3PB BREAKFAST BRIEFING NOTES

by

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(1) Discrimination awards – all rise by 10%!: De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879

Facts:

The Claimant brought various claims of disability discrimination, harassment and victimisation under the Equality Act 2010 ('EqA 2010') against her employer to which she transferred by TUPE on 29th April 2012. At the remedy hearing the Claimant was awarded £9,000 for injury to feelings and £3,300 for psychiatric injury, namely the exacerbation of her depressive illness. The ET had applied and incorporated a 10% uplift in the award for psychiatric injury pursuant to Simmons v Castle [2012] EWCA Civ 1039, but did not apply any such uplift to the injury to feelings award.

The Claimant appealed to the EAT on a number of grounds, but it was only in respect of the refusal of the two uplifts (Simmons v Castle and s.207A) which were permitted to proceed to a final hearing. The Respondent cross-appealed on the basis that the ET should not have applied the 10% uplift to the award for psychiatric injury.

EAT Held:

The EAT dismissed the Claimant's grounds of appeal but allowed the cross-appeal. In summary Judge Serota held:

1) The rationale for the uplift did not apply to proceedings in the employment tribunals since they are (generally) a no cost jurisdiction;

2) Nothing is said in the Jackson report or in either of the Simmons v Castle judgments to suggest that he or this Court had awards of compensation in the employment tribunals in mind;

3) It was not the effect of section 124(6) EqA 2010 that "employment tribunals are required to award precisely the same compensation as a county court".

The Claimant appealed to the CA.

The Fundamental Issue:

The central issue for the Court of Appeal was whether the Simmons v Castle 10% uplift should be applied to awards of compensation for injury to feelings in discrimination cases in an Employment Tribunal. The clear and accepted reason the 10% uplift was introduced was to mitigate against the reduction in damages recovery by Claimants in the County Court by virtue of the change in landscape as regards CFAs following the Jackson reforms. However on the other hand the wording of s.124(6) EqA 2010 prescribes *"The amount of compensation which may be awarded under subsection (2)(b) [i.e in the tribunal] corresponds to the amount which could be awarded by the county court or the sheriff under s.119"* so shouldn't awards in the ET correspond to those that would be awarded in the County Court?

The CA reviewed the authorities in the EAT since Simmons, which diverged in their view as to whether a 10% uplift should apply or not, particularly quoting from Beckford v London Borough of Southwark [2016] IRLR 178 which was decided after the EAT Judgment in this case and commented upon Judge Serota's findings outlined above.

CA Held:

The CA determined that the 10% uplift should have been applied to both elements of the ET's award (i.e. psychiatric injury and injury to feelings). The CA directed itself initially to the wording of s.124(6) EqA 2010. The CA found that the natural meaning of those words was that it was that amounts awarded under the EqA 2010 and those in the County Court should correspond and even if that was not the literal interpretation then that was the clear statutory purpose of this provision, namely to ensure that such comparable awards would be made for the same instances and that it was unacceptable and unattractive for compensation to differ for the same injury, depending purely on which forum in which it was presented.

Whilst it was accepted that the origin of the 10% uplift arose out of the Jackson reforms and because certain Claimants in the County Court were receiving less (in a net sense) by way of damages as a result of having to pay a percentage of their damages to their lawyers, it was also observed that Claimants in the County Court who were funding their litigation by other means and whose (net) damages received were not in fact affected by the Jackson reforms were nevertheless entitled to the 10% uplift as a number of authorities had already confirmed.

Commentary:

The first clear observation is that following this Judgment of the CA and until a Judgment to the contrary, employment advisors should expect and advise their clients that for both injury to feelings and any personal injury awards that a further 10% uplift is almost inevitable to be

awarded. The impact may not in many cases seem significant but as it is arguable that the rationale for this decision *could* be extended to other compensatory heads of loss such as an award for aggravated damages and as one would expect interest to be applied after the application of any such uplift, this decision cannot simply be ignored.

Secondly it must be observed that this decision may be setting the scene for a change in professional practice as to how we as advisors have come to assess quantum for injury to feelings. Rather than referring to the Vento bands (as uplifted by Da'Bell / for inflation), perhaps supported by recourse to certain comparable cases, the JC guidelines and our own industrial experience to arrive at a figure. LJ Underhill, who provided the leading Judgment in this case, commented that it would be useful if the President of the ET and / or President of the EAT were to publish guidance setting out new bands for awards in respect of injury to feelings much like the JC guidelines for personal injury, such that the figures provided could take account of both inflation and the 10% uplift. Thus we could therefore see, in the not too distant future, a new form of reference and basis for calculating any injury to feelings award…so watch this space!

