3PB Employment Case Law Update – 5 October 2018

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Practice and Procedure – Office Equipment Systems Ltd v Jane Hughes (2018) EWCA Civ 1842

Facts: The employer, O, appealed from a decision of the EAT in which it was held that O was debarred from making representations on the remedy to be awarded to an employee.

The employee had issued claims for unfair dismissal, unpaid holiday pay and wages, sex discrimination and breach of contract. O had failed to respond in time, was refused an extension of time and judgment on liability was given against it, with the remedy to be considered separately. An EJ found that there was sufficient material to determine remedy without a hearing and declined the employer's request to participate.

Outcome: The CA held that there was no reason why the underlying principle in the civil courts should not apply in the ET - that on a damages assessment all issues were open to a defendant, save to the extent that they were inconsistent with an earlier determination of the issue of liability. That was the same after a full hearing on liability or by default judgment, and the same should be applied in the ET.

Where liability and remedy were dealt with in a single hearing, a debarred respondent could have no legitimate complaint if the tribunal determined liability and made an award. Even in that type of case it would generally be wrong for the tribunal to refuse to read any written representations regarding remedy sent in good time by the defaulting party, but proportionality and the overriding objective did not entitle the respondent to a further hearing.

In a case that was sufficiently substantial or complex to require the separate assessment of remedy after judgment had been given on liability, only an exceptional case would justify excluding the respondent from participating in any oral hearing; and it should be rarer still for a tribunal to refuse to allow the respondent to make written representations on remedy. The

instant case was not exceptional and the employer should not have been precluded from making submissions on quantum. An appropriate course would have been to invite the employer to make submissions by a specified date and for the employment judge to consider whether an oral hearing was required.

Practice Note: This case is clearly of some importance to an employer who has been debarred. The ET's practice of listing cases to determine liability and remedy (if appropriate) may allow an opportunistic Claimant to obtain a windfall should debarring orders be made. However, is such a listing a hearing on liability and remedy or one on liability only with a discretion to consider remedy?

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 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.

Outcome: 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.

Practice Note: 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!

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 found that 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.

Outcome: The EAT dismissed the Appeal. 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.

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

Unlawful Deduction of Wages - Meena Agarwal v Cardiff University (2018) EWCA Civ 2084

The Facts: C is a consultant urological surgeon employed under a "clinical academic contract" under which she performs academic duties for the First Respondent, Cardiff University, and clinical sessions for the Second Respondent, the Cardiff and Vale University Local Health Board. The University pays her in respect of both duties though it is entitled to reimbursement by the Health Board as regards 50% of her salary. As a result of a dispute arising from a prolonged period of sickness absence, the Board believes that Ms Agarwal is not contractually entitled to be paid in respect of her clinical duties and has declined to fund the University to pay that part of her salary; and the University has withheld it accordingly. C brought proceedings in the ET for unauthorised deduction of wages under Part II of the 1996 Act; but following a preliminary hearing, Regional Employment Judge Clarke held that the Tribunal had no jurisdiction to determine the underlying contractual dispute (in accordance with the case of Somerset CC v Chambers). The EAT agreed.

Outcome: The Court of Appeal indicated that the first question was whether there had been a deduction under s13 ERA 1996. That was stated to depend on s13(3) and specifically whether the sum claimed was "properly payable." That meant payable pursuant to a legal obligation, typically but not always arising under the contract of employment. Second, if there was a question as to whether the sum was properly payable, that question had to be resolved by the employment tribunal. That necessarily meant that it would need, in a case where that was the issue, to resolve any dispute as to the meaning of the contract relied on. Third, once the tribunal had decided whether there had been a deduction, it had to consider whether it had been authorised.

Whilst historically, the ET's had interpreted contracts to determine whether or not there had been a deduction, the issue had become muddied by a line of cases dealing with Part 1 of the ERA (dealing with the jurisdiction to determine what particulars should appear in a statement). In the case of **Southern Cross Healthcare Co Ltd v Perkins [2010] EWCA Civ 1442** the CA had held that the tribunal had no jurisdiction to interpret the contract. However, the CA in this case noted that that was a case under Part 1 of the Act and not Part 2 and that the reasoning in **Somerset** was compressed and had not considered **Delaney v Staples**. They stated that:-

(1) Delaney v Staples, to which the ET and the EAT in Agarwal were not referred, is binding authority that an ET has jurisdiction to resolve any issue necessary to determine whether a sum claimed under Part II is properly payable, including an issue as to the meaning of the contract of employment.
(2) The provisions in Parts I and II of the 1996 Act differ in their origins, purpose and terms. It is only an accident of legislative history that they are now contained in the same Act.
(3) There is no good – or even, frankly, comprehensible – policy reason for carving out from the jurisdiction of the ET one particular kind of dispute necessary in order to resolve a deduction of wages claim. On the contrary, to do so would be incoherent and would lead to highly unsatisfactory procedural demarcation disputes. ETs are well capable of construing the terms of employment contracts governing remuneration and have to do so in many other contexts.

Practice Note: This appears to me to clearly be the right decision. However, in light of the ferocity of this litigation, it is possible there may be a further appeal (or attempt to appeal) to the Supreme Court…watch this space!!!!

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.

Practice Note: Be careful about how you frame your advice!

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