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Employment Law BULLETIN

Welcome to our April employment law bulletin.

There are a number of interesting cases to report this month.

In *Wasteney v East London NHS Trust* the EAT rejected a claim for religious discrimination brought by a claimant who had been disciplined for improperly pressurising a junior colleague (who was of Muslim faith) to convert to Christianity. The discipline was not for manifesting a religious belief, which would be unlawful discrimination. The discipline was for improperly promoting a religious belief in a way that was not consensual and which took advantage of someone in a subordinate relationship.

Private Medicine Intermediaries Ltd and others v Hodkinson highlights the problem employers face when attempting to contact an employee who is away on sick leave. In this case the EAT upheld an employment tribunal's finding that the employer had committed a fundamental breach of contract by sending a letter to an employee known to be very ill, dealing with performance concerns which were not pressing and/or had already been dealt with. This was a breach of the implied obligation of mutual trust and confidence and the employee was entitled to claim constructive dismissal as a result.

There are two interesting cases on whistleblowing in the EAT. In *Morgan v Royal Mencap Society* the EAT refused to endorse the striking out of a claim by an employee who believed that her complaints to her employer about her cramped working conditions were in the public interest. For a whistleblowing complaint to succeed, it must be established that the employee reasonably believed the disclosure concerned was in the public interest. Here, as the claimant worked for a well known charity, she asserted that the public should know how employees were treated by that employer. This might seem ambitious and the matter has been remitted to the employment tribunal for a full hearing. But it illustrates how, pending a review of this area by the Court of Appeal in the forthcoming *Chesterton Global Ltd v Nurmohamed* case, the courts are currently unwilling to strike out employees' complaints about their own terms and conditions notwithstanding the public interest requirement.

In *Kilraine v London Borough of Wandsworth* the EAT looked at the distinction between mere allegations, on the one hand, and, on the other, statements which are disclosures of information for the purposes of whistleblowing protection. The EAT ruled that a disclosure that was merely an allegation and contained no specific information could not be a protected disclosure. However the EAT warned employment tribunals against falling into the trap of thinking that a disclosure is either an allegation or information. Disclosures could often be a combination of the two. Thus the question is whether the disclosure contains information (in other words conveys facts). If it does, even if it also contains allegations, it may qualify as a protected disclosure.

In *Bartholomews Agri Food Limited v Thornton* the High Court declared that a restrictive covenant which was unenforceable at the time it was entered into between the employer and employee remained unenforceable 20 years later. Restrictive covenants should be drafted with a view to enforceability at the time they are entered into. And if circumstances change they should be regularly reviewed and renegotiated.

In *Gallop v Newport City Council* the EAT considered whether a decision to dismiss was direct discrimination on the ground of disability when there was no evidence that the manager taking the dismissal decision knew that the employee was disabled. The EAT confirmed that direct disability discrimination can only take place where the decision maker has actual knowledge of the claimant's disability and that disability is a conscious or subconscious reason for the decision. The knowledge of another employee or agent of the employer such as, in this case, an occupational health adviser could not be imputed to the decision maker.

In *Governing Body of Binfield Church of England Primary School v Roll* the EAT considered (albeit inconclusively) the case of a site controller at a primary school required to be available in between shifts, during the night and at weekends in order to respond to emergencies. He claimed he was required by his contract to live on site to be available 24 hours a day, 7 days a week and that he was working all of this time for the purposes of the national minimum wage. The EAT returned the case to the employment tribunal to analyse closely whether the employee was allowed to leave the site without permission, whether he could be away from his accommodation over the weekend and whether his presence on site was fulfilling any statutory obligation of the School to have someone present on site. These are the issues that need to be considered in deciding whether the NMW is payable for someone sleeping over or required to be on duty outside of normal shifts.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

Employment Law Update for Charities

- Our full day Annual Conference, **Leeds**, 16th June 2016

And in conjunction with ACAS

Understanding TUPE: A practical guide to business transfers and outsourcing

- A full day conference, **Leeds**, 13th May 2016

Understanding TUPE: A practical guide to business transfers and outsourcing

- A full day conference, **Newcastle-upon-Tyne**, 9th June 2016

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Contents

1: Christian proselytising and discrimination

2: Contacting an employee on sick leave: a breach of trust and confidence

3: Whistleblowing: the public interest test

4: Whistleblowing: qualifying disclosure

5: Restrictive covenant which was unenforceable at the time it was agreed to remained unenforceable 20 years later

6: Dismissal cannot be direct disability discrimination if dismissing officer was unaware of disability

7: National Minimum Wage: on call and sleep in requirements

Wherever you see this logo more detail is available on the BAILII website

1: Christian proselytising and discrimination

Was disciplinary action against an employee for improperly promoting Christianity to a junior colleague unlawful religious discrimination?

