3PB Employment Case Law Update – December 2017

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Barristers

Holiday Pay - The Sash Window Workshop v King

1. C's contract (which classified him working as self-employed commission only) did not specify if he was entitled to paid leave. He was not paid for any leave taken in the 13 years he worked for the Respondent.

2. He established that he was a worker within the meaning of Directive 2003/88 and therefore was entitled to holiday pay.

3. C sought to claim holiday pay for the totality of the period that he was an employee, being 24.15 weeks in total. The CJEU noted the authorities that led to national provisions or practices limiting carry over. However, it noted that "the assessment of the right of a worker, such as Mr King, to paid annual leave is not connected to a situation in which his employer was faced with periods of his absence which, as with long-term sickness absence, would have led to difficulties in the organisation of work. On the contrary, the employer was able to benefit, until Mr King retired, from the fact that he did not interrupt his professional activity in its service in order to take paid annual leave." [Para 60] It stated that the right to paid annual leave "cannot be subject to any preconditions…" It stated that an employer "that does not allow a worker to exercise his right to paid annual leave must bear the consequences." [Para 63] It suggested that to validate such conduct would be "validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of that directive…" It therefore concluded that the Directive must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of the employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.

4. **Practice Note**:- Clearly this case is of some significant importance and could have significant ramifications for the gig economy where "employers" have historically

attempted to preclude their workforce from accessing their entitlements to annual leave. The effect of Regulation 14 WTR 1998 would seem to leave an open ended and significant liability for such employers who are not even able to take advantage of limitation periods to restrict their exposure. Gulp!

The Burden of Proof - Ajayi Ayodele v Citylink Ltd & Napier (2017) EWCA Civ 1913

5. C was Nigerian and described himself as black. He worked initially as an agency worker, and from 2007, as an employee. In 2012, he resigned, claiming constructive dismissal. Before the employment tribunal, he raised claims of racial discrimination, racial harassment, victimisation, and unfair dismissal.

6. The tribunal dismissed all his claims, finding that he had failed to prove a prima facie case of discrimination so the burden of proof had not shifted to the employer.

7. Inter alia, it was argued on appeal to the CA that the ET had been wrong to hold that the burden of proof lay on an employee at the first stage to show a prima facie case of less favourable treatment. Reliance was placed on the case of **Efobi v Royal Mail Group Ltd (2017) IRLR 956** in which it was suggested that the introduction of the EqA had changed the way ET's should apply the burden of proof – it was suggested that the ET were required to consider all the evidence in deciding whether the facts indicated discrimination and unless the employer could discharge the reverse burden of proof the tribunal had to find discrimination.

8. The CA wholly rejected the contention made in **Efobi** that the EqA changed the way the ET should apply the burden of proof and suggested that the difference in wording between the RRA and the EqA was merely a "tidying up exercise." [see para 105]. It neatly summarised the difference between the two stages as follows:-

67… As the authorities of Laing and Madarassy make clear, there is a vital distinction between the "facts" and any "explanation." It is only the explanation which cannot be considered at the first stage of the analysis. Those authorities make it clear that evidence adduced by a respondent can properly be taken into account at the first stage when a

tribunal is deciding what the "facts" are in order to see if a prima facie case of discrimination has been established by the claimant.

9. **Practice Note**:- After much excitement about the ramifications of the EAT's judgment in **Efobi**, the CA has firmly shut the door on a review of the burden of proof legislation. **Efobi** itself has been appealed to the CA. However, subject to some fancy footwork, it will take an appeal to the Supreme Court to alter the orthodox approach to the burden of proof.

Marriage or Marriage Difficulties - Gould v Trustees of St John's Downshire Hill [2017] UKEAT 0115_17_0510

10. C was employed as a minister at a North London church from 1 September 1995. He got married in 1997. Some eighteen years later, the church became aware that his marriage was in difficulties. He agreed to take a sabbatical to attempt to salvage it. He was given the impression that certain church members would not accept him as minister if he separated from his wife. In July 2016, he was invited to a meeting to 'consider your sabbatical and potential plans'. In the event, no meeting took place and he was summarily dismissed the following month on the basis that 'the relationship of trust and confidence... had broken down'.

