3PB Employment Breakfast Seminar – November 2018

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Harassment – Evans v Xactly Corporation Ltd UKEATPA/0128/18LA

Facts: The employee, E, appealed against a decision of the ET which rejected his claim for a number of breaches of the EqA 2010 by reference to the protected characteristics of race and disability.

E had been employed as a sales representative from 4 January until 16 December 2016 when he was dismissed for poor performance. He claimed that the dismissal was an act of race and disability discrimination.

The race discrimination complaint was founded on E's association with the travelling community. E relied on two impairments in support of his contention that he was disabled within the meaning of s.6 EqA 2010: type 1 diabetes; and, an underactive thyroid. It was contended by E that there was a link between his health conditions and his weight.

E had produced evidence before the ET that merely raises the possibility of a causal link between weight gain and diabetes and hypothyroidism. The ET found that the evidence did not establish that causal link in relation to the facts of this case.

The ET rejected these claims and accepted that the employer's reason for dismissing E were genuine.

E also brought a claim of harassment based on four specific allegations, that he had been referred to (on one occasion) as a "*fat ginger pikey"* and (occasionally) a "*salad dodger", "fat yoda"* and *"gimli".*

The ET also rejected these complaints.

Outcome: The EAT rejected E's appeal at a Rule 3(10) hearing. The EAT found that the ET was best placed to make the findings of fact about the context and office culture which it did. The ET was fully entitled to conclude that the comments complained of did not amount to harassment as defined in s.26 EqA 2010.

The EAT noted that the ET had accepted that on the face of it the "*fat ginger pikey"* comment is a derogatory, demeaning, unpleasant and potentially discriminatory and harassing comment to make. It also noted that the ET had rightly considered the context and the overall relationship and behaviour of the parties, so that it could properly understand whether the behaviour that was found to have occurred amounted to harassment.

The EAT found that the ET was fully entitled to come to the conclusion that:

1. The comments were not unwanted since E was such "*an active participant of the culture of banter (for want of a better word for it*)".

2. They did not have the purpose of violating E's dignity or creating an intimidating environment for him,

3. Nor did they have the effect of violating E's dignity or creating an intimidating environment for him, as he was not offended.

4. in any event, it would not have been reasonable for him to have considered his dignity violated etc given the particular circumstances and all the context and material facts relevant to the claim.

Comment: This decision highlights the importance of a detailed analysis of the context within which some inappropriate comments are made. The word "banter" is often too readily used in an attempt to explain away ill-advised and offensive language. As practitioners there may be a tendency to consider that the likelihood of successfully defending claims were similar comments are bad is very low. But in some cases careful discovery of documents and presentation of witness evidence might result in a successful defence even where there have been such comments. There are clearly occasions when defending such a claim is justified.

Whistleblowing: Timis & Sage v Osipov [2018] EWCA Civ 2321

Background: Osipov ("O") was employed by an oil exploration company ("IPL") as its CEO. Two of IPL's directors were Timis ("T") and Sage ("S"). T, with agreement from S, decided that O should be summarily dismissed.

The ET found that the principal reason for O's dismissal was that he had made protected disclosures. It held that he had been unfairly dismissed by IPL, contrary to s.103A ERA 1996. That decision was not challenged.

The ET also found that, by their conduct in relation to his dismissal, T&S had subjected O to a detriment or detriments, contrary to s.47B ERA 1996. The ET found that IPL were jointly and severally liable with T&S to compensate O for his losses, quantified at around £2million. That decision was upheld by the EAT.

The principal issue on appeal was whether it was open to the ET to award O compensation against T&S for the losses occasioned by his dismissal. Their case was that compensation could only be awarded by way of compensation for unfair dismissal and, thus, only against IPL.

Outcome: The Court of Appeal upheld the EAT's decision.

T&S argued that s.47B(2) expressly provides that there is no claim for detriment where the detriment amounts to a dismissal. The recommendation that O be dismissed, and the dismissal itself, was a distinction without a difference. Thus, there could not be a claim against T&S as their recommendation amounts to a dismissal.

