3PB Employment Case Law Update – March 2018

By Simon Tibbitts

Barrister

Can you rely on OH Advice as to whether someone is disabled or not? - *Donelien v Liberata UK Limited EWCA Civ 129*

Facts

1. The Claimant, in the second half of 2008 was arriving to work late, leaving early or even taking whole days off work. She told her managers that she was suffering from a variety of symptoms but in short it appeared that they largely related to high blood pressure problems. She was certified as unfit to work and had several periods of absence from work.

2. At the beginning of 2009 after one such period of sick leave the Claimant provided a letter from her GP which suggested a phased return to work to which her employer agreed. In short the employer attempted to refer her to occupational health on a number of occasions, the first in February 2009 but the Claimant was uncooperative. Eventually the Claimant agreed and advice was obtained from occupational health, albeit that the Claimant would not agree to the OH advisor being able to contact her GP to obtain further information.

3. Specific questions were posed to OH which were not answered in full by the initial report provided and dated 18th June 2009, but the employer went back to OH to press for answers on those issues (such as whether the Claimant was disabled and what reasonable adjustments were needed). OH provided a further report dated 6th July 2009 which responded in fuller terms and gave advice that she was not disabled.

4. The Claimant attended a return to work interview on 5th August 2009 in which she stated she was only willing to work 3 days a week starting at 1pm (as opposed to her contracted 10am start) but her employer explained that they would not be able to support a 3 day working week going forwards and that the Claimant would be expected to attend at 10am and if not able to do so to notify the employer of her absence in accordance with the employer's absence reporting policy.

5. The Claimant went off sick yet again and then a further return to work meeting on 18th August 2009 was held which was *'unproductive'*. Disciplinary proceedings were initiated for unsatisfactory attendance and failure to comply with the employer's absence notification procedures. There was further OH advice provided in September 2009 following a telephone consultation with the Claimant which advised in summary that on the information they had (still not having consent to contact her GP) they were of the view that the Claimant was fit enough to attend a disciplinary hearing. Ultimately the Claimant was then dismissed.

Decision of the ET

6. The Claimant was found by an Employment Tribunal to be disabled from 20 August 2009 at a preliminary hearing. The tribunal however also held (at the final hearing) that the employer did not have actual or constructive knowledge that the Claimant was disabled and her claims were dismissed.

The issue

7. The pertinent issue in question was whether the employer could "*plead ignorance based on their OH advice coupled with their own knowledge of the reasons for the Claimant's absences*". Especially given the findings in Gallop v Newport City Council [2014] IRLR 211.

Decision of the CA

8. The CA upheld the EAT and ET's findings that the employer did not have actual or constructive knowledge of disability at the material time and thus the duty to make reasonable adjustments did not arise. The CA re-emphasised the principles set out in Gallop that in terms of constructive knowledge it was not relevant as to whether the employer knew as a matter of law the employee was a disabled person, but rather that they knew or ought to have known of the relevant facts, namely (a) that the employee is suffering from a physical or mental impairment which (b) has a substantial and long term adverse effect on (c) their ability to carry out normal day to day activities.

9. The CA however went on to distinguish this case from that of Gallop as in this case it was not found to be the case that the employer had simply 'rubber stamped' the medical adviser's report, taking it as conclusive in circumstances where that report or opinion was

unreasoned. Nor did the CA take Gallop to be stating that employers could not attach weight to the advice of occupational health.

10. In the present case it was not just on the report of OH that the employer considered the Claimant was not disabled, that report 'chimed with their own experience and impressions and indeed the letters they had received from the Claimant's GP' and indeed the employer had their own meetings with the Claimant. Further when the initial OH report was considered unsatisfactory the employer sought further clarification and thus this case was clearly not simply a 'rubber stamping' exercise. The CA went through the factual elements set out in Gallop and in short concluded that the tribunal had been entitled to find that the employer did not have constructive knowledge of the Claimant's disability at the material time.

Comment

11. Whilst this case fell within the now repealed provisions of the Disability Discrimination Act 1995 given that the relevant terminology as to knowledge used in that legislation is identical to that under the EA 2010 this case should be equally applicable to cases brought under EA 2010.

12. Similarly whilst this case concerned a claim in respect of reasonable adjustments, given the issue of constructive knowledge and the terminology used is replicated over other heads of claim these principles and this authority should equally be applicable in those circumstances as well (such as for claims under s.15 EA 2010).

13. Whilst Gallop does not mean that the employer cannot rely upon the weight of its OH advice, it is still the case that an employer cannot just rubber stamp the advice and rely on it exclusively. However, if the advice is reasoned and it is not simply followed uncritically then it may well be found that the employer lacks the relevant constructive knowledge.