11. C brought an employment tribunal claim against the church's trustees for direct discrimination on the ground of marriage. The claim was struck out because the C's case was that he had been dismissed because of his marriage difficulties, rather than the marriage itself.

12. The EAT overturned the ET's judgment. The EAT observed that the fact of being married need not be the only or main reason for the alleged less favourable treatment:- it is sufficient if it played an 'operative part'. C's pleadings were clear in asserting that the decision to dismiss was for the composite reason that he was married and having marital difficulties. In other words, the alleged reason for dismissal was 'marriage specific' − the fact that he was married rather than merely having a relationship was an essential part of his case. The EAT therefore overturned the tribunal's decision to strike out C's claim. This was not tantamount to treating marital difficulties as a proxy for marriage under S.8 EqA. The EAT emphasised that 'context was everything': here there was an employer

who held marriage in particular regard and an employee whose marriage and marital difficulties had allegedly played a significant part in his treatment.

13. The EAT did not accept that its approach would extend S.8 EqA to cover divorce or bigamy. The status of divorce is not protected, but this does not inform the scope of the protection for the status of marriage. It also pointed out that if a vicar is dismissed for the criminal offence of bigamy, the true comparator is likely to be a vicar who commits a similarly serious criminal offence not involving marriage. S.8 could, however, extend to a case of adultery: the comparator would be a vicar who was sexually unfaithful to his or her common law partner. If the comparator would be treated differently than the married vicar, then any less favourable treatment would fall within the scope of S.8 EqA.

14. **Practice Note**:- This case emphasises the importance of context when assessing whether treatment is on a prescribed ground. Context can be highly important in determining whether the treatment is unlawful under s13 EqA (and indeed for establishing whether there has been harassment where the test is even broader). How tenuous the relationship is to be protected under the EqA is likely to be something which will require careful consideration.

Uber BV and ors v Aslam and ors (2017) IRLR 4

15. The Uber business relies on a smartphone app through which customers can order and track a taxi and pay the fare. Uber treats drivers as self-employed and there is complex contractual documentation between it, the drivers and the passengers. Uber seeks to present itself as a technology platform facilitating the provision of taxi services, not as the provider of the taxi service itself. It holds itself out as acting as agent for the drivers, and its agreement with passengers states that the contract for the taxi service is between the driver and the passenger. Under the contract between Uber and the driver, the driver is not required to make any commitment to work. However, when a driver signs into the app, this usually signals that they are coming 'on-duty' and are therefore able to accept bookings. As for day-to-day work, prospective passengers book trips through the app. Upon receipt of a passenger request, the app locates an available driver (i.e. one who is logged in). The selected driver has ten seconds to accept the booking through the app, failing which Uber assumes that the driver is unavailable and locates another. If a driver fails to accept bookings, warning messages are generated which can lead to the driver's access to the app being suspended or blocked (which prevents the driver working).

16. A number of Uber drivers brought employment tribunal claims of unlawful deductions from wages, relying on failure to pay the national minimum wage, and failure to provide paid annual leave. Two of the drivers were selected as test claimants and the employment tribunal considered, as a preliminary issue, whether the drivers were 'workers' for the purpose of S.230(3)(b) ERA. The tribunal found that they were. It rejected Uber's case that the drivers were self-employed, and that it merely provided the technology platform that allows drivers to find and agree work with individual passengers. In the tribunal's view, this characterisation of Uber's business model and the contractual documentation created to support it did not accord with the reality of the working arrangements, which was that Uber relies on a pool of workers to provide a private hire vehicle service. As for what periods would count as 'working time' for the purposes of the WTR and the NMWA, the tribunal concluded that the drivers should be treated as working whenever they are in the territory in which they are authorised to drive, have turned on the app, and are ready and willing to accept fares. Uber appealed to the EAT.

