3PB Employment Case Law Update – 13 July 2018

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What constitutes 'information' in the context of making a protected disclosure? Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436

Facts: the appellant commenced employment with the respondent education authority in September 2003 as an Educational Achievement Zone Literacy Advisor Teacher. She subsequently became an Education Achievement Project Manager. Her relations with other staff and managers at the respondent were not always smooth. Over the years, she made a number of complaints about others. Four of these complaints formed the basis of this case, the latter ones taking place in December 2009 and the other in June 2010. Shortly after the later disclosure, the appellant was placed on garden leave, following which she was formally suspended on full pay pending a disciplinary investigation on charges that she had made unfounded allegations against colleagues on a number of occasions. In early 2011, the respondent faced a major reduction in government funding for education initiatives. In the light of that loss of funding, the appellant was dismissed on 30 September 2011 on grounds of redundancy. She brought claims of unfair dismissal and detriment as a result of whistleblowing.

The ET decided to determine as a preliminary issue whether or not any of the disclosures were qualifying disclosures. The ET struck out 3 of the 4 disclosures and went on to find that the dismissal was by reason of redundancy, but was unfair due to lack of consultation. The appeal related to the 2 aforementioned disclosures.

The December 2009 disclosure was contained in a letter, and before the EAT the claim was refined to the following paragraph [relevant section highlighted]:

"I think that it is also important to remind you that what has been achieved over the years has been despite bullying and harassment that was tolerated, and at times, not least at present, encouraged over that time by Stephen Pain, Liz Rayment-Pickard [the appellant's line manager], yourself and others, and also despite successive and repeated failure to

honour LA [local authority] and individual agreements to extend my role and to provide career development. ***Since the end of last term, there have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented****. As an example, I have brought to your attention the inappropriate behaviour of Liz Rayment-Pickard, and despite your undertaking have received no feedback."*

By reference to the well-known case of Cavendish Munro Ltd v Geduld [2010] ICR 325, the ET found that the letter did not contain information, merely allegations.

The disclosure from June 2010 was contained in an email, the relevant section relied upon as follows:

"She did not support me, as she claims, when I reported a safeguarding issue during [a meeting on 16 June 2010]. Her response, which shocked me was 'I can't comment, I am never there during the school day, only before … or after … so I can't comment'. This was, repeated, belittling and I tried very hard to engage her as my line manager in the report."

Before the ET, it was argued that this tended to show a breach of the legal obligation to support employees in complying with their own safeguarding obligations [one might think this is a strange obligation to rely upon, when there is a much more obvious obligation of simply ensuring that the employer's safeguarding obligations are satisfied]. Once again, the ET found that this email amounted to a mere allegation and that there was no genuine legal duty to support her in these circumstances.

EAT: Langstaff J dismissed the appeal. However he disagreed with the ET's reasoning, in particular, their findings of a rigid dichotomy between information and allegation. On this issue he said that "*I would caution some care in the application of the principle arising out of Cavendish Munro…The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point."*

He found that there was nothing in the first disclosure which amounted to information, but considered that in fact there was information in the second disclosure in that it provided information as to what was or was not said at the meeting being referred to. On the 'tends to show' issue, Counsel amended the argument and sought to rely upon an obligation of the respondent to ensure that its function as regards the need to safeguard children was discharged. However as these arguments had not previously been raised, and so dismissed the claim in this regard inter alia.

Court of Appeal: they analysed the case of Cavendish Munro, in which an employee of an insurance broking company, through his solicitors, alleged that certain acts amounted to unfair prejudice under the Companies Act. He threatened to issue proceedings. However the complaints were in very general terms with no factual detail. The EAT held that

"24. Further, the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". ***In our view this would be an allegation not information.***

25. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43.

It was argued on behalf of the appellant that the guidance in *Cavendish* was incorrect and that the concept of "information" is capable of covering statements which might also be characterised as allegations and it was wrong to suppose they were mutually exclusive. The Court of Appeal agreed that the concept of "information" was capable of covering allegations, but disagreed that the EAT had sought to introduce a rigid dichotomy. It was held that:

I think, in fact, that all that the EAT was seeking to say was that a statement which merely took the form, "You are not complying with Health and Safety requirements", would be so

general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content.