(2) Conduct of an employee does not have to be culpable (whether negligent, reckless or dishonest) in order to constitute a potentially fair reason under s.98(2)(b) ERA 1996: JP Morgan v Ktorza (UKEAT/0311/16/JOJ)

Facts:

The Claimant worked for JP Morgan on the sales side of their foreign exchange desk. There was, certainly up to mid-2014, a practice within the Respondent of short or partial filling ('Partial Filling'). Filling meant carrying out a client's order and thus Partial Filling accordingly meant carrying out the order, initially at least, only in part. In response to the FCA and US Department of Justice starting to focus their scrutiny on a number of financial practices such as Partial Filling the Respondent initiated 'Project January' which was intended to address such matters. It covered a number of topics / practices and in fact whilst Partial Filling was addressed it was given only 4 lines which read, *"Trading has the right to decide if and when to fill a client order. Sales and traders may consult on order fills, provided that trading has the final say. The rationale is that trading should have the full set of information regarding all client orders and the Firm's internal orders and risk positions."* The Claimant attended a training session for Project January on 27th August 2014 but he was not shown nor given a copy of the written document.

On 31st October 2014 a client placed an order for 10m EUR-USD. Mr Mir, a trader, informed the Claimant that he had filled it. However the Claimant asked Mr Mir to sell back 5m. A disagreement ensued between Mr Mir and the Claimant. This was apparently the first occasion since the training session where any member of the sales staff had engaged in Partial Filling in this way. The Claimant was suspended on full pay in November. There was no investigatory interview and despite his requests for a copy of Project January, it was not provided until the day before the postponed disciplinary hearing on 21st May 2015.

The Claimant conceded at the disciplinary hearing that it may have been his mistake but that it was brought about by a genuine lack of awareness of the new guidelines introduced only around two months prior to the trade in question. The Claimant's line manager was questioned by the disciplinary chair who accepted that the Claimant had genuinely been unaware of the position, though it seems no notes of this interview, nor the limited few others the disciplinary chair performed, were kept and nor was the Claimant informed of this further evidence or given opportunity to comment upon such. The Claimant was already subject to a Final Written Warning for late booking of trades and running risk by tightening prices without reference to a trader. The Claimant was dismissed with notice, the disciplinary chair stating that 'he felt there was no ambiguity either from sales or trading that Partial Filling was the express domain of trading and that the Claimant should have been aware of the change in practice as regards Partial Filling.

ET Held:

The ET found that the Claimant had been unfairly dismissed. It is somewhat unclear as to whether the EJ found the dismissal unfair solely on the basis of s.98(4) or also on the basis that the Respondent had not discharged the burden of proving that the Claimant was dismissed for a reason which fell within s.98(2) ERA 1996, namely for a potentially fair reason. However from the comments of the EJ it certainly appears that he did not consider the Respondent had proven a potentially fair reason as the EJ commented that *"For someone to be dismissed by reason of their 'conduct' that conduct has to be in someway culpable. There was no suggestion that the claimant was dishonest or sought to get any personal gain."* The EJ went on later to state, *"To qualify as 'conduct' within the meaning of s.98(2)(b) ERA 1996 the conduct, in the view of the tribunal has to be culpable.*

The EJ then went on to define 'culpable conduct' stating that it, *"…can include negligence or recklessness. The person accused has to be aware that what they are doing, or have done, would or might be subject to the disapproval of their employer, their clients or fellow employees. Put another way, there has to be a subjective element. One cannot establish culpability without any subjective element"* and later that the conduct, *"must be culpable and not innocent unwitting conduct"*.

EAT Held:

The EJ had erred in two respects and so the appeal was upheld and remitted to a freshly constituted ET for rehearing. The EAT found that the EJ had (as seemed apparent from, but not expressly stated within, his reasons) determined that at the s.98(1) stage it was a requirement for the Respondent to establish that the conduct was culpable. That, the EAT held, was wrong in law. Secondly the EAT held that the EJ had further fallen into error in respect of s.98(4) stage as he had not approached this matter from the perspective of the Respondent and whether their actions had in the circumstances been reasonable, but had rather reached his own conclusions on the facts and then asked whether from his own perspective the Respondent had acted reasonably and so had in effect substituted his view for that of the Respondent.

