3PB Employment Case Law Update – February 2018

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Age discrimination/Objective justification – Sargeant and Others v London Fire and Emergency Planning Authority and Others UKEAT/0116/17/LA and The Lord Chancellor and Anor v McCloud and Ors [2018] UKEAT/0071/17/2901

Sargeant and Ors

1. **The facts:** The 5 Claimants were test cases in a litigation comprising of more than 5000 claims in England and Wales. In March 2011 the Hutton Report recommended wholesale public sector pension reform in order to place those pensions on a more sustainable footing. The Government accepted the recommendations of the Report and enacted pension reforms through the Public Services Pensions Act 2013. Thereafter the Firefighters' Pension Scheme (England) Regs 2014 brought in changes providing less generous pensions. Transitional provisions were also brought in and in short, depending on the age of the pension scheme member they were treated differently.

2. It was an agreed fact between the parties that the Claimants had been treated less favourably on the grounds of their age and that this amounted to unlawful age discrimination subject to the Respondents being able to show that their treatment was objectively justified in accordance with s.13(2) EqA.

3. The Respondents defence relied upon the implementation of pension reforms across the public sector as a result of Government and Parliament decisions to give effect to social policy objectives, including political, economic, social, demographic, efficiency and budgetary considerations. The Respondents argued that the transitional provisions involved recognition by the Government that the scheme members closest to normal pension age have less time to make necessary lifestyle and financial adjustments, and that it was therefore appropriate to provide protection from the effect of the reforms for

those scheme members. Accordingly, they argued that they fell within the s.13(2) EqA defence.

4. **Decision of the ET:** That the transitional provisions were a proportionate means of achieving a legitimate aim pursuant to s.13(2).

5. **The issue:** What approach should the ET take in scrutinising the Respondent's claim to satisfy the requirements of legitimate aims and proportionate means as well as the standard and nature of evidence required to support such contentions? [This was considered alongside ***McCloud*** see below]

6. **Decision of the EAT:** The ET's conclusions on proportionality amounted to an error of law. The ET is obliged when considering both legitimate aim and proportionate means to recognise that the margin of discretion which the CJEU line of authority accords Governments, when taking and implementing decisions about social policy. However, in ***Seldon v Clarkson Wright and Jakes [2012] ICR 716*** the Supreme Court expressly concluded that the Tribunal in an appropriate case, must consider for itself whether the aim is legitimate in the circumstances of the employment (***Seldon*** para 61) and to scrutinise the means used to achieve the aim in the context of the particular business to see whether they meet the objective and whether there are other less discriminatory measures which would do so.

McCloud and Ors

7. **The facts:** In ***McCloud*** the claims all related to categories of judge other than High Court Judges and the transitional provisions of the Judicial Pension Regulations 2015 which provided for the New Judicial Pension Scheme ('NJPS'). In short, the transitional provisions provided considerably less valuable pensions both in terms of a reduction in the benefits paid and tax treatment of the scheme. The determining factor of the type of benefit received was a members age upon joining the scheme. It was an agreed fact between the parties that the transitional provisions subject younger judges to a disadvantage, but it was claimed that such treatment was objectively justified pursuant to s.13(2) EqA. It was also accepted that because of the gender and racial profile of the relevant groups, the proposals had a disproportionate impact on female and BME Judges (this related to a s.19 EqA claim which in the interests of brevity I have not considered further).

8. As in ***Sargeant & Ors*** (above), the Respondents sought to place the claims within the context of pension reforms across the public sector, which resulted in members of public

service pension schemes accruing less advantageous benefits than previously. An equality impact assessment was undertaken in 2013 and a public consultation in 2014 resulting in the 2015 Regulations.

9. The Respondents contended that the transitional provisions were a proportionate means of achieving their legitimate aim of protecting those closest to retirement from the financial effects of pension reform and that any differences in treatment were justified and lawful. The Respondents contended that the aim was to establish public service pension arrangements which were *"sustainable and affordable in the long term, fair to both the public service workforce and the taxpayer, and consistent with the fiscal challenges ahead whilst protecting accrued rights"* in line with the Hutton Report.

10. **Decision of the ET:** The ET applied domestic law as set out in ***Seldon v Clarkson Wright and Jakes [2012] ICR 716*** and did not defer to the states broad margin of discretion as per EU authorities. The Respondents were unable to prove that the defence of objective justification was made out.