The Court of Appeal found that a construction of s.47B(2) which prevented a claimant from bringing a claim against an individual co-worker based on the detriment of dismissal would produce an incoherent and unsatisfactory result and is accordingly unlikely to conform to Parliament's intention. To prevent individual co-workers from being held liable in a case where the detriment amounts to dismissal would produce obvious anomalies:

(a) that co-workers whose unlawfully motivated acts short of dismissal cause the claimant to be dismissed will be liable for those acts while an individual with the same motivation who decides on the actual dismissal escapes scot-free; and

(b) that there is no such bar to individual liability in the case of a claimant who is a worker rather than an employee and who has his or her contract of employment terminated, even though the two situations might be thought to be substantially identical.

The Court of Appeal concluded:

(1) it is open to an employee to bring a claim under s.47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under s.47B(1B). All that s.47B(2) excludes is a claim against the employer in respect of its own act of dismissal.

(2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, s.47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and quantification of such losses will apply.

Comment: This decision will cause obvious concern for individuals in managerial positions. Although the case may be of limited practical significance in some cases, where employers have deep pockets, that is not always the situation. Further, this case may be of significance in so-called "tainted information" cases (such as **Royal Mail v Jhuti and CLFIS v Reynolds**). In such cases, a dismissal may be fair provided the decision-maker has no improper motivation. Following ***Osipov***, a claimant could claim against the individual victimisers (and thus, potentially, against the employer under s.47B(1B)), for the full financial loss suffered as a result of losing their job.

Direct Discrimination – Lee v Ashers Baking Company Ltd and others [2018] UKSC 49

Facts: Mr Lee ("L") is a gay man associated with an organisation called QueerSpace, a volunteer organisation for the lesbian, gay, bisexual and transgender community in Northern Ireland. L placed an order for a cake with Ashers baker with the QueerSpace logo and the words *"Support Gay Marriage"* printed on it. The order was initially accepted but then later refused on the basis that the bakery was a Christian business and could not print the slogan requested.

L brought a discrimination claim alleging unlawful discrimination on the grounds of sexual orientation, and political opinion, and religious belief. These claims succeeded at first instance in the County Court and before the Northern Irish Court of Appeal.

The decision of the County Court: The owners of bakery directly discriminated against L on the grounds of sexual orientation, political opinion, and religious beliefs by refusing to make a cake decorated with the words "*Support Gay Marriage"* because of their own religious beliefs. The reason for refusing the order was because the owners of Ashers oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs. They would have refused to sell a cake to a heterosexual customer with the same message.

The decision of the Court of Appeal: The decision was upheld. It found that "*this was a case of association with the gay and bisexual community and the protected characteristic was the sexual orientation of that community*."

A number of issues were appealed to the Supreme Court. This (brief) note will focus on the question as to whether the bakery directly discriminated against L on the grounds of sexual orientation by refusing to make the cake with the index wording.

The issue: Is it unlawful direct discrimination for a bakery to refuse to supply a cake iced with the message "support gay marriage"?

Outcome: The Supreme Court held that Ashers did not directly discriminate against L on the grounds of sexual orientation. The objection was to the message and not the messenger. The correct comparator is a customer of a different sexual orientation who wanted the same message on the cake.

The reason for the treatment was the message and not L's sexual orientation and *"Anyone who wanted that message would have been treated in the same way".* It cannot constitute direct discrimination to treat all employees the same way.

The Court also rejected the argument that the criteria applied by the bakery was indissociable from sexual orientation. This is where the express or overt criterion used as the reason for less favourable treatment is not the protected characteristic itself but some proxy for it. In other words an argument that L was subjected to associative discrimination by reason of connection to the gay and bisexual community.