No said the EAT in *Wasteney v East London NHS Trust*.

Ms Wasteney is a Christian. Complaints were made by a junior worker of Muslim faith about her behaviour. The complaints related to various interactions with Ms Wasteney which the complainant employee characterised as “grooming”. This included Ms Wasteney’s praying with the junior worker, the laying on of hands, giving her a book which concerned the conversion to Christianity of a Muslim woman and inviting her to various services and events at Ms Wasteney’s church. This was unwanted attention.

These complaints were investigated and the Trust found Ms Wasteney guilty of serious misconduct by blurring professional boundaries and subjecting a junior colleague to improper pressure and unwanted conduct. She was given a formal warning. Ms Wasteney claimed unlawful religious discrimination and harassment.

The employment tribunal rejected those claims and the EAT agreed.

There was a distinction to be drawn between merely manifesting a religious belief, discipline for which would be unlawful discrimination; and on the other hand, disciplining someone for improperly promoting a religious belief in a way that was not consensual, and which took advantage of someone in a subordinate relationship, which was not unlawful discrimination because of religion or belief.

Nor did Article 9.1 of the European Convention on Human Rights (freedom of thought, conscience and religion) assist Ms Wasteney. This was qualified by Article 9.2 (the rights and freedoms of others). So that did not, said the ET (with which the EAT agreed), give Ms Wasteney "a complete and unfettered right to discuss or act on her religious beliefs at work irrespective of the views of others or her employer".

In rejecting Ms Wasteney's claims, said the EAT, the employment tribunal approached its task correctly and provided proper and adequate explanation of its reasons.

2: Contacting an employee on sick leave: a breach of trust and confidence

In ***Private Medicine Intermediaries Ltd and others v Hodkinson***, the EAT ruled that an employer who had written to a disabled employee during sick leave had committed a fundamental breach of contract and the employee's resignation triggered a constructive dismissal. However, it set aside findings that the letter was harassment or discrimination in consequence of something arising from disability.

Under the Equality Act 2010, harassment occurs where someone engages in unwanted conduct related to a protected characteristic and that conduct has the purpose or effect of violating the victim's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim. It will also be discriminatory to treat someone unfavourably because of something arising from an employee's disability if the treatment cannot be objectively justified.

Miss Hodkinson was a sales director for Private Medicine Intermediaries Ltd (PMI). Her employer accepted that her thyroid condition and cardiac arrhythmia meant that she was disabled for the purposes of the Equality Act.

During a period of sick leave for work-related depression and anxiety (and not related to her disability), Miss Hodkinson made clear that she was too unwell to communicate with her employer without breaking down. PMI subsequently wrote a letter to Miss Hodkinson referring to action taken in regard to complaints she had made about her managers. The letter also referred to six areas of concern the employer had about her performance and conduct, all of which had been brought to her attention previously.

Miss Hodkinson resigned and brought claims for constructive dismissal, disability-related harassment, discrimination arising from disability and a failure to make reasonable adjustments. An Employment Tribunal found that the claimant had been constructively dismissed, stating that PMI should have known that the letter would cause Miss Hodkinson distress. It also upheld her claims for harassment and discrimination arising from disability but dismissed her reasonable adjustments claim.

The EAT did not agree that the employee had suffered disability-related harassment as the unfavourable treatment (sending the letter) was not found to have been related to her disability but to her depression and anxiety. Neither did it agree that the letter was unfavourable treatment in consequence of something arising from her disability as, amongst other things, the letter did not pose Miss Hodkinson any form of disadvantage or hurdle.

However, the EAT upheld the tribunal's finding that the employer had committed a fundamental breach of contract by sending the letter when the employee was known to be very ill and when the performance concerns set out in that letter were not pressing and/or had already been dealt with. The EAT agreed that this was a breach of the implied obligation of mutual trust and confidence and that Miss Hodkinson had been constructively dismissed as she had resigned in response to the breach.

This case highlights the need for employers to act with caution when contacting employees on sick leave with concerns about their performance or conduct at work, particularly if the employer is aware that contact with the employer may aggravate the employee's illness. It may also be advisable to deal with grievance-related issues before any parallel capability or disciplinary issues rather than combining them within the same communication.

3: Whistleblowing: the public interest test

In ***Morgan v Royal Mencap Society*** the EAT overturned a strike out decision, finding that an employee could reasonably have believed that her complaints to her employer about her cramped working conditions were in the public interest.

