3PB BREAKFAST BRIEFING NOTES

by

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Dismissal connected to absence because of cancer treatment was not discrimination arising from disability: Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16/JOJ

Facts: C managed the Rotherham branch of DES Ltd's business. The business was not achieving the profitability that management desired and DES Ltd was on the lookout for cost savings from 2012 onwards. In October 2014, C went into hospital for an operation for renal cancer. He was absent from work for about two months, following which he returned full-time. Around the time of C's absence, DES Ltd identified the opportunity to save around £40,000 by deleting his post and absorbing his responsibilities into other roles at the branch. C was notified of his potential redundancy in March 2015. Consultation followed and, although alternative employment was considered, no suitable vacancy could be identified. C was accordingly given notice of dismissal for redundancy on 28 April. He brought claims of unfair dismissal, direct disability discrimination and discrimination because of something arising in consequence of disability.

ET: All claims were rejected. In relation to discrimination because of something arising in consequence of disability, under S.15 EqA, it noted that there was *some link* between C's absence and his dismissal because his absence gave DES Ltd an opportunity to identify the ability to manage without him. However, the tribunal did not consider that this was the same as saying that C was dismissed because of his absence. In the tribunal's view, C's absence was *not an effective or operative cause of his dismissal*, it merely allowed DES Ltd to identify something which it might very well have identified in other ways and in other circumstances. The matter that caused C's dismissal was DES Ltd's view that it could do without him. C appealed to the EAT.

EAT: The EAT dismissed the appeal. Mrs Justice Simler, President of the EAT, referred to two of the leading EAT authorities on S.15 EqA, Hall v Chief Constable of West Yorkshire Police and Basildon and Thurrock NHS Foundation Trust v Weerasinghe. His Honour Judge Peter Clark, when giving permission for the present appeal to proceed to a full hearing, had suggested

that there was a tension between the two cases but Simler P did not agree. In Weerasinghe, Mr Justice Langstaff, then President of the EAT, held that S.15 laid down a two-stage approach: first, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be 'because of' that 'something'. Simler P agreed with Langstaff P's observation that, while the words 'arising in consequence of' may give some scope for a wider causal connection than the words 'because of', the difference, if any, will in most cases be small. She rejected C's argument that a connection less than an operative cause or influence is sufficient to satisfy the causation test. A 'significant' influence is required, not a mere influence. The EAT's approach in Hall clearly required an influence or cause that operates on the mind of a putative discriminator, whether consciously or subconsciously, to a significant extent, and so amounts to an effective cause. On this analysis, there was no conflict between Hall and Weerasinghe.

Simler held as follows:

The Tribunal was entitled to ask whether the Claimant's absence, which it accepted arose in consequence of his disability, was an effective cause of the decision to dismiss him. To put that question another way, as this Tribunal did, was the Claimant's sick leave one of the effective causes of his dismissal?

The Tribunal accepted that there was a link between the Claimant's absence through illness and the fact that he was dismissed, the link being that his absence afforded the Respondent an opportunity to observe the way in which the work was dealt with and threw into sharp relief their ability to manage without anybody fulfilling his role of Rotherham Branch Manager. Nevertheless, the Tribunal went on to say that was not the same as saying that the Claimant was dismissed because of his absence. This is a case where on the facts found by this Tribunal it felt able to draw a distinction between the context within which the events occurred and those matters that were causative. No doubt there will be many cases where an absence is the cause of a conclusion that the employer is able to manage without a particular employee and in those circumstances is likely to be an effective cause of a decision to dismiss even if not the main cause. ***But that does not detract from the possibility in a particular case or on particular facts, that absence is merely part of the context and not an effective cause****.*

Commentary: The EAT's decision clarifies and reaffirms previous EAT decisions on discrimination arising from disability. This is a useful decision for employers, who might simply have assumed that making an employee redundant due to a reason connected with a disability-related absence would always constitute discrimination arising from disability. It is important to remember that the mere fact that a disability-related reason forms part of the background facts is not sufficient to found a s15 claim- the disability-related issue must an effective or operative cause of the treatment relied upon. It is easy to envisage that a similar scenario may also arise in the context of an employee on maternity leave if other staff absorb her duties and cope well in her absence. However, in that case, she would have first refusal of any suitable alternative work which is available.