The Court rejected the approach adopted by the Court of Appeal to "*associative discrimination"*. Simply because the reason for the less favourable treatment has something to do with the sexual orientation of some people, that did not mean that the less favourable treatment is "*on the grounds of"* sexual orientation. It was not a case of less favourable treatment because L was likely to associate with the gay community.

There must, in the judgment of the Supreme Court, be a closer connection than that, a connection that it declined to find on the facts of this case. In particular, the Supreme Court disagreed with the Court of Appeal's view that "*the benefit from the message or slogan on the cake could only accrue to gay or bisexual people"*. It could also accrue to the benefit of the children, the parents, the families and friends of gay people who wished to show their commitment to one another in marriage, as well as to the wider community who recognise the social benefits which such commitment can bring. As the Supreme Court found, "*In a nutshell, the objection was to the message and not to any particular person or persons*."

Factually, there was evidence that Asher's employed and served gay poeple without issue/discrimination.

The Supreme Court went on to find that the objection to the message engaged human rights issues and that Ashers were entitled to refuse to produce a cake iced with a message with which they profoundly disagreed. The principle would hold regardless of what that message was and the fact that manufacturing the cake could not really be construed as in any way promoting or supporting the cause.

Comment: In my opinion the case is right on a technical approach to s13 EqA. It is important to remember that the SC was relying on findings of fact made by the County Court Judge.

Lady Hale has tried to lessen the blow of this decision in the context of discrimination against gay people noting that it is a very real problem and this decision is not intended to minimise this issue. However she stated that is not what happened here adding, *"…it does the project of equal treatment no favours to seek to extend it beyond its proper scope."*

There is an interesting "postscript" in the judgment that appears to import the American "compelled speech" doctrine in what appears to be an attempt to confine the scope of its ruling. There is, according to the postscript, a "clear distinction" between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and

refusing to produce a cake for the particular customer who wants it because of that customer's characteristics. The Court states that "*one can debate which side of the line particular factual scenarios fall. But in our case there can be no doubt. The baker would have refused to supply this particular cake to anyone, whatever their personal characteristics. So there was no discrimination on the grounds of sexual orientation".* To what extent this will give businesses the right to opt out of supplying services if it disagrees with the message a customer wants to convey remains to be seen.

Good faith/Bad faith - Saad v Southampton University Hospitals NHS Trust UKEAT/0276/17/JOJ

Facts: S was a Specialist Registrar, who was training to become a Cardiothoracic Consultant. He was referred to the Cardiothoracic Unit ("the CTU") in December 2003. This involved a rigorous training programme. It did not proceed smoothly, and in 2006, he was referred to the Professional Support Unit by the Programme Director, Mr T, as he was not making sufficient progress. S was assigned a case manager, Ms L, to provide him with support. He raised with her what he perceived to be unfair treatment towards him within the CTU, but made clear he did not want to take any action at that stage. In April 2011 he raised with Ms L that he felt bullied by Mr T but he did not want to make a complaint but wanted an independent review of his progress. Ms L told him carefully to think about raising a grievance as she felt he should focus on his training.

On 21 July 2011 S raised a grievance about the behaviour of Mr T, including an allegation that back in 2007 Mr T had made a comment describing him as a *"terrorist looking person"* and that he had likened him to *"the doctors who carried out the terrorist attack in Glasgow airport".* He requested to be moved to a different deanery.

In October 2011 S brought claims of victimisation (s27(3) EQA) on the grounds of race, and a detriment claim on the basis of having made a protected disclosure (when it was still a requirement for the latter that the disclosure be made in good faith). The Respondent agreed that the comments he raised constituted a protected act and a disclosure of information and the only issue was whether it was made in good faith.

The ET held that:

(i) there were no reasonable grounds for his believing the allegation to be true, although it accepted that he had subjectively believed that it was; and

(ii) the reason for raising the grievance was that the Claimant had intended this would mean the assessment - which he knew would go badly for him - would be postponed and his wish to be moved to a different deanery in order to save his career.