However, with the benefit of hindsight, I think that it can be said that para. [24] in Cavendish Munro was expressed in a way which has given rise to confusion. The decision of the ET in the present case illustrates this, because the ET seems to have thought that Cavendish Munro supported the proposition that a statement was either "information" (and hence within section 43B(1)) or "an allegation" (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment had to correct this error. The judgment in Cavendish Munro also tends to lead to such confusion by speaking in [20]-[26] about "information" and "an allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1).

They went on to make it clear that in order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a ***sufficient factual content and specificity*** such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.

In relation to the specific disclosures in this case, the CA agreed with Langstaff that the first disclosure did not contain information. They also agreed that in fact the second disclosure *did* contain information but rejected it for the same reason on other grounds.

Commentary: This decision provides some useful guidance from a higher court as to what is or is not likely to amount to a protected disclosure. It serves as a reminder that allegations ***are*** capable of amounting to protected disclosures under the whistleblowing legislation, provided they contain sufficient detail. Employers should always consider the nature and scope of such disclosures before determining how they should be treated. Determining whether a disclosure gives information is a matter of fact in every case, and will always require objective analysis.

When determining the amount of one's holiday pay, should regular voluntary overtime be included? In the context of the NHS, should non-guaranteed and voluntary overtime be included? Yes to both, says the EAT:

Flowers v East of England Ambulance Trust UKEAT/0235/17/JOJ

Facts: A group of the Trust's employees brought employment tribunal claims for unlawful deductions from wages, arguing that the calculation of their holiday pay had failed to take account of overtime falling within two categories, known as (i) non-guaranteed overtime and (ii) voluntary overtime. The former arises when, at the end of a shift, an employee is in the middle of a task that must be seen through to completion. For instance, when dealing with a call made to emergency services. The latter arises when an employee volunteers to work extra shifts and there is no requirement whatsoever to do such work. The claimants argued that they had (a) a contractual entitlement under their NHS terms and/or (b) that these items constituted 'normal remuneration' under Article 7 of the Working Time Directive.

The ET found that their terms entitled them to have their non-guaranteed overtime taken into account for holiday pay, but not their voluntary overtime. Dealing first with the contractual claim, clause 13.9 of the NHS terms states:

'*Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work. This would be based on the previous three months at work or any other reference period that may be locally agreed.*'

The ET found that a distinction was drawn between the two types of overtime. Non-guaranteed overtime formed part of 'pay' within the meaning of clause 13.9 because working when a shift overran was a contractual obligation. However as there was no contractual obligation on the claimants to perform voluntary overtime, it was concluded that this was not part of 'pay' for the purposes of their annual leave.

As regards the claim under the WTD [the claim being brought directly under the WTD rather than the Working Time Regulations as the Trust is an emanation of the State], the Trust conceded in light of Bear Scotland Ltd that non-guaranteed overtime should be taken into account (as a brief reminder, this case dealt with what constituted 'normal pay' according to s220-224 ERA), which was stated to be that which was normally received. In circumstances

in which an employee was expected to do certain work and had been regularly carrying out such work over a period of time, that fell under 'normal pay'.

However as regards the voluntary overtime, the ET found that did not form part of the claimants' normal remuneration, and thus fell outside the ambit of Article 7: such overtime, being purely voluntary, was not work which the claimants were required to do by their contracts of employment. Both sides appealed.

EAT decision on voluntary overtime

Argument under WTD

Between the ET and EAT hearing, the EAT handed down judgment in Dudley Metropolitan Borough Council v Willetts [2018] ICR 31. In that case, 56 employees responsible for maintenance of council houses with regular hours of 37 per week argued that their once monthly additional 'on call' hours needed to be taken into account when determining holiday pay. The EAT held that the overarching principle is that normal remuneration must be maintained in respect of the period of annual leave guaranteed by Article 7. Thus the payments in that period must correspond to the normal remuneration received while working. Taking this into account, the EAT in Dudley held that the exclusion of payments for voluntary work which is normally undertaken by the employee in question would offend the overarching principle and would give rise to the real risk of pay structures being fragmented in order to minimise levels of holiday pay.