11. **The issue:** What approach should the ET take in scrutinising the Respondent's claim to satisfy the requirements of legitimate aims and proportionate means as well as the standard and nature of evidence required to support such contentions? [This was considered alongside ***Sargeant and Ors***.]

12. **Decision of the EAT:** When scrutinising an employers defence of objective justification, the correct approach is that as set out by the Supreme Court in ***Seldon v Clarkson Wright and Jakes [2012] ICR 716***. It is necessary for the ET to weigh the gravity of the effect upon employees discriminated against the importance of the legitimate aims in assessing whether the particular measure chosen was justified. The fact that a particular aim was capable of being a legitimate aim is only the beginning of the story. It is necessary to enquire whether it was in fact the aim being pursued. Once an aim had been identified which was legitimate in principle, the ET still has to ask whether it was legitimate in the particular circumstances of the employment concerned. That requires careful scrutiny of the aim and means, in the context of the particular business in order to determine whether they meet the objective and whether there were other, less discriminatory measures which would do so.

13. **Comment on Sargeant & Ors and McCloud & Ors:** The appeals illustrate the complex nature of objective justification in the contexed of age discrimination related to pension provision. It is entirely clear from the EAT's decisions that in determining s.13(2) EqA it is not sufficient for the ET to consider the issue of proportionality by reference to CJEU

lines of authority only and the Supreme Court guidance must be followed. The ET must scrutinise the evidence, applying the tests rigorously and in the context of the employment before them.

14. In my experience, defences of objective justification are often poorly evidenced. The truth perhaps is that objective justification is not an easy defence to compile evidence on. In ***McCloud***, the EAT has helpfully summarised within the judgment the ET's findings as to the Respondent's lack of evidence/explanation which ultimately resulted in the conclusion that the defence was not made out.

Sex Discrimination – HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School [2017] EWCA Civ 1426

15. **The facts:** AHS, a voluntary-aided Muslim faith school for boys and girls aged between 4 and 16, had a policy based on an interpretation of Islam of separating boys and girls for lessons, breaks, trips and clubs from Year 5 onwards.

16. An OFSTED Inspection in June 2016 concluded that the policy limited pupils' social development. OFSTED later amended their conclusions to add that segregation was unlawful under EqA. There was no suggestion by OFSTED that girls received an inferior or different education to the boys. AHS brought judicial review proceedings against OFSTED.

17. **The issue:** Was the segregation policy which applied to both boys and girls a breach of the EqA? Was there sufficient evidence of differential treatment?

18. **Decision of the High Court:** Segregation did amount to a detriment. However, Mr. Justice Jay upheld AHS's challenge, ruling that OFSTED had been wrong to conclude that there was a breach of EqA. There was no differential treatment between the group of boys and girls. Furthermore, there was no evidence that segregation imposed a particular detriment on girls or that it generated a feeling of inferiority as to the status of females in the community.

19. **Decision of the Court of Appeal:** Mr. Justice Jay's analysis of s13 was flawed. It is necessary to consider differential treatment from the perspective of an individual pupil opposed to his or her group as a whole e.g. 'females' or 'males'.

20. The correct comparator in a case of discrimination against a girl was a boy who can mix with other boys. In the case of discrimination against a boy it was a girl who can mix with other girls. Therefore, from an individual perspective (opposed to the group perspective taken by the HC), the less favourable treatment was because of sex. Therefore, the CA concluded the treatment amounted to direct discrimination contrary to s13 EqA.

21. **Comment:** This judgment serves as a helpful reminder that separate but equal treatment will not necessarily evade protection under s13 EqA. Equally bad treatment has never been an attractive defence for an employer but that argument must now be considered through the prism of the Court of Appeal's decision. Importantly, this case must not be taken as applying to all cases and is clearly fact specific in its conclusions. Whilst this case considers unlawful discrimination in education, the principles are relevant to employment law cases. The dissenting judgment of Lady Justice Gloster makes some observations as to the notion of 'expressive harm', which was argued by OFSTED, when segregation was viewed in the historical and social context of women being regarded as the inferior sex. There is very little case law on 'expressive harm' in this context and Lady Gloster's striking observations as to social context and impression will undoubtedly be considered in future appeals.

Discrimination – Time limits – Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA

22. **Facts:** H was a consultant in general surgery and was summarily dismissed in January 2015. He was the line manager of 4 doctors (3 were from India and one from Pakistan). The 4 doctors raised a grievance against H alleging bullying and harassment. Their complaint was not initially one of discrimination on the grounds of race. At a later point, after a heated discussion between H and the 4 said doctors another grievance was raised. This second grievance alleged that H had made racially offensive remarks in their absence. The complaints within the two grievances were combined and investigated.