This is the second appellate decision since the decision in *Chesterton Global Ltd v Nurmohamed* UKEAT/0335/14, to find that a small number of affected employees might constitute a sufficient sub-set of the public for the claimant to have a reasonable belief that disclosures concerning an employee's own working conditions are made in the public interest. However, it should be noted that both of these cases have been remitted to the Employment Tribunal for a full hearing and that the claimants' disclosures may ultimately not be found to have met the public interest test.

Ms Morgan worked for the Royal Mencap Society. She raised verbal and email complaints to her managers regarding the aggravation of a knee injury due to her cramped desk space and seating.

She resigned from the role and brought claims for constructive dismissal, automatically unfair dismissal and detriments because of her alleged protected disclosures about health and safety.

In her additional particulars of claim, Ms Morgan stated that: "the public should know exactly how some of these charities treat [their] employees, and the type of charity they are financially supporting" and that her disclosures were made in the public interest because she felt her working environment "presents a threat to the health and safety of others".

At a preliminary hearing in the Employment Tribunal, the whistleblowing-related claims were struck out as having no reasonable prospect of success. On appeal, the EAT overturned the strike out and remitted the case to a full hearing before a different employment judge.

Following *Chesterton*, the EAT found that it was arguable that Ms Morgan, even though she was the principal person affected, reasonably believed the complaints were in the interests of other employees of the charity and/or of the wider public. It commented that, as with discrimination claims, it will rarely be appropriate for a tribunal to strike out a whistleblowing claim since evidence of the reasoning behind the employer's decisions will usually need to be tested.

The EAT made reference to the debate in the House of Commons during the passage of the Public Interest Disclosure Bill during which the Minister referred to instances where "in a worker's complaint about a breach of their own contract, the breach itself might have wider public interest implications". This case could be seen as going one step further than that of *Underwood v Wincanton plc* UKEAT/0163/15 which followed *Chesterton* and in which a complaint relating to four employees was found to have the potential to qualify as a protected disclosure. It seems that, at least until the appeal of *Chesterton* is heard in October, tribunals will be unlikely to strike out whistleblowing claims based on an employee's complaints about their own terms and conditions.

4: Whistleblowing: qualifying disclosure

In ***Kilraine v London Borough of Wandsworth***, the EAT has commented on how tribunals should treat whistleblowing disclosures which are a combination of information and allegation.

Ms Kilraine was an Education Achievement Project Manager employed by Wandsworth local council. The case concerned three disclosures which the claimant had made over a number of years. One of these concerned the way a school had responded to a health and safety issue she had raised. Another consisted of a complaint that she was being bullied and harassed at work. And a third concerned her line manager's failure to support her when she raised a safeguarding issue. Ms Kilraine was suspended during a disciplinary investigation into whether she had made unfounded allegations against colleagues. She was made redundant while still suspended.

The Employment Tribunal dismissed some of her claims on the basis that the disclosures were allegations and not disclosures of information. In this it followed *Cavendish Munro Professional Risks Management Ltd v Geduld* UKEAT/0195/09 which stated that protected disclosures must contain information (in other words must convey facts) rather than just voicing concerns or raising allegations.

The EAT rejected Ms Kilraine's appeal. It ruled that one of the disclosures was merely an allegation and contained no specific information. It also held that the claimant had not been suspended on the ground that she had made a protected disclosure and that there was no obvious breach of a legal duty by Ms Kilraine's line manager.

However, the EAT warned tribunals against falling into the trap of thinking that a disclosure is either an allegation or information: disclosures will often be a combination of the two. A tribunal should ask the question: does the disclosure contain information (in other words convey facts)? If it does, even if it also contains allegations, it may qualify as a protected disclosure.

5: Restrictive covenant which was unenforceable at the time it was agreed to remained unenforceable 20 years later

In ***Bartholomews Agri Food Limited v Thornton***, the High Court has refused an application for an interim injunction on the grounds that the restriction was in restraint of trade at the time the contract of employment was entered into and, even judged at the time of the application, was far wider than was reasonably necessary to protect the legitimate business interests of the employer.

Mr Thornton began work for Bartholomews in 1997, initially as a trainee agronomist and later as a qualified agronomist. His role was to advise farming clients on such matters as crop rotation, seed choice and soil condition. He resigned in December 2015 and intends to take up a new role with a retailer supplying seeds to farming customers, commencing after his 3 month notice period has been served.

Bartholomews sought an interim injunction to enforce the terms of a non-dealing restrictive covenant set out in the written agreement entered into by Mr Thornton in 1997.

The High Court refused the application. Following *Pat Systems v Neilly* [2012] IRLR 979, it found that the covenant was not enforceable at the time the contract was entered into and remained so regardless of the passage of time and the more senior position of the employee at the time the employer sought to enforce it. In 1997, Mr Thornton had no experience or customer contacts and the court ruled that it was "manifestly inappropriate" to impose the restriction on a junior employee.