The Trust argued that Dudley was wrong. In that case, Simler J had reviewed the cases of BA v Williams, Lock v British Gas Trading Ltd and Bear Scotland and derived the following principles:

1. The right to paid annual leave is a particularly important principle of EU social law from which there can be no derogation;

2. The overarching principle is that normal remuneration must be maintained in respect of the period of annual leave guaranteed by Article 7. Thus the payments in that period must correspond to the normal remuneration received while working;

3. The purpose of this requirement is to ensure that a worker does not, by taking leave, suffer a financial disadvantage, which is liable to deter him from exercising that right;

4. Payments in respect of overtime - whether that be compulsory, non-guaranteed, or voluntary - constitute remuneration;

5. For a payment to count as "normal" remuneration, it must have been paid over a sufficient period of time. This will be a question of fact and degree. Items which are not usually paid or are exceptional do not count. Items that are usually paid and regular across time may do so;

6. The structure of a worker's remuneration cannot detract from the right to maintenance of normal remuneration;

7. One decisive criterion or test for determining whether a particular component of pay is part of normal remuneration is where there is an "intrinsic link" between the payment and the performance of tasks that the worker is required to carry out his or her contract of employment;

8. However that is not the only decisive criterion or test. What matters is the overarching principle and its object.

Soole J considered that the decision in Dudley was clearly right, and that exclusion for payments for voluntary work which was normally undertaken would offend the overarching principle. A particular example of that risk related to zero hour contracts in which there was no contractual duty to work any hours. If a contractual requirement was a pre-requisite to hours being factored into holiday pay, zero hours workers would not be entitled to holiday pay. Further, if there was an exclusive test based on an intrinsic link between payment and performance required under the contract, an unscrupulous employer could seek to evade the WTD by a contractual device e.g. imposing a requirement to only work 1 hour per week. The question therefore in each case is whether an employee has a **pattern of voluntary overtime which was sufficiently regular and settled** to classify as normal remuneration.

Contractual argument

The Appellants argued that as clause 13.9 made it clear that holiday pay was to be calculated on the basis of what the individual '*would have received had they been at work'* over a particular reference period, the holiday pay should equate to the same sum that the individual would have been paid had they not taken holiday. Further, this clause should be interpreted in line with the WTD. For the other side it was argued that the first line of the clause defined the components of holiday pay. As it was agreed that overtime was not a 'supplement' nor was it 'regularly paid' (it being paid at different times, according to the individual's circumstances), holiday pay did not include overtime. Furthermore, overtime payments were dealt with in a different section to the pay section and thus it was in a distinct category.

The EAT preferred the claimants' argument that there was no justification for the distinction drawn by the tribunal between overtime which was/was not required by the contract of employment. Viewed as a whole, the purpose of clause 13.9 was to calculate holiday pay on the basis of what the employee would in fact have been paid if at work; and to base that calculation on the reference period identified or otherwise agreed.

Commentary: it is now clear that where a sum of money is paid over a sufficient period of time on a regular basis, it should form the basis of a holiday pay calculation. Clearly this is a positive outcome for employees and is in line with the underlying objective behind holidays, namely to ensure that employees have sufficient time off work for rest and recuperation. If an individual regularly carried out overtime such that they in fact relied upon that income, the non-inclusion of this within their holiday pay would be a huge disincentive to taking holidays.

Further, according to the NHS Employers website, the NHS terms 'apply in full to all staff directly employed by NHS organisations, except very senior managers and staff within the remit of the Doctors' and Dentists' Review Body'. As such, the construction given to clause 13.9 is of widespread significance. It is understood that an application for permission to appeal has already been lodged with the Court of Appeal and so this is an area to keep a close eye on.