23. Thereafter, H himself raised a grievance alleging racial harassment against 3 of the complainants. This went no further.

24. H was subject to disciplinary proceedings in respect of some of the allegations raised by the complainants including allegations of racially offensive remarks. The recommendation of disciplinary proceedings was made on 9 September 2014; the

disciplinary invitation on 6 November 2014 and the hearing on 16 December 2014. The outcome was summary dismissal for race discrimination relating to comments he made. The appeal was heard on 15 April 2015 and rejected. The ET1 was lodged on 22 May 2015.

25. One of the claims made by H was direct discrimination on the grounds of race. The less favourable treatment was subjecting H to disciplinary procedures and ultimately dismissing him. The complainants were the comparators. The issue taken was not subjecting the complainants to disciplinary proceedings in respect of their racially motivated comments about H.

26. **Issue:** Is a decision to instigate disciplinary procedures just a one-off act or can it give rise to an ongoing state of affairs for the purposes of s123(1)(b) EqA?

27. **Decision of the ET:** H's claim of direct discrimination was in principle made out but was out of time. The NHS Trust's explanation for not opening an investigation in respect of H's race discrimination grievance was that the remarks they were alleged to have made were not as serious as the ones they had alleged against H. The ET took exception to this explanation and concluded that this assessment was based on subjective opinions of the NHS Trust's officers which were unconsciously influenced by race. H was not in an ethnic minority and did not fit the normal profile for someone subjected to racial harassment. The Tribunal concluded that if the complaint had been made by someone in an ethnic minority it would have been "inconceivable" that the employer would have been dismissive of his complaint. Accordingly, the NHS Trust had not discharged the burden of proof.

28. Nonetheless, the ET concluded that the claim was out of time and regarded it as a one-off act of discrimination opposed to an act extending over a period. They concluded it would not be just and equitable to extend time.

29. **Decision of the EAT:** The ET was wrong to conclude that there was a one-off act of discrimination. By taking the decision to instigate disciplinary procedures, the NHS Trust created a state of affairs that would continue until the conclusion of the disciplinary process. This was not merely a one-off act with continuing consequences. The process is initiated, the NHS Trust would subject H to further steps from time to time. Furthermore, each of the steps taken in accordance with the procedures is such that it cannot be said that they comprise of a succession of unconnected or isolated specific acts as per ***Hendricks***. The EAT noted that disciplinary procedures in some employment contexts – including the medical profession – can take many months, if not years, to

complete. In such contexts, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be confident of an extension on just and equitable grounds. The EAT considered that would place an unnecessary burden on claimants when they could rely upon the act extending over a period provision.

30. **Comment:** This pragmatic approach to the issue of time limits will give some reassurance to Claimants who consider that they have a discrimination claim in the context of disciplinary proceedings. Furthermore, this logic could be applied to other forms of employer process such as capability proceedings. That said, there is more than ample scope to argue that any such continuing act ceases. Therefore, the best course is to act cautiously when it comes to time and not rely on this decision as being applicable in all cases.

PIDA and Jurisdiction – Bamieh v EULEX Kosovo and ors UKEAT/0268/16/RN

31. **The facts:** B was employed by the FCO as an international prosecutor under a serious of annual contracts governed by English law. Under the contracts B was seconded to EULEX in Kosovo in a Rule of Law Mission established to assist the country reach international standards and achieve self-government following the war in the Western Balkans. Staff were sent from a number of states. Seconded staff remained under the authority of their sending state throughout the secondment but undertook duties in accordance with the Mission chain of command.

32. B believed that her contract was not renewed in November 2014 due to protected disclosures she had made and wished to bring a claim in the Tribunal for whistleblowing detriment and automatically unfair dismissal. In addition to the FCO, B pursued EULEX, the head of Mission and two individual FCO secondees 'F' and 'R', whom she alleged subjected her to detriments and were therefore individually liable under s47(B)(1A). For example, B claimed that R commenced a series of investigations into her conduct and F is said to have recommended suspension of C without any investigation.

33. **Issue:** Does the Tribunal have jurisdiction to hear whistleblowing claims brought by a Foreign and Commonwealth Office employee against co-workers in relation to detriments taking place outside of Great Britain whilst working on secondment?