14. Employers should thus ensure, like in this case, that the questions that are sent to OH are appropriately framed to allow a '*reasoned'* opinion on disability and should, like in this case, revert to OH if the opinion which is returned is short or cursory. If these steps are taken then an employer will be in a far stronger position in relying on the advice received from OH but clearly even in those circumstances should not blindly follow that advice.

Agency Worker Regulations – A 'term-by-term' comparison is required – *Kocur v Angard Staffing Solutions Limited & Royal Mail Group Limited UKEAT/0181/17*

Facts

15. The Claimant initially worked as a casual worker directly for RMG. However in January 2015 he became an employee of Angard and his services were supplied to RMG as an agency worker on a regular basis. The Claimant completed 12 weeks with RMG as an agency worker by the summer of 2015 and therefore entitlements under Reg.5 of the Agency Worker Regulations 2010 arose.

16. The Claimant raised grievances with both Respondents as to a number of matters which (of relevance) included the length of paid breaks he was afforded by comparison to direct recruits of RMG and the fact he was entitled to just 28 days annual leave whereas direct recruits of RMG were entitled to 30.5 days per annum. The Claimant accordingly brought claims in the ET for various breaches of the AWR 2010.

Decision of the ET

17. The ET upheld some of the Claimant's complaints under the AWR 2010 but dismissed his claims in respect of annual leave and paid rest breaks.

18. The ET held that in respect of annual leave, whilst there was a disparity in the holiday entitlement that was compensated for by virtue of the enhanced hourly rate which the Claimant received as compared to those working directly for RMG as if the Claimant did not put himself forward to work the additional 2.5 days then he would have had the same time off (30.5 days) as those working directly for RMG and would be in receipt of the same pay.

19. Likewise as regards the rest breaks, given he was allowed to take the same length of break (it was just that half of it was unpaid) and given the enhanced hourly rate of pay the Claimant received as compared to those working directly for RMG, the Claimant in terms of pay was in receipt of at least equivalence in terms of pay to that of those working directly for RMG.

Decision of the EAT

20. The EAT upheld the Claimant's appeal in respect of annual leave entitlement and paid rest breaks. The EAT considered the AWR 2010 and the EU Temporary Agency Workers Directive (No. 2008/104), finding that it cannot have been the intention of parliament to create a situation whereby agency workers were precluded from doing better in some respects (e.g. hourly rates of pay) than employees. Indeed the higher rates of pay could be said to compensate to some extent for the unstable and irregular nature of such work. The wording of Reg.5(1) AWR 2010 and having regard to the Directive meant that the phrase 'the same' was to mean 'at least' and thus provides for a minimum level of entitlement but does not impose a ceiling on entitlements.

21. There was clearly a failure to provide an additional 2.5 days additional leave and the EAT did not consider that this could be 'compensated for' by an enhanced hourly rate. There is nothing in the directive or the AWR 2010 that enables the agency or the hirer to offset a failure to confer a specific entitlement with a higher rate of pay. Thus an employer cannot make a payment in lieu in respect of a specific entitlement to annual leave if such a payment in lieu could not be made to employees as well.

22. Fundamentally the EAT held that a term-by-term approach was required by the AWR 2010 and not a 'package based' approach. Indeed there was not within the AWR 2010 nor the Directive anything to suggest that the employer or agency could offset the shortfall in respect of one of those terms (such as annual leave) by conferring a greater entitlement in respect of another (such as pay).

23. It is however important to note that the EAT did note that (for the purposes of the AWR 2010 at least) the 'mechanism' by which parity was achieved need not be identical. Thus for example remuneration for annual leave could be paid to an agency worker by way of a lump sum payment at the end of an assignment or indeed by way of a higher hourly rate into which holiday pay has been rolled up, both of which might differ as to how employees are remunerated for their annual leave but that in such a case the 'payment mechanism' had to be transparent and the agency worker readily able to ascertain precisely what aspects of his remuneration related to annual leave.

24. This distinction became more important and less hypothetical when coming to consider the issue as regards rest breaks as both types of worker had in fact been provided with a rest break of 1 hour, it was just that the Claimant (and other agency workers) had only been paid in respect of half of that hour compared to the full hour being paid to those working directly for RMG. So was this the difference merely to do with the 'mechanism' of payment or was the difference one of substance and seeking to adopt a 'packaged based' approach?