17. The EAT dismissed the appeal. Her Honour Judge Eady QC, sitting alone, held that, following the Supreme Court's decision in Autoclenz Ltd v Belcher, the ET was entitled to find that the contractual documentation did not reflect the reality and thus that it was entitled to disregard the terms and labels used in the written agreements. The tribunal was required to determine the true agreement between the parties and, in so doing, it was important for it to have regard to the reality of the obligations and the situation. The tribunal was therefore bound to focus on the statutory language, rather than the labels used by the parties, and reach a fact-sensitive decision.

18. HHJ Eady QC noted that the key question was: when the drivers are working, who are they working for? Uber submitted that the tribunal had failed to understand its argument that an agency arrangement, whereby it acted as agent in relation to contracts between drivers and passengers, was common in the private hire industry. However, in HHJ Eady QC's view, the tribunal was not denying the possibility of individual drivers operating as separate businesses and, as such, entering into direct contracts with passengers, it was merely saying that this was not what it found to be the true position. It was entitled to take into account, among other things, the scale of the business, rejecting the notion of Uber as 'a mosaic of 30,000 small businesses linked by a common platform'. The tribunal was also entitled to rely on its finding that drivers were integrated into Uber's business, and were marketed as such. HHJ Eady QC also rejected Uber's argument that the tribunal erred by taking into account features of the relationship that resulted from

regulatory requirements as indicia of an employment relationship – it was not obliged to disregard factors simply because they might be seen as arising from the relevant regulatory regime.

19. As for the tribunal's conclusion with regard to working time, Uber argued that the tribunal failed properly to take into account that, even while signed into the app, drivers were at liberty to take on or refuse work as they chose, or to cancel trips already confirmed, and could even work for others, including direct competitors of Uber. It therefore submitted that, in those circumstances, they were not at Uber's disposal or working for Uber. HHJ Eady QC conceded that this aspect of the appeal had caused her some trouble. However, she was satisfied that the tribunal had grappled with this issue and reached a permissible conclusion. The tribunal had made a finding that drivers were expected to accept at least 80% of trip requests when signed in, and that being 'on duty' meant being 'willing and able to accept trip requests'. Even if the evidence allowed that drivers were not obliged to accept all trips, the very high percentage of acceptances required justified the tribunal's conclusion that, once in the territory with the app switched on, drivers were available to Uber and at its disposal.

20. **Practice Note**:- I do not think that this authority breaks new ground. However, it is a reminder of the importance with which the EAT places on the findings of the ET, and a useful reminder of the importance of looking at the true agreement between the parties.

Weekly Rest Breaks - Mr Maio Marques da Rosa v Sol

21. C was employed by a casino owned by Varzim Sol. The casino was open every day for 12 hours except on 24 December. During the last 4 years of C's employment a new working pattern was introduced which meant that that he was never required to work more than 6 consecutive days before being offered a break. Prior to the introduction of this arrangement C had been expected to work 7 consecutive days a week on many occasions. On 16 March 2016 C's employment came to an end on grounds of redundancy. He then commenced proceedings against his former employer. He alleged that Varzim Sol should have paid him overtime for each 7th day he worked.

22. Under Article 5 of Directive 2003/88, "weekly rest period" was defined as follows:- 'Member States shall take the measures necessary to ensure that, per each seven-day

period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.'

23. In its judgment on how to interpret the directive, the CJEU stated that "…Member States are to take the measures necessary to ensure that, 'per each seven-day period', every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3 of Directive 2003/88. However, that article does not specify when that minimum rest period must take place and thus gives Member States a degree of flexibility with regard to the choice on timing." [Para 39]

24. This means that the Article 5 of EU Directive 2003/88 can be read as allowing a rest day at the beginning of one 7-day period and at the end of the following 7-day period. This means that a worker may work up to 12 consecutive days (if the weekly rest period is granted on the first day of the first seven day period, and the last day of the following seven day period), provided that the other requirements of the WTD, such as daily rest breaks and the maximum working week, are satisfied.