34. **Decision of the ET:** The FCO conceded that the Tribunal had jurisdiction to hear claims against it. The other Respondents disputed that. Following a 6-day PHR the ET concluded that it had no jurisdiction to hear the claims except that against the FCO. EULEX had no domestic legal personality; there was no territorial jurisdiction over acts dome by EULEX or the Head of Mission; neither had acted as agents for the FCO; the co-workers F and R were not domiciled in the UK or based there for work purposes and so were not covered**.**

35. **Decision of the EAT:** The test for territorial jurisdiction is as set out in ***Lawson v Serco Ltd*** [***2006] ICR 250*** and ***Duncombe v Secretary of State for Children, Schools and Families (No.2) [2011] UKSC 36***. In ***Lawson*** Lord Hoffman explained that the ERA has no geographic limitation, but it was inconceivable that Parliament intended it to confer rights on employees working abroad and having no connection with Great Britain. It would therefore only apply in unusual or exceptional cases. In ***Duncombe***, Baroness Hale JSC considered when such unusual or exceptional cases might arise (para 16 is of illustrative importance). She stated that the employment must have a much stronger connection both with Great Britain and British employment law than with any other system of law. Importantly, she stated, "There is no hard and fast rule…".

36. On the facts of this case that test was met in respect of the claims against F and R. In the EAT's analysis, the question of territorial jurisdiction in respect of the detriment provision (s47B(1A) required an assessment of the sufficiency of the connections between each individual respondent and Great Britain and British Employment Law. The fact that F and R were not based in Great Britain is not necessarily determinative. Although a foreign base and employment will usually be decisive, it is not absolute and can be overcome where the connection to GBR and British employment law is sufficiently strong.

37. The following factors were held to amount to be relevant (para 116): F and R were working under contracts with the UK Government (the employer could not be based anywhere else); they were required to act consistently with their position as representatives of Her Majesty's Government; they were bound by the Official Secrets Act 1989; were required to hold a UK passport; disciplinary action, decisions on suspension or dismissal lay with FCO; they were governed by English law; they would have expected the ERA to apply to them; there was a strong similarity between EULEX and the international enclaves in which the ***Duncombe*** claimants were employed, which had no particular connection to the countries in which they happened to be situated and were governed by international agreements between the participating states. The EAT

therefore concluded that territorial jurisdiction under the ERA extended to B's claims against F and R as individually named respondents.

38. **Comment:** The conventional principles laid down in ***Lawson*** and ***Duncombe*** were previously developed and applied in relation to 'employer' respondents opposed to co-workers of the same employer who have potential liability under s47(B)(1A) ERA. Whilst this case has been determined in the context of the FCO and the analysis is heavily reliant on the fact that the British Government is the employer, do not be tempted to rule out a wider application of the principles to other employers before conducting a full analysis.

UDW – ET Jurisdiction – Tyne and Wear Passenger Transport Executive v Sanderson and ors T/A Nexus UKEAT/0151/16

39. **Facts:** The Tribunal was asked to determine whether the employer had made unauthorised deductions of wages following a pay settlement negotiated by collective bargaining between the RMT trade union and the employer. In particular, an issue arose as to the correct method of calculation of pay with reference to a plethora of materials relevant to interpretation. The issue was whether by implication the TU agreement changed the basis upon which the Respondent was entitled to calculate shift allowance. The Claimant's alleged that the Respondent had incorrectly calculated pay and consequently, that there was a £500k shortfall over the relevant period.

40. **The issue:** Do the ET and EAT have the jurisdiction to interpret the meaning of a contractual term in respect of claims under Part II ERA where the parties do not agree about the meaning of the contractual provisions?

41. **Conflicting authorities on jurisdiction:** At the time of consideration there were conflicting authorities on this point. On 22 March 2017, Slade J handed down the decision in ***Agarwal v Cardiff University Hospital and Another UKEAT/0210/16/RN*****.** The EAT concluded that just as authority in the Court of Appeal (***Southern Cross Healthcare Co Ltd v Perkins and Others [2010] EWCA Civ 1442***) precludes the ET from construing a contract in relation to Part I ERA, by parity and the same reasoning this also applies to Part II.

42. However, on 22 April 2017, His Honour Judge Richardson took a different view in ***Weatherilt v Cathay Pacific Airways Ltd UKEAT/0333/16/RN*** and refused to follow the

decision in ***Agarwal***, leaving those arguing cases before the ET with two conflicting EAT authorities.