Rationale:

The s.98(1) and (2) stage of the ERA 1996 is simply to identify (a) the reason (or primary reason) of the employer for dismissing the Claimant and (b) establishing which of the potentially fair reasons within s.98(2) it falls. There is no obligation at this stage to identify or establish conduct as culpable or in any way look to the Claimant's subjective perspective or state of mind. It is what is in the mind of the employer at the time on the information known or believed by him, the employer may be factually wrong, but that is not the point. The EAT was referred to and in turn the EAT referenced and reiterated the Judgment in Royal Bank of Scotland v. Donaghay (UKEATS/0049/10) in which it was confirmed that there is no requirement under s.98(2) ERA 1996 that the conduct in question be 'reprehensible' before the employer can be found to have discharged the onus on him under that section and that in fact anything an employee does or fails to do is 'conduct' under s.98(2) ERA 1996.

Commentary:

Whilst the EJ undoubtedly fell into error, on reading some of the extracts from his reasons one can at first blush perhaps have some sympathy because as Employment professionals dealing with misconduct dismissals over numerous years when we refer to 'conduct' we probably (if we are being honest) are looking for something which is in some sense dishonest or otherwise negligent or wrong as otherwise we might be considering and advising in terms of 'capability' rather than 'conduct'.

That is why I consider that this case is an important reminder that in effect anything an employee does (or even omits to do) is conduct. If a Respondent can show that they genuinely dismissed an employee for that conduct then the dismissal is 'potentially fair'. The safeguarding provision that prevents an employer dismissing an employee genuinely but bizarrely for say an innocuous action (conduct) such as opening a door for a colleague is purely the remit of s.98(4). Thus it is at this latter stage (when the burden is neutral and the Respondent has the benefit of the band of reasonableness to rely on) that concepts such as the severity of the conduct or the extent it is dishonest or culpable comes into play but only to the extent that such relevant factors were before the employer at the time the decision to dismiss was made.

(3) Privilege against self-incrimination and when it arises in the ET: Coletta v Bath Hill Court (Bournemouth) Management Company Ltd (UKEAT/0297/16/RN)

Facts:

The Claimant was employed as a porter by the Respondent who was a management company for a substantial block of apartments. The Respondent found approximately 41 instances between 2007 and 2014 when the Claimant had claimed overtime erroneously, a sum totalling in the region of £7,000. The Respondent brought disciplinary proceedings and dismissed the Claimant for dishonesty, the Claimant accepted the overtime was wrongly claimed but

contended it was by reason of error and not dishonesty and presented a claim for unfair dismissal.

The matter came before the ET and it was determined at a preliminary stage of that final hearing that he would only deal with liability and it appears issues such as contributory fault and Polkey were reserved to be dealt with later together with remedy if necessary. During the hearing however a witness for the Respondent gave evidence that the matter had been investigated by the police and the file passed to the CPS. No criminal proceedings had of yet taken place. Concern was expressed by the EJ in respect of the Claimant's privilege against self-incrimination.

Counsel for the Respondent confirmed that he accepted the Claimant's evidence on the subject of why *the Claimant* said the Respondent's belief was not genuine and so did not need to cross-examine on that – (after all that was only the Claimant's belief / perspective of another party's belief / motivation and so that evidence itself was only of arguably marginal relevance to the issue at stake). Thus taking account of the fact that the real issues before the ET were whether the Respondent had proved their reason for dismissal, whether that reason was a potentially fair reason and whether the Respondent had acted reasonably in all the circumstances, the EJ confirmed that there was nothing in the Claimant's witness statement that was relevant to be cross-examined upon that day to those issues. Indeed the EJ had already determined that he would only deal with liability and not remedy, Polkey or contributory fault. It appears that the Claimant's representative expressed some unhappiness at the time to the EJ's observations and proposed course to protect the Claimant's privilege against self-incrimination.

Ultimately the hearing proceeded and the Claimant was not called or cross-examined. The EJ did however take into account the evidence within the Claimant's witness statement that was in his view of some (limited) relevance to the issues as to whether the Respondent genuinely believed in his misconduct and whether it was the principal reason for his dismissal.

Whilst the EJ found some procedural errors he did not consider that these rendered the dismissal unfair and he found, overall, that the dismissal was fair.

The Key Issues:

(1) It was contended that the EJ erred in that the effect of the EJ's course of action was to effectively prevent the Claimant giving oral evidence and that it was wrong in law for the EJ to say that he had no relevant evidence to give or upon which he should be cross-examined.

(2) That the EJ should have adjourned the hearing so as to protect the Claimant's right to a fair hearing.