Can a dismissal for a first offence of serious (not gross) misconduct ever be fair? Yes, says the EAT: Quintiles Commercial UK Ltd v Barongo UKEAT/0255/17/JOJ

Facts: The Claimant was employed as a Medical Sales Representative. He was invited to a disciplinary hearing to consider two allegations, namely failing to complete a compliance online training course by the deadline and failing to attend a compulsory pioneer training course. The Claimant did not deny either of these matters, and further accepted that they amounted to misconduct on his part. In mitigation, he contended he had been dealing with other matters; he had not intentionally failed to engage with the training but had prioritised other work commitments. The disciplinary hearing took place by telephone and it was concluded that the Claimant's actions amounted to gross misconduct. The Claimant appealed and the appeal officer took the view that whilst the conduct ought to have been characterised as serious rather than gross misconduct, he thought that trust and confidence had broken down and so upheld the decision to dismiss.

At first instance the ET considered the Respondent's Disciplinary Policy, which provided that misconduct falling short of gross misconduct:

"… generally … does not warrant dismissal on the first occasion, other than in exceptional circumstances. Repeated instances of general misconduct, in conjunction with a valid warning, can, however, result in dismissal." (Page 2 of the policy)

It was noted that no exceptional circumstances were relied upon.

ET judgment: it was concluded that the dismissal was unfair for the following reasons:

"… Once the misconduct is characterised as serious and not gross, it means that warnings are to apply. This Claimant had no previous live warnings on his file. That meant he came as someone with a clean record into this disciplinary hearing. If the Respondent had believed and reasonably so that his misconduct had been gross, then that could furnish a reason for not applying warnings. However, the characterisation of the misconduct as serious on appeal means that the failure to issue a warning renders the dismissal unfair. Serious misconduct would have entitled any sort of warning including a final written warning but the express rejection of gross misconduct renders this dismissal unfair. …"

The ET further summarised its conclusion in that regard, as follows:

"The particular issue in the case is whether dismissal was a sanction open to a reasonable employer. As soon as the appeal officer, rightly in my judgment, characterised the matter as serious misconduct and expressly not as gross misconduct, the Respondent could only reasonably be in warnings territory given that the Claimant had a clean disciplinary record. This was so under its own policy and under the general law of unfair dismissal."

EAT decision: it was found that the ET had erred in law in concluding that once it was established that the misconduct did not constitute gross misconduct, it automatically followed that the dismissal was unfair. The starting point was always the wording of the statute. Section 98(2) ERA provided that a dismissal is capable of being fair if it is for a reason which "relates to the conduct of the employee". Although the correct categorisation of the conduct - whether gross misconduct or something less - will be crucial when determining a complaint of wrongful dismissal, where the employee has been dismissed without notice or with short notice, under section 98 a dismissal is not rendered automatically unfair if the conduct properly falls to be categorised as something less than gross misconduct: it is capable of being a fair dismissal provided simply it is for a reason relating to the employee's conduct.

Whilst it maybe that in most cases an ET will find that a dismissal in such circumstances falls outside the band of reasonable responses, but it should be careful not to simply assume this is so, as if it were a rule laid down by section 98(4); it is not.

The particular circumstances of this case apparently included the Respondent's concern that it could no longer trust the Claimant to meet the standards required of him for his work. Its case was that this informed the decision to dismiss - not just the two acts of serious misconduct, but those acts seen against the background of the performance issues relating to the Claimant.

Commentary: Although the EAT commented that in most cases such a dismissal will fall outside the band of reasonable responses and be unfair, they pointed out that there was no rule that this must be the case and the tribunal should have considered all the circumstances, including the Acas code and the employer's disciplinary procedure. However it is common practice for both lawyers and judges to proceed on the rule of thumb principle that for acts which do not constitute gross misconduct, dismissal for a first offence is only appropriate where there have been previous warnings. This case is a stark reminder that such a rule is not laid down in the Employment Rights Act and that every case depends on its own facts.

Supreme Court has upheld previous decisions that an ostensibly 'self-employed' plumber was in fact a 'worker': Pimlico Plumbers Ltd v Smith [2018] UKSC 29

Facts: the claimant, a plumber, carried out work solely for PP Ltd from August 2005. The relevant contractual documentation stated that he was an independent contractor, in business on his own account, that PP Ltd was not obliged to offer any work, and that S was under no obligation to accept it. He paid tax on a self-employed basis and was registered for VAT. On the other hand, he was subject to a 3-month non-compete/non-solicit clause on the termination of the agreement, he had to abide by the company's rules and he had to give notice of his other activities which could give rise to a conflict of interest. The company manual stated that:

- he should complete a minimum of 40 hours' work a week;
- notice must be given for any annual leave or time off required;

- he had to hire and drive a PP Ltd-branded van and wear a PP Ltd uniform;
- he had to carry a PP ID card at all times;
- there was no express right of substitution in the contractual documentation but PP Ltd's plumbers could swap assignments between themselves.