43. **Decision of the EAT:** ***Agarwal*** was wrongly decided. The ET does have jurisdiction to construe contractual terms in deciding whether a deduction of wages had been unauthorised under Part II ERA.

44. In respect of construing contracts, the ET had concluded that the terms and conditions on pay were unambiguous and in that context applied the officious bystander test. The EAT said that this was the incorrect approach. Instead of considering whether a term needed to be implied and the officious bystander test, the correct approach was that referred to by Lord Neuberger in ***Arnold v Britton [2015] 1 AC 1619*** expressed as:

    "…what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean…" (at para 15).

45. **Comment:** This is welcome clarification on UDW claims under Part II ERA. However, the ET is still bound by the Court of Appeal's decision in ***Southern Cross*** and it accordingly remains the case that so far as Part I ERA is concerned the ET does not have the jurisdiction to construe the contract.

WTR – Crawford v Network Rail Infrastructure Ltd [2017] UKEAT/0316/06

46. **The facts:** C was a railway signalman working on single manned boxes on 8-hour shifts. 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.

47. C claimed entitlement to a 20 minute rest break under regulation 12 WTR or compensatory rest under regulation 24(a).

48. **The Employment Tribunal:** Regulation 12 did not apply; the arrangements were compliant with regulation 24(a).

49. **The issue:** Does an equivalent period of compensatory rest have to comprise of one period lasting at least 20 minutes or can it be satisfied by shorter breaks which in aggregate last at last 20 minutes?

50. **The EAT:** Applying the guidance in ***Hughes v The Corps of Commissionaires Management Ltd [2011] EWCA Civ 1061***, there should be a single break of at least 20 minutes from work. It is not compliant with WTR to have several shorter breaks that together amount to 20 minutes or greater. Merely, being on call does not mean that the 20 minutes is not satisfied in principle.

OTHER NEWS

Case management

51. The President of Employment Tribunals (England & Wales) has updated the Presidential Guidance on General Case Management to remove all reference to employment tribunal fees, following the Supreme Court's decision in ***R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51.*** There are also further amendments within the new guidance.

Fees

52. The Supreme Court's decision in ***UNISON v Lord Chancellor*** was handed down just over 6 months ago on 27 July 2017. Those litigating employment matters will have noticed the increase in claims and the associated delays in the Employment Tribunals which are struggling to administer the higher number of cases. In December 2017, the Ministry of Justice reported that the number of single applicant claims have increased by 64 per cent.

53. In January 2018 the Employment Tribunals National User Group recorded an increase in single claims of around 100 per cent with prominence in short-track cases (e.g. wages). It remains to be seen whether claims will ever reach the peak of pre-fee levels, but it seems unlikely at the time of writing. What does seem likely though, is that parties will face greater delays before cases are heard, especially as the MOJ aims to reduce spending by a further 10 per cent over the next 2 years!

54. Provisional MOJ figures have recorded that over 2151 fees have been repaid, amounting to £1.8 million. Further details will be processed in March 2018.

Appeals to watch out for over the next month

55. The Supreme Court is due to hear the employer's appeal in ***Pimlico Plumbers Ltd and anor v Smith 2017 ICR 657*** on 20 and 21 February 2018. The case considers 'worker' status for the purposes of the ERA and 'employee' under EqA.

56. Employers will be eagerly awaiting the Court of Appeal's decision in ***King v The Sash Window Workshop Ltd*** following the ECJ's ruling (Case C-214/16), that individuals wrongly classified as self-employed contractors may be able to claim back-pay in respect of unpaid annual leave. The Court of Appeal will determine whether the Working Time Regulations can be interpreted consistently with the ECJ's decision.

57. In ***Trustees of the William Jones's Schools Foundation v Parry 2016 ICR 1140,*** the Court of Appeal will consider the correct approach that Tribunals should take when applying rule 12(1)(b) of the Tribunal Rules 2013, which provides for rejecting a claim where it is in a form that cannot sensibly be responded to. In particular, it will consider whether a claim can be rejected under r12(1)(b) without a hearing. This is currently listed for 21/22 February 2018.

58. On 14 February 2018 the Court of Appeal will consider the decision in ***Abertawe Bro Morgannwy University Local Health Board v Morgan EAT 0320/15*** in which the Tribunal concluded that it was just and equitable to extend the time limit to presenting discrimination complaints. The CA will consider whether it was open to the Tribunal to make findings as to the reasons for an employee's delay in presenting her claims based on inference only, even though she had not given any direct evidence on the point.

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