25. The EAT concluded that the difference as regards rest breaks was one of substance as during that hour, despite the differences in salary, the agency worker was paid less for that hour than workers of RMG. The fact that the Claimant was paid more overall for the whole shift did not change the fact that he was paid significantly less for the one-hour rest break and focusing on the whole shift would not enable consideration as to whether those terms and conditions were compliant with the AWR 2010. Focusing on the overall pay for a shift diminishes the scope of the intended statutory protection.

26. The EAT again went on to state that payment for the whole rest break *could* be rolled up into hourly pay *but only* if this was done in a transparent way and such that payment amounts to at least the same level of remuneration as workers of RMG for the rest break. This however was clearly not the case in the present circumstances.

Comment

27. Whilst this case makes it abundantly clear that under the AWR 2010 a term-by-term as opposed to package-based approach is required, the EAT was evidently clear to emphasise that (especially as regards purely pay) this is not to be equated with a requirement that in all instances everything needs to be identical between agency workers and workers engaged directly.

28. At least as far as the AWR 2010 are concerned, different mechanisms can be used such as incorporating aspects of pay within a higher hourly rate of pay for agency workers. However where this is proposed, clear and careful consideration should be given to ensure one does not fall foul of the AWR 2010 and in particular ensuring that this apportionment does not disadvantage the agency worker in terms of remuneration overall by comparison and that it is clearly specified and set out in policy, terms and payslips will be of importance to ensure that everything is transparent to the agency worker in question.

Windfalls for Part-Time Workers? - *Brazel v Harpur Trust UKEAT/0101/17*

Facts

29. The Claimant was a part-time music teacher whose weekly hours fluctuated and who only worked during term time under a zero hours contract. She was required like the vast majority of most teachers to take her holiday during school holidays and was contractually entitled to the statutory 5.6 weeks annual leave.

30. In light of the fact that the Claimant did not work a full standard 46.4 week working year (i.e. 52 weeks less 5.6 weeks leave) the employer considered it was appropriate to pro-rate her entitlement to holiday pay such that it would be based on the number of weeks actually worked as a proportion of 46.4 'working weeks'. If it were not so pro-rated then those who work fewer weeks during a given year would be unfairly rewarded by comparison to those who work the full number of weeks.

31. Following ACAS guidance (which prescribes that 5.6 weeks equates to 12.07% of hours worked over a year) the school calculated the Claimant's holiday pay as 12.07% of the hours she worked in the preceding term. The Claimant contended that this was not the same as the calculation under s.224 ERA 1996 and Reg.16 WTR 1998 as further to those provisions her holiday pay should be calculated based on average earnings over the preceding 12-week period of weeks in which she had worked and not pro-rating her entitlement to annual leave as the employer had done.

Decision of the ET

32. The ET had regard to the ACAS guidance, the ECJ decision in Greenfield v Care Bureau Ltd and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and concluded that that 12.07% calculation by the school was indeed correct and thus dismissed the Claimant's claim. The ET squared the circle so to speak with the provisions of Reg.16 and s.224 ERA 1996 by noting that to strictly adhere to Reg.16 would result in a windfall for term-time only workers and thus read into the provisions of Reg.16 that holiday pay could in certain circumstances (where working less than 46.4 weeks per year) be capped at 12.07% of annualised hours and thus pro-rata'ing the Claimant's holiday entitlement to reflect the time actually worked such that full time employees are not treated less favourably and to avoid a windfall for term-time employees was indeed the correct approach.

Decision of the EAT

33. The EAT upheld the Claimant's appeal. In summary HHJ Barklem was unable to distil any support for the proposition (which the ET accepted) that there is a requirement to carry out an exercise in pro-rating in the case of part-time employees so as to ensure that full-time employees are not treated less favourably or to avoid a 'windfall' for term-time only workers. Whilst the PTWR and EU provisions concerning PT workers was to ensure part-time workers were not treated in a less favourable manner than full time workers, there was not, as of yet, a principle to the opposite effect.

34. Accordingly despite it being recognised that calculating holiday pay for someone who works irregular hours strictly in accordance with s.224 ERA 1996 and Reg.16 WTR may in certain cases have 'anomalies' such as to favour someone who does not work throughout the year, that did not justify either words being read into the WTR, nor that the entitlement to 5.6 weeks' pay should be pro-rated.

Comment

35. As the law currently stands it appears that this judgment is clearly correct but one has to wonder, especially in light of our forthcoming separation from the EU, whether the vexed issue of holiday pay might end up being an area where we see change within our domestic legislation which might affect the outcome of a case such as this.

36. Presently however this case provides a salient reminder that whilst in some instances the pro-rata principle might be required as regards holiday entitlement so as to protect the rights of part-time employees where there has been a change in work patterns (following Greenfield and Land Tirol), there is not a requirement to carry out such a pro-rating exercise so as simply to ensure that full-time employees are not treated less favourably.