These written documents were described as having been 'carefully choreographed' by the Supreme Court to serve PP's inconsistent objectives of retaining the power but rendering the individuals self-employed. When the arrangement was terminated, he brought claims in the employment tribunal including failure to pay holiday pay, unlawful deductions from wages and disability discrimination. An employment judge therefore had to determine whether he was an employee under s230(1) ERA, a worker under 230(3)(b) ERA (a 'limb (b) worker'), a worker for the purposes of the WTR and/or an employee for the purpose of the extended definition under S.83 EqA.

ET: he was a limb (b) worker, a WTR worker and an EqA employee but not an employee for the purpose of an unfair dismissal claim.

EAT and Court of Appeal: dismissed PP Ltd's appeal against that decision. Although individual plumbers working for PP Ltd were able to swap assignments, that was, at most, an informal concession. Furthermore, S was not in business on his own account, which would negate worker status under S.230(3)(b) ERA; he was an integral part of PP Ltd's operations and was subordinate to it. PP Ltd appealed to the Supreme Court.

The Supreme Court has now dismissed the appeal. With regard to the question of S's right to provide a substitute, it held that the employment judge had found, and had been entitled to find, that S's only right of substitution was of another PP Ltd operative. Thus, the substitute had to come from the ranks of those already bound to PP Ltd by an identical suite of heavy obligations. In the Supreme Court's view, this was the converse of a situation in which the employer is uninterested in the identity of the substitute, provided only that the work gets done. The employment judge was therefore entitled to conclude that this limited right of substitution was not inconsistent with an obligation to perform services personally. S was therefore a limb (b) worker unless it could be said that PP Ltd's status was, by virtue of the contract, that of a client or customer of S's.

On the 'client or customer' question, the Supreme Court noted first that the tribunal had legitimately found that there was an umbrella contract, placing a continuing obligation on S to make himself available for work. PP Ltd argued that, despite that obligation, S was entitled

to reject work and was free to take outside work. It also pointed out that PP Ltd did not supervise or otherwise interfere in the manner in which S did his work, and that S bore some financial risk in taking on work through PP Ltd. However, the Supreme Court held that the employment judge had been entitled to have regard to a number of factors that strongly militated against recognition of PP Ltd as a client or customer of S. These included the requirement that:

- he wear a branded uniform
- drive a branded van
- carry an identity card
- closely follow the administrative instructions of its control room
- the severe terms as to when and how much PP Ltd was obliged to pay S
- the contractual references to 'wages', 'gross misconduct' and 'dismissal'
- the suite of restrictive covenants regarding his working activities following termination.

Thus, the tribunal was, by a reasonable margin, entitled to conclude that S was a limb (b) worker. This conclusion meant that S was also a worker for the purposes of the WTR and in employment for the purposes of the EqA.

Commentary: on the face of it this case has widespread implications throughout the so-called 'gig economy'. However, as is ever the case in employment law, each case will depend on its own facts and this case has not made any substantive change to the law. Issues such as personal service, mutuality of obligation and control have always been the tests to be considered when determining the question of employee status. The shift really is in the fact that individuals such as Mr Smith were generally treated by businesses and lawyers alike as falling under the self-employed category, and this decision has opened the door for a great deal more groups of individuals to fall under the worker category, no doubt causing widespread concern amongst businesses in the gig industry.

A government consultation seeking views on ways to make it clearer what workplace rights people have, closed at the start of June. It remains to be seen whether the government will take action to help provide more clarity to businesses and their workforces. Whilst the government may try to legislate in this area in an attempt to make it clearer how to decide

whether an individual is an employee, worker or self-employed, it seems likely that there will always be an element of interpretation and the outcome will turn on the specific facts of the working relationship. This means that this area is likely to continue to cause confusion and uncertainty for some time to come.

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