The whistleblowing claim was therefore dismissed. As regards the victimisation claim, the ET found that due to their findings on the whistleblowing claim, this claim also failed. In particular, they found that the fact that his belief was unreasonable and that he had an ulterior motive was fatal meant that it was a false allegation and not made in good faith.

The issue: If an employee subjectively believed the truth of an allegation made, does he retain protection from victimisation or does s27(3) EqA apply?

The EAT decision: The ET had erred in simply reading across from its finding of bad faith in respect of the whistleblowing claim when the two statutory contexts were different. The whistleblowing legislation required the disclosure to have been made in good faith and that the employee had a reasonable belief in the specified matters. Under the whistleblowing legislation one is considering "motive." As Auld LJ said in **Street v Derbyshire Unemployed Workers' Centre (2005) ICR 97,** "*good faith is a question of motivation, and as a matter of general human experience, a person may well honestly believe something to be true, but, as in the instant case, be motivated by personal antagonism when disclosing it to somebody else…**The primary purpose for the disclosure of such information by an employee must, I think, be to remedy the wrong** which is occurring or has occurred; or, at the very least, to bring the section 43B information to the attention of a third party in an attempt to ensure that steps are taken to remedy the wrong."*

In determining bad faith under s27(3) EqA 2010, the primary focus was on the employee's honesty and not motive. The finding that the Claimant had subjectively believed that the allegation was true was sufficient to counter the suggestion that he acted in bad faith. Eady J concluded as follows:

What is significant, however, is the fact that subsection 27(3) EqA (as was also the case in the legacy statutes) has no prior stage where the ET has first to determine whether the employee believes in what they are saying (the evidence or information they are giving or the allegation they have made). The ET is simply required to find whether that evidence,

information or allegation is true or false; if false, it must then determine whether it was given or made by the employee in bad faith. And that must mean that it has to determine whether the employee has given the evidence or information or made the allegation honestly: to paraphrase Auld LJ in Street, absent other context, bad faith has a core meaning of dishonesty. In this context (and, again, as Auld LJ observed in Street), it has to be at the bad faith stage that the ET turns its attention to the question whether the employee has made the allegation honestly or not. Unlike the good faith formerly required for a qualifying disclosure to be protected, whether the employee has an honest belief in what they have said will not have been tested at any prior stage.

As regards an ulterior motive, Eady J found that there were good policy reasons for exercising caution when having regard to the existence of a collateral motive in the context of a claim of unlawful victimisation under the EqA. One might have a genuine complaint but be reluctant to raise it. If their own conduct is later called into question, such a complaint may become relevant in order to deflect criticism, but it does not necessarily follow it is made in bad faith.

Comment: This case is a useful reminder that the same phrases do not always carry the same interpretation when used in different legislation, and that the context of the legislation must be considered. Given that the purpose of the whistleblowing legislation is to protect those who wish to right wrongs, a malicious or ulterior motive in making a disclosure is not what Parliament intended should be protected. However, in the context of the discrimination legislation, the good faith requirement should be considered on the basis of the honesty of the allegation itself.

Amendments – Pruzhanskaya v International Trade Exhibitors (JV) Ltd (2018) UKEAT/0046/18/LA

The Facts: P appealed against an employment tribunal's refusal to allow her to amend her particulars of claim in proceedings brought against the respondent employer for unfair dismissal and discrimination on the grounds of pregnancy or maternity.

P had been on maternity leave and then annual leave between January 2014 and March 2015. On her return to work she was appointed to a new role, but her employment was terminated in May 2016, ostensibly on the grounds of redundancy. She commenced

proceedings in October 2016. In May 2017, P applied to amend her claim to add an allegation that the principal reason for dismissal was that she had made protected disclosures which, if established, would render her dismissal automatically unfair under the s103A ERA 1996.

The ET decision: The ET refused to grant permission to amend, holding that the proposed amendment amounted to a significantly changed case and added a substantial new issue which was brought considerably out of time, and that the employer would be prejudiced in having to deal with the new allegation.