25. **Practice Note:-** It is worth noting that there is a particular derogation under the WTD, which allows each member state to stipulate a reference period for the weekly rest period of either seven or fourteen days (at the employer's choice). The UK has utilised this derogation and has stipulated a maximum reference period of 14 consecutive days. In view of this recent decision, it is therefore possible for an employer to grant a 48-hour rest period at the beginning of one such period and at the end of the following period. This could mean that a worker in the UK (who does not fall into any of the special categories in the WTR 1998) would be permitted to work for 24 consecutive days, provided that the other elements of the WTD are satisfied, and it does not breach the employment contract or any collective agreement. It should be noted that this case concerned the "default situation" under the WTD, and not a situation where the derogation had been utilised. It is therefore possible that if a situation such as 24 consecutive working days was challenged in the ECJ or the domestic courts or tribunals, a different conclusion more favourable to workers might be reached, particularly bearing in mind the WTD's objective of protecting health and safety.

PIDA - Royal Mail v Jhuti (2017) EWCA Civ 1632

26. Shortly after C started her role with the employer, she made protected disclosures to her line manager regarding breaches of company policy in providing discounts to customers. C was subsequently put under great pressure by her line manager to withdraw her allegations in writing, which she did. She became the victim of bullying and harassment by her line manager, and raised a grievance. C was later dismissed for poor performance by a new manager, who was never provided with the disclosures as set out in the employee's grievance by the previous line manager.

27. The ET dismissed the claim for unfair dismissal. However, this was overturned by the EAT who said that a person who makes a decision in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to the employer of both of them.

28. The Court of Appeal has confirmed that, for the purposes of unfair dismissal claims, the reasonable belief to be attributed to an employer when dismissing an employee should be determined by reference to what the decision-maker actually knew at the time of dismissal, and not what they 'ought' to have known. As such, an employee was not automatically unfairly dismissed for making protected disclosures where the dismissing manager was, in reality, unaware that such disclosures had been made.

29. In reversing the EAT's finding that this was an automatically unfair whistleblowing dismissal, the Court of Appeal confirmed that: (i) in most cases, tribunals should only consider what knowledge the person authorised to take the decision to dismiss had when dismissing the employee; and (ii) only this decision-maker's knowledge can be attributed to the employer. It held that the statutory right not to be unfairly dismissed depends on there being unfairness on the part of the employer, so even unlawful conduct on the part of individual colleagues was immaterial unless it was properly attributable to the employer in accordance with the above.

30. **Practice Note:-** The decision in Jhuti in the EAT was surprising and contrary to the traditional view that one considered what was motivating the decision maker. This decision is not unexpected. It confirms that provided: (i) employers undertake reasonable investigations prior to dismissing; and (ii) the actual decision-maker reaches a rational decision to dismiss based on the information available to them at the relevant time, a tribunal will find it difficult to criticise the employer's actions.

Direct Discrimination - Ramos v Servicio Galego de Saude

31. The ECJ has decided that where an employer fails to assess the workplace risks posed to breastfeeding workers, this may constitute direct sex discrimination. It also held that, where a pregnant or breastfeeding worker is exposed to a potential risk at work, it is not enough for employers to do a general risk assessment of the worker's role: they must instead assess the breastfeeding worker's individual circumstances in order adequately to determine whether there are specific risks to her or her child.

32. In this case, the employer had conducted a risk assessment for the role of an A&E nurse but they had not carried out an individual assessment of C's circumstances and the effect of the complex shift system, potential exposure to ionising radiation, healthcare associated infections and stress on her as a breastfeeding worker.

