissal of "workers...during the period from the beginning of their pregnancy to the end of maternity leave"".* Other provisions of the Directive grant protection once the worker has informed the employer, but Art.10 is clear that it is from the very beginning of pregnancy. The AG comments that giving priority to protecting female workers from the beginning of pregnancy is *"the better reading"* and that Art.10 extended to cover G. The AG's opinion is that the dismissal would become an unlawful dismissal once the employer was notified.

Art.10 protection can only be lifted in *"exceptional cases not connected with their condition which are permitted under national legislation and/or practice".* B argued that this permitted the dismissal of pregnant workers, as it corresponded exactly to *"one or more reasons not related to the individual workers concerned"* in Art 1(1)(a) of the Collective Redundancies Directive. The AG disagreed with this interpretation. She commented that *"a worker caught up in a collective redundancy procedure belongs to two different protected groups, for different reasons, and should benefit from the protection of both directives".* The AG gives the opinion that *"the normal sense of 'exceptional' is 'unusual' or extraordinary'".* Collective redundancies are not, in the main, exceptional. They could be, for example where a whole sector of activities ceases, but the national court must verify this. There must also be no possibility of reassigning the pregnant worker to another post. For it to be lawful to dismiss a pregnant worker, it must be a circumstance where, for example *"all secretarial posts save one are to become redundant and that one post is filled"* and where the alternative posts are, for example, a driver or welder.

The AG concluded, in response to further questions asked, that Art.10 protected against dismissal and against the consequences of dismissal (where it has already taken place), but that there is no requirement on Member States to make specific provision for pregnant workers to be afforded priority for retention (as this is not the same as reassignment).

Comment: The AG opinion is not binding on the CJEU, which must still make a ruling on the matter. However, if it follows the AG's opinion, there could be implications for UK law, in particular around Reg.10 of the Maternity and Parental Leave (MAPLE) regulations 1999. Reg.10 provides women with a preferential right to suitable available vacancies as an alternative to redundancy, but it applies only *during* maternity leave and not before. A change could be required so that Reg.10 applies to pregnant women from the start of their pregnancy. Further, it is currently the position that pregnant women or those on maternity

leave can still be fairly selected for redundancy (provided of course there is no discrimination attached to the selection). However this decision opens the way for a possible extension of rights, namely that pregnant women could not be fairly dismissed.

The most surprising element of the decision is that the protection of a pregnant worker is engaged *before* the employer has been informed of the pregnancy. Clearly this could lead to practical difficulties, especially if the employee delays in advising the employer of their pregnancy. By the point at which the employer becomes aware of the pregnancy, the redundancy situation may have long been completed with the available positions all being filled by other employees. In such circumstances, what is the employer to do? It is hoped that the ECJ will take a pragmatic approach when it considers this aspect of the AG's opinion in due course.

In other news

Tribunal fees refund

- The Government has launched the first stage of a refund scheme for employment tribunal fees, following the Supreme Court’s judgment in R (on the application of UNISON) v Lord Chancellor in July 2017 that the fees regime was unlawful. The opening phase of the scheme will last for four weeks and full details of the scheme will be made available when it is fully rolled out.
- A press release from the Ministry of Justice and HM Courts and Tribunals Service states that, at this initial stage, up to around 1,000 people will be contacted individually and given the chance to apply for a refund before the full scheme is opened up in the coming weeks. The MoJ and HMCTS are also working with trade unions in relation to large multiple claims. The press release goes on to clarify that successful applicants will be paid interest of 0.5%, calculated from the date of the original fee payment up until the refund date.
- For those who have paid Employment Tribunals fees, but have not been invited to take part in the initial stage, a pre-registration scheme is being set up so that they can register an interest in applying when the full scheme is rolled out.

MOJ statistics

- In the year 1 April 2016 to 31 March 2017 a total of 88,476 tribunal applications were made. This compares to 83,031 the previous year, 61,308 in 2014/15, 105,803 in 2013/14 and 191,541 claims in 2012/13. Although this is the second year in a row that there has been an increase, it is only by 5,445 and not particularly significant when looking at the overall drop in claims since fees were introduced.
- The highest sum awarded in a tribunal claim was £1,744,575.56 and, unusually, was awarded in an unfair dismissal claim. Usually the "honour" of the highest award goes to a discrimination claim where there is no cap on compensation. However, this award must have been made in a case where the cap does not apply (whistleblowing or dismissal for raising a health and safety issue).
- The highest award in a discrimination claim was £456,464 awarded in a race discrimination claim - a significant drop from the highest award last year which was over £1.7 million.
- The number of costs awards made by the tribunal in 2016/17 has fallen for the third year in a row. The number made this year was only 479, having previously fallen from 870 in 2014/15 to 658 in 2015/16. Once again more awards were made to claimants than respondents.
- The maximum costs award made was £146,404 with the median award dropping by £75 to £925.

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