The issue: Where a Claimant has already claimed ordinary unfair dismissal and makes an application to amend to include a complaint of automatically unfair dismissal should it be considered as a new cause of action for amendment purposes?

The EAT decision: Whilst the EAT accepted that the addition of PD's was a significant new issue, the EAT held that the ET had erred in viewing the complaint as being out of time. The amendment did not involve a "new" cause of action. The complaint of automatic unfair dismissal was an aspect of the right not to be unfairly dismissed. That complaint had been brought in time. Judge Richardson reviewed the cases of **Selkent, Evershed v New Star Asset Management (2011) EWCA Civ 870** and **Conteh v First Security (Guards) Ltd (Unreported)** and concluded that none of them authoritatively determined that a PIDA unfair dismissal was a "new" cause of action. In those circumstances, the Judge's assessment that the claim was out of time was a wrong assessment and the amendment application was therefore remitted to a fresh ET for consideration.

Comment: This decision is hardly surprising and consistent with Judge Richardson's earlier analysis in the case of **Makauskiene v Rentokil Initial Facilities Services (UK) Ltd UKEAT/0503/13/RN.** In my experience it is often (wrongly) stated that the introduction of an automatic reason is a "new" claim. It is clear that it is not and greater focus should be placed on prejudice that will be suffered, the timing and manner of the application etc. Have regard to the ET guidance on amendments!

For examples of when an application to amend to bring an automatically unfair dismissal claim was refused (and upheld on appeal) please see **Olayemi v Athena Medical Centre and ors EAT 0613/10** and **Kuznetsov v Royal Bank of Scotland plc 2017 IRLR 350, CA**.

Philosophical Belief – A Gray v Mulberry Co (Design) Ltd (2018) UKEAT/ 0040/17/DA

The Facts: G had been dismissed by Mulberry for failing to sign a copyright agreement, which sought to confer certain rights on the employer in respect of works created by the employee, as a condition of continued employment. In her role G had access to some of the employer's designs ahead of their launch. M required all of its employees to sign an agreement which contained a confidentiality clause. G refused to sign the agreement on the basis that it interfered with her own work as a writer/filmmaker. M amended the agreement to make it clear that it did not relate to any of the employee's personal work. She still refused to sign the agreement and was dismissed.

G asserted that a belief in "the statutory human or moral right to own the copyright and moral rights of her own creative works and output" amounted to a philosophical belief within the meaning of section 10(2) of the Equality Act 2010.

At no stage during her employment had she suggested that she had a philosophical belief as stated or that that was the reason for her refusal to sign the agreement. The tribunal approached the issue of belief by reference to the questions set out in **Grainger v Nicholson (2010) 2 All ER 253**. They are:-

(i) Was the belief genuinely held;
(ii) Was it a belief, as discussed in the case of **McClintock v The Department of Constitutional Affairs [2008] IRLR 29**, or an opinion or viewpoint based on the present state of information available;
(iii) Did the belief concern a weighty and substantial aspect of human life and behaviour;
(iv) Had the belief attained a certain level of cogency, seriousness, cohesion and importance;
(v) Whether the belief was worthy of respect in a democratic society;

The ET decision: C did not hold a philosophical belief that was capable of protection under the 2010 Act because it did not have a cogency, seriousness, cohesion and importance. It rejected the claim of direct discrimination on the basis that her dismissal was due to her

failure to sign the agreement and not because of her philosophical beliefs, of which the employer had no knowledge.

As to the claim of indirect discrimination, the tribunal found that the provision, criterion or practice (PCP) in question, namely the requirement to sign the agreement or be dismissed, was not shown to have put other persons sharing her belief at a particular disadvantage. It found that in any case the defence of justification under s19(2)(d) of the Act applied.