33. **Practice Note**:- The case is a reminder to employers to assess the risks to particular individuals who are pregnant or breastfeeding and that carrying out a general risk assessment for the role may not be sufficient. This case may also increase avenues of redress for UK workers, who have until now been expressly excluded from bringing direct discrimination claims for less favourable treatment on the grounds of breastfeeding under the Equality Act 2010.

Michalak v General Medical Council and others, [2017] UKSC 71

34. *The ET has jurisdiction to hear a discrimination complaint brought by a doctor against the General Medical Council (GMC).*

35. **The facts:** M, a doctor, was dismissed from the NHS Trust where she worked, and won claims before an employment tribunal for unfair dismissal, sex and race discrimination and victimisation. However, before the tribunal had reached its determination, the Trust referred her to the GMC for it to consider her continued registration as a medical practitioner. The Trust later accepted that there were no proper grounds on which to make the referral and, accordingly, her full registration as a practitioner remained intact. M brought another complaint before an employment tribunal under section 53 – which prohibits discrimination by qualifications bodies - that, in the investigation and hearing of her case, the GMC had acted in a manner that constituted discrimination under the EqA.

36. **The issue:** There was a preliminary question of jurisdiction. Section 120(7) EqA 2010 states that the ET does not have jurisdiction to determine complaints relating to a contravention of section 53 "in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal." Decisions of the GMC on a medical practitioner's registration can be appealed to the High Court under ss.38 and 40 of the Medical Act 1983, but M's complaints did not fall within this statutory route of appeal because they were not about her registration. Her only option would be to commence judicial review proceedings. The question therefore was whether s 120(7) covers judicial review proceedings.

37. **The Supreme Court found:** Section 120(7) does not encompass judicial review proceedings; the EAT's earlier decision in *Jooste v GMC* 2012 EqLR 1048 was wrong. An appeal involves a review of a decision in all its aspects, allowing the appeal body to examine the basis on which the original decision was made, assess the merits of the conclusions reached and, if it disagrees, substitute its own view. An appeal in a discrimination case must confront directly the question whether discrimination has taken place, not whether the GMC had taken a decision that was legally open to it. Judicial review, by contrast, entails proceedings in which the legality of a decision, or procedure by which it is reached, is challenged, and the remedy available on a judicial review application in circumstances such as in the present case is a declaration that the decision is unlawful or that the decision be quashed: the court cannot substitute its own decision for that of the decision-maker and, in that sense, the decision of the GMC could not be reversed. As for whether judicial review was available 'by virtue of an enactment', the SC disagreed that judicial review arises 'by virtue of' S.31 of the Senior Courts Act 1981: it originated as a common law procedure and is regulated but not established by s.31. The words 'by virtue of an enactment' in S.120(7) are directed to cases in which specific provision is made in legislation for an appeal, or proceedings in the nature of an appeal, in relation to decisions of a particular body: they are not intended to refer to the general right to seek judicial review merely because, since 1981, that happens to have been put on a statutory footing.

OTHER NEWS

38. The Government has launched the first stage of a refund scheme for employment tribunal fees. Full details of the scheme will be made available when it is fully rolled out. In the initial test phase, up to around 1,000 people will be contacted individually and

given the chance to apply for a refund before the full scheme is opened up. Successful applicants will be paid interest of 0.5%, calculated from the date of the original fee payment up until the refund date.

39. Taking effect from April 2018, the personal allowance and higher rate threshold will increase as follows:-

    Personal allowance – increase from £11,500 to £11,850

    Higher rate threshold – increase from £45,000 to £46,350

40. Taking effect from April 2018, the National Minimum Wage/National Living Wage will increase as follows:-

    a. For those aged 25 and over – increase from £7.50 to £7.83

    b. For those aged 21 to 24 – increase from £7.05 to £7.38

    c. For those aged 18 to 20 – increase from £5.60 to £5.90

    d. For those aged 16 and 17 – increase from £4.05 to £4.20

    e. For apprentices – increase from £3.50 to £3.70

30 November 2017

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