37. Indeed, the element (such that it is) of apportionment of holiday pay is already impliedly built into the statutory provisions of s.224 ERA 1996. Those provisions are evidently far from perfect and may well in situations such as this (or where for example an employee elects to work at a much higher level in the 12 weeks preceding a period of annual leave than at other times of the year) in one sense at least, enable what many might regard as 'a windfall' for that worker.

Pre-Cancerous Conditions – Do they amount to a disability? - *Lofty v Hamis t/a First Café UKEAT/0177/17*

Facts

38. The Claimant became aware of a blemish on her cheek and was informed after investigation that it was 'lentigo maligna' i.e. a pre-cancerous lesion which could result in skin cancer. She was signed off work, underwent a couple of operations to remove the lesion and did not thereafter in fact develop skin cancer. The Claimant thereafter remained off work for related health issues and anxiety. Her employment was terminated because she failed to attend meetings to discuss her continued absence. The tribunal was presented with evidence which included that from Cancer Research UK which stated that 'in situ' cancers (such as in this case) were not cancers in the true sense because they cannot spread to other parts of the body.

39. It was held by the ET that the Claimant was not disabled within EA 2010 and accordingly her disability discrimination claim was dismissed. The Claimant's condition had been referred to by the consultant as 'pre-cancerous' and following surgery she had not developed skin cancer. Thus the Claimant's condition did not amount at any stage to 'cancer' for the purposes of Para 6, Schedule 1 of EA 2010 and thus she was not deemed to be disabled.

The Issue

40. In short the issue was whether a 'pre-cancerous' state or in-situ cancer could amount to a deemed disability under the EA 2010.

Decision of the EAT

41. Para 6 of Schedule 1 to the EA 2010 requires that a complainant has one of the specified conditions and it is not sufficient that he or she might develop a relevant condition in the future. The diagnosis of pre-cancerous cells might mean something different depending on where the cells are to be found, however in terms of skin cancer the evidence meant that the Claimant had an 'in situ cancer' and Para 6, Schedule 1 does not distinguish between invasive and other forms of cancer, it requires only that the Claimant has cancer and the section was intended to avoid unnecessary complexity and uncertainty and therefore in essence whilst an 'in situ cancer' might only be regarded as a minor cancer in the grand

scheme of things, it was still cancer and therefore the Claimant was and should have been deemed to be disabled.

Comment

42. This case does not set down a general rule that all pre-cancerous states will fall within a 'deemed disability'. It will clearly be a factual question in the specific circumstances. However what it does make clear is that the severity of the cancer and the likelihood of it spreading are not pertinent questions to be addressed. It is rather simply a question of whether the Claimant can be considered as having cancer at the point of diagnosis or not.

43. Employers thus need to be careful when they are presented with an employee who is said to be in a 'pre-cancerous' condition and should clearly seek expert medical opinion before taking action (such as dismissal) against that employee to ensure they do not fall foul of the provisions of the EA 2010.

OTHER NEWS

- ### Changes to Tax Treatment of PILON

44. It is important to note that as of 6th April 2018 all payments made in lieu of notice will be classed as earnings and subject to tax in the normal way pursuant to the new sections 402A-E ITEPA 2003 (inserted by The Finance (No.2) Act 2017). The new provisions operate so as to exclude any PILON sum from the 'tax free termination payment' of £30,000 and this can be the case whether or not in any settlement (for example) that sum is explicitly referred to as PILON or not.

45. This means that employment practitioners should be aware this is likely to impact on a client's recovery both when it comes to settlement agreements and calculating awards made by the tribunal. Thus, regardless of whether the client will otherwise exceed the 'tax free termination payment' threshold, advisers will have to consider 'grossing up' or ensuring the tribunal awards gross as opposed to net pay when it comes to calculating PILON.

- **Increase in Compensation Limits and Minimum Awards**

46. The Employment Rights (Increase of Limits) Order 2018 has been made which results in the following increases where the 'appropriate date' for the cause of action falls on or after 6th April 2018:

	06.04.2017	06.04.2018
Cap on a week's pay	**£489**	**£508**
Cap on Compensatory Award	**£80,541**	**£83,682**
Guarantee Pay (per day)	**£27**	**£28**
Min Basic Award (s.120 ERA 1996)	**£5,970**	**£6,203**

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Simon Tibbitts

Barrister
3PB Barrister

0117 928 1520
simon.tibbitts@3pb.co.uk

3pb.co.uk