G appealed on three grounds:- (i) That the ET had erred in concluding that her belief was not a philosophical belief (ii) that the ET had erred in its assessment of particular disadvantage aspect of the test for indirect discrimination and (iii) its conclusions on justification were flawed.

The EAT decision: The Appeal was dismissed. It stated that the ET had not confused cogency with importance. Whilst it accepted there was an importance with owning one's creative output that did not mean that the belief had necessarily attained a certain level of cogency or cohesion. It was stated that having a belief relating to an important aspect of human life or behaviour is not enough for it to have a similar status or cogency to a religious belief.

Furthermore, the focus had to be on manifestation of the belief by reference to her refusal to sign the agreement. Whilst that refusal might have been dictated by her belief, it did not amount to a manifestation of it. She had not at any stage made her belief known to the employer. The impression she had given to her employer was that her objection was because of the difficulty it might create for her in seeking to sell her private work. There was no suggestion that her refusal was motivated by a philosophical belief.

The tribunal had not erred in its approach to the fourth Grainger criterion, which stated that the belief must attain a certain level of cogency, seriousness, cohesion and importance. It had properly considered that criterion with regard to its manifestation and found the claimed belief to be lacking.

As to the indirect claim, the EAT stated that the tribunal had been required to consider, pursuant to s.19(2), whether the PCP was discriminatory in relation to the employee's belief and whether it put those with whom she shared her protected characteristic at a particular disadvantage. That did not require the ET to consider whether all persons sharing the belief would be disadvantaged (see **Mba v Merton LBC (2014) 1 WLR 1501).** In order for indirect

discrimination to be established, it had to be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision might have an adverse impact on the group – **Eweida v British Airways Plc (2010) EWCA Civ 80.** The sole adherent of a philosophical belief, who was unable to establish any group disadvantage, could not succeed in a claim of indirect discrimination.

As to justification the ET had correctly addressed the question as to whether requiring the employee to sign the agreement or be dismissed was a proportionate means of achieving the legitimate aim of protecting its intellectual property and had been correct to conclude that it was. The agreement in its amended form went no further than was necessary to protect the employer's legitimate interests and it had been proportionate to make signing the agreement a condition of continued employment.

Comment: This case shows some of the complexity associated with claims of philosophical belief in a fast developing area of law.

Practice and Procedure - X v Y Ltd (2018) UKEAT/0261/17/JOJ

The Facts: C received an e-mail which was marked "Legally Privileged and Confidential." The content has not been set out in detail in the Judgment. However, it contained advice on how to commit unlawful victimisation by seeking to use the redundancy/restructuring programme as a cloak to dismiss C.

Outcome: The EAT found that the e-mail was not covered by legal professional privilege on the grounds of an iniquity. Mrs Justice Slade stated that:-

the email of 29 April 2016 records advice on how to cloak as dismissal for redundancy dismissal of the Claimant for making complaints of disability discrimination and for asking for reasonable adjustments which will continue if there is "ongoing employment". In my judgment a strong prima facie case has been established that what is advised is not only an attempted deception of the Claimant but also, if persisted in, deception of an Employment Tribunal in likely and anticipated legal proceedings. The email does not record any advice on neutral selection criteria for redundancy. It concentrates exclusively on how the redundancy can be used to rid the Respondent of ongoing allegations of discrimination by the Claimant and of underperformance which he stated are related to his disability and failure to make reasonable adjustments.

Comment: Be careful about how you frame your advice!

Holiday pay - **Kreuziger v Land Berlin and Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu**

Facts of K: K was a paid legal trainee employed by the Land of Berlin. During the last months of this traineeship, he did not take paid annual leave. After his traineeship ended, he requested an allowance in lieu of the days of leave which he had not taken, which the Land refused in reliance on national law. K challenged that refusal before the German administrative courts.

Facts of S: S was employed by MPG. Two months before the end of the employment relationship, MPG invited S to take his remaining leave. S took only two days off and requested payment of an allowance in lieu of the annual leave not taken, which MPG refused, also in reliance on national law. S then brought proceedings before the German labour courts.