If an employee working night shifts is required to 'sleep in' at the premises, are they entitled to NMW for this time? It depends, says the EAT in 3 conjoined appeals: Focus Care Agency Ltd v Roberts UKEAT/0143/16/DM; Frudd v The Partington Group Ltd UKEAT/0244/16/DM; and Royal Mencap Society v Tomlinson-Blake UKEAT/0290/16/DM.

These 3 appeals were heard together as they raised the same broad issue, namely whether employees who 'sleep-in' in order to carry out their duties engage in 'time work' (within the meaning of Regulation 30 of the NMW Regulations 2015) for the full duration of the sleep-in shift or whether they are working for NMW purposes only when they are awake to carry out the relevant duties.

Regulation 7 provides that in order to determine if one has been paid the NMW, the total remuneration in the relevant period is to be divided by the number of hours worked.

Regulation 17 sets out that there are 4 types of work:

(i) Salaried hours work;
(ii) Time work;
(iii) Output work; and
(iv) Unmeasured work.

Only time work was relevant in these cases. Time work is defined in regulation 30:

Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid—

(a) by reference to the time worked by the worker;

(b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or

(c) for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.

In other words, it relates to work whereby a worker is paid by reference to the number of hours worked OR work paid for by reference to a measure of output (e.g. £4 per widget produced).

Regulation 32 sets out which time is to be counted towards 'time work' in circumstances where *'worker is available at or near a place of work'*:

(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.

(2) In paragraph (1), hours when a worker is "available" only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.

In other words, work time is when a worker is 'available and required to be available' UNLESS they are entitled to be at home or near work OR allowed to sleep, and suitable facilities are provided. On the face of it therefore, the regulations seem to suggest that if you work in say a care home and sleep overnight, you are not entitled to NMW unless you are actually awake and dealing with an issue that has arisen.

However, it is unfortunately not that simple, as a distinction is drawn between when one is working, contrasted with when one is available for work. Mrs Justice Simler considered that the first question to be determined by reference to reg 30 was whether, even in periods where a worker is permitted to sleep, they are nevertheless 'working' by being present. She said that if one was 'working' within the meaning of reg 30, then reg 32 is not engaged at all. Unsurprisingly counsel for the employers argued that this rendered reg 32 redundant. This was rejected, and it was found that reg 32 covers cases such as where a pub worker lives above a pub but is free to come and go as they please, so long as they sleep there, as they clearly were not 'working' during the night yet were nonetheless required to be available.

She also pointed out that if the employer's argument were accepted, this would lead to practical difficulties. For example, if a night watchman with no specific duties was allowed to sleep during the night, they would not be entitled to the NMW for that whole period, merely the period when they were awake and dealing with an issue that arose. Reference was made to a helpful example provided by Buxton LJ in the Court of Appeal case of British Nursing Association v Inland Revenue [2003] ICR 19:

> **"12. No one would say that an employee sitting at the employer's premises during the day waiting for phone calls was only working, in the sense of only being entitled to be remunerated, during the periods when he or she was actually on the phone. Exactly the same consideration seems to me to apply if the employer chooses to operate the very same service during the night-time, not by bringing the employees into his office (which would no doubt impose substantial overhead costs on the employer and lead to significant difficulties of recruitment), but by diverting calls from the central switch board to employees sitting waiting at home. ……."**
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> **"13. That in the event there may during the middle period of the night be few calls to field is nothing to the point. It is for the employer to decide whether it is economic and necessary to his business to make the facility available on a 24-hour basis. If he does so decide, it is the availability of the facility, not its actual use, that is important to him; and that is what he achieves by the working arrangements described in this case."**

The EAT noted that the distinction made in the previous authorities was between cases where :

(i) an employee is working merely by being present on the employer's premises, in which case NMW is due; and
(ii) the employee is provided with sleeping accommodation and is simply on-call and thus not entitled to NMW.

Whilst recognising the fact that there are criminal sanctions and financial penalties applicable where there is a breach of the regulations, such that it would be helpful for employers if a clear and obvious distinction could be drawn between which cases fell on either side of the line, Mrs Justice Simler declined to put forward such a test, finding that '*this is a particularly fact sensitive area and in applying the words of Regulation 30, it seems to me, as Mr Jones submits, there is a* ***necessarily multifactorial evaluation to be conducted****.'*

On one side of the line where NMW is applicable there are cases where someone may be 'working by being present' but have very little to do (e.g. answering a phone which rarely rings). On the other side are cases in which workers are required to spend the night, such as a pub manager or a house keeper, who were found not to qualify.