The court also ruled that the covenant would have been too wide to be enforceable if it had been more recently entered into as it went further than was reasonably necessary to protect

Bartholomew's legitimate business interests. The covenant restricted the employee from dealing with any customer of the employer for six months following termination, regardless of whether the employee had personally dealt with those customers. The court stated that, as Mr Thornton dealt personally with customers representing less than 2% of the turnover of the business, it would have been wrong in any event to impose this restriction.

Employers will be aware that non-dealing restrictive covenants are more likely to be enforceable if they relate to the particular customers dealt with by the employee within a limited time period before termination. This case is also a reminder that restrictive covenants should be relevant to the seniority and position of the employee in question at the time they are entered into and that they should be reviewed regularly to ensure that they protect the actual risks to the business when that employee moves on. Employers should note that it is advisable to offer consideration to an employee when entering into new restrictive covenants.

6: Dismissal cannot be direct disability discrimination if dismissing officer was unaware of disability

In ***Gallop v Newport City Council***, the EAT considered whether a decision to dismiss was direct discrimination on the ground of disability when there was no evidence that the manager making the dismissal decision shared the occupational health adviser's knowledge that the employee was disabled.

Mr Gallop was employed as a technical officer by Newport City Council. He had several periods of absence from work due to work-related stress. While off sick, he was suspended on allegations of misconduct involving bullying colleagues. Following this, Mr Gallop's colleagues refused to work with him and he was dismissed by Mr Davison in May 2008.

Mr Gallop brought an unfair dismissal claim and various discrimination claims under the Disability Discrimination Act 1995. The Employment Tribunal found that he had been unfairly dismissed but dismissed the discrimination claims. The case then progressed to the EAT and the Court of Appeal and was remitted back to another Employment Tribunal, only to be appealed once again.

In the current appeal to the EAT, it was decided that direct discrimination could not have taken place because no evidence had been found that Mr Davison had actually known about Mr Gallop's disability and so his decision to dismiss could not have been on the ground of that disability.

The EAT clarified that direct disability discrimination only takes place where the decision maker has actual knowledge of the claimant's disability and the disability is a conscious or subconscious reason for the decision. The knowledge of another employee or agent of the employer, such as an occupational health adviser, cannot be imputed to the decision maker.

It is important to note that, in contrast to a direct discrimination claim, a reasonable adjustments claim may be founded on the "constructive" knowledge of the employer. In such a case, even if there is no evidence that the employer actually knew of the disability, the tribunal might decide that the employer could have reasonably been expected to know about it and that the duty to make reasonable adjustments did therefore arise.

7: National Minimum Wage: on call and sleep in requirements

In ***The Governing Body of Binfield Church of England Primary School v Roll***, the EAT has remitted a claim for unauthorised deductions from wages under the National Minimum Wage Regulations 1999 (the Regulations) back to the Employment Tribunal.

Recent case law has shown that workers on a "sleep-in" shift may be found to be actually working for the purpose of the Regulations (and so be entitled to have all sleep-in hours taken into account when calculating if the NMW is being paid) if their presence fulfils a legal obligation of the employer and if it would be a disciplinary matter if they were found to be away from the premises. Otherwise, if workers are at home or provided with somewhere to sleep, they will only be working at those times when they are awake and responding to a call.

The case concerned Mr Roll who was employed as a site controller at a primary school. Mr Roll was contracted to work 39 hours a week with 2 hours' regular overtime. He worked a morning shift and an afternoon/evening shift from Monday to Friday. He was also required to be available between these shifts, during the night and at weekends to respond to emergencies. He was given subsidised accommodation on the school site and his presence on site acted as a deterrent to intruders.

Mr Roll claimed that he was required by his contract to live on site and to be available 24 hours a day, 7 days a week. He stated that he was actually working for the whole of this time for the purposes of the Regulations, regardless of whether he was at home or carrying out tasks under his contract. The Employment Judge agreed with this analysis and awarded him £81,532.37.

In remitting the case back to the Employment Tribunal, the EAT paid particular attention to the Employment Judge's analysis of the written and oral terms of Mr Roll's employment contract and the evidence presented to supplement these terms. The EAT held that the Employment Judge had failed to take into account facts found by the tribunal including the following: Mr Roll was allowed to leave the school site outside his core shift hours (as long as he did not go too far away); he was able to attend social functions away from the site; if he gave 14 days' notice, he could be away from his accommodation over the weekend; his presence on site was not fulfilling any statutory obligation of the school to have someone present on site; and Mr Roll was not in fact disciplined for being off site outside his shifts (although he may have been disciplined for not responding to emergency calls).

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