The ECJ decision: A worker who does not apply for paid annual leave during employment does not automatically lose the right to an allowance in lieu of untaken leave on termination. The worker must have been given an opportunity to take that leave and it is for the employer to show that it encouraged the worker to do so, while informing him or her, accurately and in good time, of the risk of losing that leave at the end of the applicable reference period.

The ECJ went on to hold that a contrary provision of national law would have to be disapplied even in a claim against a private individual, given that the right to paid annual leave is a fundamental right of EU law enshrined in the Charter of Fundamental Rights of the European Union.

The ECJ began by pointing out that Article 7(2) does not impose any condition on the right to a payment in lieu on termination other than that the employment relationship has terminated and the worker has not taken all of the paid annual leave to which he or she was entitled. Furthermore, it is permissible for national law to set down the conditions for exercising the right to annual leave, including provision for the right to annual leave to be lost at the end of a reference period. However, in the ECJ's view, it would not be compliant with Article 7 for national law to prescribe an automatic loss of rights in such circumstances without first verifying that the worker had an effective opportunity to take the annual leave owing to him or her. The ECJ pointed out that the worker is the weaker party in such a situation and so it

is incumbent on the relevant court to ensure that the employer does not restrict the worker's rights. It cannot be left solely up to the worker to ensure that he or she is able to exercise his or her rights effectively.

In S's case, since has was employed by a private sector employer, the ECJ had to go on to decide whether the same conclusion applied in a case brought against a private individual.

Comment: This decision does not mean than an employer must force an employee to take holiday. However, it must encourage the worker to take his or her holiday, while informing him or her, accurately and in good time, of the risk of losing that leave at the end of the applicable reference period.

If an employer does so but the employee is obstructive or deliberately refuses to take leave and is aware of the consequences then in principle it is possible that the worker will lose the right to paid annual leave or the corresponding paying in lieu on termination.

The existence of a clause or provision to that effect in contractual or policy documentation is unlikely to meet the standard required in isolation. Employers should consider sending active reminders to employees, take active steps to ensure they are able to take annual leave and maintain records of the same.

Vicarious liability – Bellman v Northampton Recruitment Ltd [2018] EWCA Civ 2214

Facts: B was employed by NR Ltd as a sales manager. In 2011 a company Christmas party was held at a golf club. 24 people attended, including ten members of staff, their partners, and some other guests. Following the party, at around midnight, just over half of the guests went on to a hotel for further drinks, in taxis paid for by M, the managing director. The group included about five members of staff, including M and B. These were impromptu drinks rather than a planned extension of the party.

Most of the group continued to drink alcohol and NR Ltd paid for most of the drinks. The conversation was initially on social topics but by about 2 am it turned to work matters. A controversial issue arose concerning how much a new employee was paid and whether he ought to be based at the Northampton office or the Nuneaton office.

M became annoyed at being questioned. Having 'summoned' the employees present, he began to lecture them on how he owned the company, he was in charge and would do what he wanted, and that he made the decisions and paid their wages.

When B challenged him on the matter of the new employee, in a non-aggressive manner, M said 'I fucking make the decisions in this company, it's my business. If I want him based in Northampton he will be fucking based there', and punched B. Two other employees tried to hold M back but he broke free and punched B for a second time fracturing his skull and causing brain damage.

As a consequence, B suffered from headaches, anosmia, fatigue, low mood, deficits in verbal reasoning, verbal memory and word finding, and speech and language impairment. B (through a litigation friend) brought a claim for damages against NR Ltd on the basis that it was vicariously liable for M's conduct.

The issue: Can an employer can be vicariously liable for an assault on an employee an informal drinks?

The decision of the High Court: The employer was not vicariously liable. Although M's duties were wide-ranging, it was not right to consider him as on duty, or potentially on duty, just because he was in the company of other employees. The assault was committed after, not during the Christmas party and the impromptu drinks were not a seamless extension of the party.