Mrs Justice Simler then set out the approach that ought to be taken.

The first step is to consider whether an individual is 'working' (as opposed to merely being available to work). Whether one is working requires a consideration of the contract, along with the nature of the engagement and the work required to be carried out. She said '*the fact that an employee has little or nothing to do during certain hours does not mean that he or she is not working. Regulation 30 is not to be equated with any particular level of activity. An employee can be working merely by being present even if they are simply required to deal with something untoward that might arise, but are otherwise entitled to sleep and even where an employee has never had to wake and deal with an untoward matter'.*

She stated that a number of factors will potentially be relevant, and no one single factor is determinative. The following are potentially relevant:

(i) The employer's particular purpose in engaging the worker: for example, if the employer is subject to a regulatory or contractual requirement to have someone present during the particular period the worker is engaged to be present (e.g. in a care home);
(ii) The extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer may be relevant e.g. the extent to which the worker is required to remain on the premises on pain of discipline if he or she slips away to do something else e.g. pub landlord is allowed to leave the premises;
(iii) The degree of responsibility undertaken by the worker may be relevant for example, a limited degree of responsibility in sleeping in at the premises to call out the emergency services in case of a break-in or a fire on the one hand, and a night

sleeper in a home for the disabled where a heavier personal responsibility is placed on the worker in relation to duties that might have to be performed during the night;

(iv) The immediacy of the requirement to provide services if something untoward occurs or an emergency arises may also be relevant. In this regard, it may be relevant to determine whether the worker is the person who decides whether to intervene and then intervenes when necessary, or whether the worker is woken as and when needed by another worker with immediate responsibility for intervening.

Reg 32 only comes into play if the tribunal decided that the employee was not working by being present.

Going through then the facts of the 3 cases which illustrate the test as laid down:

(i) Focus Care Agency Ltd v Roberts

Facts: R provided a supported living service to its users. During the night there are 2 workers- the "waking night worker" who has primary responsibility for the service user and is required to be awake at all times, and the "sleep-in night worker", who is employed to assist with any emergency that might arise and is provided with facilities for sleeping. The issue surrounded the latter work. R's case was that when C was interviewed, he would have been told that he would be paid £25/night for this shift. However this was not set out in the contract, which simply stated that beyond the normal weekly hours (36), overtime was paid at £7.15/hour. C was paid £25/shift and did not raise any issues until he was dismissed.

ET: The Tribunal found that the sleep-in night worker was required to be on the premises at all times. It also found as the terms did not reflect a different rate, the whole time constituted work and attracted an hourly rate. Reliance was also placed on the fact that R was required to provide 2 people to be on the premises at any time. It was also found that C was entitled to the NMW during the night shifts.

EAT: the ET was entitled to conclude that the contractual terms applied, regardless as to what was said at interview, as the contract explicitly stated that it *'supersedes any earlier written or oral arrangement'*. R argued that given the circumstances, there was an agreed change to the terms by conduct. The EAT disagreed, and also agreed that there was no waiver of rights. Although unnecessary (as C succeeded on contractual arguments), the EAT considered the third ground of appeal, namely that the ET erred in finding that NMW was payable. It was found that the ET failed to carry out the multifactorial evaluation, and relied only on the assumption that the worker was required to be present throughout the night.

(ii) Frudd v Partington Group Ltd

Facts: The claimants were on-site wardens at a caravan park where they lived. They had a written contract which required them to reside on the premises in caravan accommodation provided to them. Their contract provided that they were required to be on-call to deal with

requests for assistance after their shift finished at either 5 or 8pm until 8am the next day. They were paid a flat-rate per call-out whilst on call at night in respect of emergencies.

ET: The Tribunal had held that during the night shifts they were not working, they were simply available for work, and thus were only entitled to NMW whilst awake and working as the exception in regulation 32 of the 2015 Regs applied, namely that it is not 'time work' if an employee is at home.

EAT: the case was remitted to the tribunal as it was found that the judge failed to apply the multifactorial approach, and simply decided that the case fell on the Shannon side of the line. In particular, he did not address R's purpose for employing the claimants, whether they were required to be present throughout the shift to fulfil an obligation, or the extent of their responsibilities during the sleep-in shift. He also did not make express findings as to whether they were obliged to remain on site throughout the shift.