EAT Held:

The EAT allowed the appeal, finding the EJ had erred in respect of (1) and remitted the matter for a rehearing before a freshly constituted tribunal. However the EAT did not find that the EJ had erred in respect of (2) as no application for an adjournment had been made by either party.

Rationale:

Whilst the question as to whether there were reasonable grounds for dismissal will focus on whether it was reasonable for *the Respondent* to conclude that the Claimant was guilty of dishonesty and thereby is likely to in turn focus on the evidence provided by the Respondent, that did not mean that the Claimant's evidence was irrelevant. It was relevant to take account of the Claimant's account and the factors he put forward to the Respondent at the time in deciding whether the Respondent acted reasonably. Furthermore the EAT commented that experience shows that cross-examination can throw light on the validity of a witness' evidence either way and sometimes a point gains strength as a witness is asked about it.

Commentary:

This case reminds us that whilst there is a privilege against self-incrimination, that privilege can of course be waived. Whether to waive that privilege or not is clearly a matter for the individual and not for the ET itself to protect of its own volition. It is of course perfectly acceptable and indeed proper for a representative or indeed the ET to raise such matters openly when they arise to ensure the individual in question is aware of their rights and the difficulties they may face, but ultimately it is a matter for the witness concerned as to whether they wish to waive or risk waiving privilege by giving evidence.

Furthermore if a party wishes to give evidence but is concerned about waiving privilege against self-incrimination then an application for an adjournment can be made. However there is certainly no expectation or requirement for an EJ to adjourn proceedings of their own volition nor to always grant such an application when it is made in such instances. Whether such an application will be successful will need to be determined applying normal principles and will depend on the facts of the individual case.

(4) Court of Appeal reminds us again that 'because of' is not to be equated with a simple 'but for' analysis: Greater Manchester Police v Bailey [2017] EWCA Civ 425

Facts:

The Claimant had previously presented claims of race discrimination against the Respondent, which were settled by way of a compromise agreement. One term of that agreement was that the Claimant would be seconded from Greater Manchester Police to the Regional Crime Unit within TITAN for an agreed period of 2 years. In November 2012 the decision was taken to

terminate the Claimant's secondment to TITAN. The Claimant was to remain working on 'Operation Holly' which he had be doing since the spring of 2012 but he would now be doing so in his capacity as a GMP officer. This was not merely a technical change as this would mean that the Claimant would lose his entitlement to a car supplied by TITAN and furthermore would no longer be able to claim his travel expenses. There was at the time a draft policy under consideration for which officers seconded to TITAN would have five years tenure and the Claimant argued that this policy should apply to him, however the response to this was that by virtue of his unique position, he had been 'attached' rather than 'seconded' and thus the terms of this policy would not apply to him.

It was clear that the original 'secondment' was a special arrangement, indeed autonomous and was specifically referred to as such by TITAN. The Claimant had been seconded without going through the normal recruitment processes, the GMP had unusually agreed to pay his costs outside the normal arrangements for the running of regional secondments. In October 2012 a new head of TITAN was appointed and on reviewing his establishment he noted that the Claimant had been posted previously to the unit in a supernumerary capacity and made enquiries as to what the position was concerning the Claimant returning to the GMP. In November 2012 the Claimant was informed that he would be transferred back to the GMP and the Head of TITAN used the term 'attached' to describe the Claimant's position no doubt by virtue of his earlier observation that the Claimant had been referred to as supernumerary which was intended to reflect the unusual and unique features of the Claimant's position and how he came to be working for TITAN.

The Claimant raised several claims against the GMP on the grounds of direct racial discrimination and victimisation, the 'protected act' for the s.27 EqA 2010 claim being the fact he had brought earlier ET claims. The detriments the Claimant cited as either direct discrimination / victimisation were as follows:

(a) failure to second him to the RCU in accordance with the compromise agreement (he was in fact 'seconded' to the RIU, another department within TITAN;
(b) treating him as 'attached' to TITAN rather than seconded;
(c) terminating the secondment arrangement summarily and / or without consultation;
(d) failing to allow the Claimant to complete 5 years in his seconded position in the RIU, contrary to the NWROCU tenure policy introduced in 2011;
(e) withdrawing the Claimant's use of an RIU car summarily and / or withdrawing without consultation;
(f) withdrawing the Claimant's right to claim travel expenses summarily and / or without consultation;
(g) failing to investigate the Claimant's complaints about these matters properly.

ET Held:

The ET held that (a) was out of time and (b) was dismissed. The ET did however hold that whilst the detriments (c) to (f) (which concerned the termination of the Claimant's secondment and the

consequences flowing therefrom) did not amount to direct discrimination, they did amount to victimisation and that finally (g) amounted to both victimisation and discrimination.