The decision of the Court of Appeal (Asplin LJ): Applying the most recent and authoritative consideration of the issue of vicarious liability in ***Mohamud v WM Morrison Supermarkets plc [2016] ICR 485*** required the court to consider two matters:

Firstly, what functions or 'field of activities' have been entrusted by the employer to the employee (i.e. what was the nature of the employee's job); and, secondly, whether there was a sufficient connection between the position in which the employee was employed and his or her wrongful conduct to make it right for the employer to be held liable under the principle of social justice.

In considering the first question, it was noted that he was in overall charge of all aspects of the business, did not have set hours, and had the authority to control his own methods of work. Much of what M did during the average working day was connected to NR Ltd, and for much of the week he was either directly working on company business, or available for consultation or direction.

M was managing director and directing mind and will of a relatively small company, that he had responsibility for all management decisions, including the maintenance of discipline, and

he would have seen the maintenance of his managerial authority as a central part of his role. He was entrusted by NR Ltd with authority to issue instructions to more junior employees, and generally had a wide remit. The judge also found that NR Ltd was a round-the-clock operation and that M did not have set hours and had authority to control his own methods of work. Accordingly, looking at the matter objectively on the facts as found, both M's remit and his authority were very wide.

In relation to the second question of "sufficient connection" between M's role and the assault, at the time M was purporting to act as MD of NR Ltd. He was seeking to exercise his authority on subordinate employees who challenged his managerial decision. M was asserting his authority and managerial decisions immediately before the assault. The assault arose out of his misuse of the position. The drinks were the same evening as a work event and he paid for and orchestrated them on behalf of NR Ltd. M was asserting his authority prior to and during the assault.

Accordingly, NR Ltd was vicariously liable for the assault.

Comment: We are nearing Christmas party season which can result in numerous difficulties for employers. From an employer's perspective the decision is quite exposing. Whilst arguments are common, physical assault is rare in the workplace, especially of the severe nature as in the present case. Therefore, in a practical sense the risk to the employer is still low.

What this case does not do is open the floodgates for vicarious liability in respect of all assaults. Even if one colleague is more senior than the other that is not enough in itself. Liability arose in this case because M was MD of a small business and his field of activity was almost unrestricted on behalf of NR Ltd. The parties had been discussing work and M was asserting his authority within his field of activity.

From a legal perspective, this decision makes it clear that previous case law should be viewed from the decision in **Mohamud**.

In other news…

Next breakfast briefing

The next Birmingham breakfast seminar will be held on 15 February 2019, please sign up online or contact the clerking team (details below): www.3pb.co.uk/events/

Employment Tribunal statistics

- The latest quarterly statistics published by the MOJ for the period April to June 2018 show:
    - There has been an increase of 165% in the number of single employment tribunal claims presented to the tribunal compared to the same period in 2017.
    - The number of single claim receipts was 10,996.
    - The number of claims disposed of during this period was 10,891 – a rise of 13% on the same period in 2017.
    - During the period of operation of ET fees (July 2013 to July 2017) receipts were relatively stable at around 4,300 per quarter.
- In 2017/2018, 536 cases received compensation for Unfair Dismissal. The average award was £15,007.
- In 2017/2018, there were 136 discrimination cases where compensation was awarded. Disability discrimination claims received the largest average award at £30,700.

Consultation Paper on reforming employment law hearing structures

- On 26 September 2018, the Law Commission issued Consultation Paper 239 on reforming employment law hearings. The consultation closes on 11 January 2019.

- It is seeking view on a range of issues, including:
    - Extending limitation periods in employment tribunals, generally to 6 months;
    - Allowing employment judges to sit in the civil courts when hearing civil court discrimination claims, or creating an 'employment and equalities' list of judges;
    - Increasing, or removing altogether, the £25,000 limit for breach of contract claims, and allowing tribunals to hear breach of contract claims while the employee remains employed.

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