(iii) Royal Mencap Society v Tomlinson-Blake

Facts: The claimant was a care support worker for 2 men (who live in a privately owned property) with autism and substantial learning difficulties. Their care and support plan requires 24 hour support. The workers either work a day shift or a sleep-in shift.

C's work pattern was either from 10am to 10pm or 3pm to 10pm. She would then work the following morning from 7am to 10am or 7am to 4pm. For these hours she received a salary. For the 'sleeping shift', C received a flat rate of £22.35 together with 1 hour's pay.

During the sleeping shift, no specific tasks were allocated, but she was obliged to keep a listening ear out in case she was needed and was expected to intervene where necessary (e.g. if the men became unwell or distressed). She was only required to intervene on 6 occasions over the preceding 16 months. If she was required to provide care for longer than an hour, she was entitled to additional payment.

R argued that the obligation was simply to be "available", she was not working, and thus reg 32 applied.

ET: The tribunal had held that the whole of the sleep-in shift was time work and the claimant was, therefore, entitled to NMW. They found that despite the fact she did little work during this period, she was required to be there both for the proper performance of her duties and to enable R to comply with legal obligations. C would be disciplined if she left the premises. This was far removed from the situation in which an individual could do what they pleased provided that they remained contactable.

EAT: upheld the ET's decision. The ET carried out the correct multifactorial evaluation and relied on all of the relevant factors.

Comment: This judgment is no doubt of great concern to employers who use sleep-in workers, where there had been hope that the Employment Appeal Tribunal might row back from what seems to be the current trend of sleep-ins constituting working time. Increasingly it looks as though many employers will need a radical reconsideration of their sleep-in and pay arrangements in order to be NMW compliant. From this perspective, it is – at least - helpful that the Employment Appeal Tribunal have comprehensively addressed and summarised the key factors to be taken into account.

The issues raised in the Focus Care case also serve as a salient warning to employers to ensure that their employment terms do not inadvertently create entitlements to pay over and above National Minimum Wage.

Where an employee works in more than one EU state, the employment contracts fall within the jurisdiction of the country where, or from which, the employee principally carries out their obligations: ***Nogueira and others v Crewlink Ltd C-168/16; Moreno Osacar v Ryanair, formerly Ryanair Ltd C-169/16***

Facts: Six cabin crew employed by Crewlink and assigned to work for Ryanair out of Charleroi airport in Brussels, brought claims in the Belgian courts for unpaid wages, overtime pay and severance pay. The employers argued that the Belgian courts had no jurisdiction and that the Irish courts must determine the claims.

Under the Brussels Regulation 2001, there are special regulations determining the jurisdiction where employment claims can be brought. Article 19 provides that:

An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

(a) in the courts for the place where the employee ***habitually carries out his work*** *or in the courts for the last place where he did so, or*

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Both Crewlink and Ryanair are Irish companies and their registered office is in Ireland. The employment contracts of the cabin crew were in English and were stated to be governed by Irish law and conferred jurisdiction on the Irish courts. However, the employment contracts stated that the employees' homebase, where they would start and finish work, was Charleroi airport in Brussels and the employees were required to live within an hour of the airport.

At first instance the labour court in Charleroi held that the Belgian courts did not have jurisdiction to hear the claims. The claimants appealed and the Mons Higher Labour Court in Belgium referred the question to the ECJ as to how "*the place where the employee habitually carries out his work*" should be interpreted for mobile workers in the international air transport sector.

The Advocate General: was of the view that "the place where the employee habitually carries out his work" is the place where, or from which, the employee principally carries out his obligations for his employer. In deciding this, the court should take into account a number of factors:

- the place where the employee starts and ends his working day (which was of overriding importance)
- the place where the aircraft on which he carries out his work is habitually based
- the place where the employee is made aware of instructions communicated by his employer and organises his working day
- the place where he is contractually required to live
- the place where an office made available by the employer is situated
- the place where the employee would attend if unfit for work or in the event of disciplinary problems.

It is for the Belgian courts to apply the factors and reach their own view. However, in the Advocate General's opinion, the Belgian courts should have jurisdiction as the factors "unequivocally designate the courts of the place where Charleroi airport is situated". Whether the employees were employed by Crewlink or Ryanair was not relevant and nor was the nationality of the aircraft in determining where the cabin crew habitually carried out their work.

Commentary: It remains to be seen whether the ECJ will follow this opinion but it serves as a reminder that express jurisdiction clauses can be overridden by the facts.

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