Having found that the Claimant was subjected to a detriment and had raised a protected act the ET made the following comment which led to their decision to uphold the victimisation claim in respect of (c) to (f) and dismiss the direct discrimination claim, *"the claimant found himself in this position because of the unique way in which he came to be in the NWROCU [TITAN] in the first place. He was only there because of the agreement he had made with the respondent, an agreement which is inextricably linked to, and arises out of, his protected act of bringing his previous proceedings. Hence there is no escaping the fact that his treatment was 'because of' his having done a protected act."*

The Claimant appealed to the EAT but his appeal was dismissed by the EAT, albeit that it was accepted that the ET had erred in their application of the burden of proof (the ET stated that once the initial two elements (protected act and detriment) had been established the burden shifted to the respondent to show the reason for the treatment (contrary to Madarassy)). However the EAT held that that error did not vitate the ET's overall reasoning.

The Issue:

The fundamental issue in this case was effectively whether the ET had erred in its application of the causative test in finding the victimisation claims as proven.

CA Held:

Whilst the ET had, within it's judgment appeared to at certain points to have posed the correct question to itself, namely *"what were the reasons that the respondent ended the claimant's secondment when and in the manner that it did"* – i.e. the 'reason why' question, the ET had fallen into error in its application of the causative test. Indeed the CA held that on the ET's findings of fact it could safely conclude that the victimisation claim should have been dismissed and therefore there was no need for the matter to be remitted on this point.

The CA observed that from the ET's findings and evidence presented below a clear picture emerges that *"what motivated all the various actors from early 2012 onwards was a belief – held as strongly in TITAN and in the GMP…that the Claimant's secondment ought not to continue beyond the agreed term because it was anomalous."*

The CA further commented that, *"It is self evidently the case that there would have been no secondment to terminate if the Claimant had not brought his earlier claims, but that kind of "but for" causative link does not mean that the termination was "because of" his earlier claims in the relevant case"*. It was thus in the CA's view immaterial that the secondment had been made in the first place in order to compromise a discrimination claim.

Commentary:

Whilst this case does not fundamentally tell us anything new, it is a salient reminder of how easy it is when considering the application of the 'because of' test, whether in victimisation or direct discrimination claims, to fall into error as both the ET and EAT did in this instance. There is a fundamental difference between establishing a factual causative link in a 'but for' sense and reflecting on the 'reason why', namely the conscious or subconscious motivation of the decision maker and whilst the ET in this case appeared capable to draw this distinction in respect of the direct discrimination claim it is to be remembered that such equally applies to claims of victimisation.

In other news…

- **Farmah and ors v Birmingham City Council (UKEAT/0286/15/JOJ)**

Equal Pay claims involving claimants doing *different work* cannot be included on the same ET1 under rule 9 ETs (Constitution & Rules of Procedure) Regs 2013. Rule 9 only allows claims *'that are based on the same set of facts'* to be included on the same claim form. Thus if the claimants are doing different jobs, seek comparison to different male comparators or bring their claims on a different basis (i.e. equal value / rated as equivalent) then the claims will be based upon different sets of facts.

However wrongly including claims by two or more claimants in the same claim form is an irregularity falling within rule 6 and thus the ET retains a discretion to take such action as it considers just and thus strike-out of the claims is only one option and by no means an inevitability. However the underpayment of fees will be a material factor in considering how the discretion should be exercised. Thus advisors should take note and exercise caution in attempting to save fees by submitting under rule 9 as doing so improperly risks strike out and may risk a complaint and claim against you from your client.

- **King v The Sash Window Workshop Ltd**

The Advocate General has given his opinion that employers are bound to provide an 'adequate facility' for workers to exercise the right to paid annual leave under Article 7 of the EU WTD (No.2003/88). 'Adequate facility' might take the form of specific contractual terms or the establishment of a legally enforceable administrative procedure through which an application for leave can be made. However where no 'adequate facility' has been made available then the AG considered that any reference or carry over periods that would otherwise fall within a member state's discretion (and which may effectively estop or limit claims for holiday pay) must necessarily be disapplied.

The Judgment is likely to follow the AG opinion. This latest development in the much vexed area of holiday pay is especially interesting given the current political landscape, as following Brexit and what may be regarded as the government's stance in attempting to curb historical holiday

pay claims, one has to question whether this ‘protection’ of worker’s rights to A/L will be something that will survive following our exit from the EU.

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