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EMPLOYMENT AND APPEALS COMMITTEE
Friday, 15th June, 2018

The use of Welsh by participants is welcomed. If you wish to use Welsh please inform us by noon, two working days before the meeting

S U P P L E M E N T A R Y P A C K

1.	**EMPLOYMENT LAW UPDATE**

To receive an update on employment law.
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Employment Case Law Update June 2018

Employment Committee

Zero-hours lecturer employed on same type of contract as permanent, full-time lecturer

Mr Roddis was employed by Sheffield Hallam University (the University) on a zero-hours contract as a part-time associate lecturer. He brought a claim under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (*SI 2000/1551*) (PTW Regulations), seeking to compare himself to a permanent full-time lecturer. At a preliminary hearing, an employment tribunal held that he had not identified a valid comparator, on the basis that the two individuals were not employed under the same type of contract, as required by Regulation 2(4)(a)(i) of the PTW Regulations. This was overturned on appeal, with the EAT holding that Mr Roddis and his comparator were both employed under the same type of contract. They were both employees employed under a contract of employment.

The EAT applied the guidance set out in *Matthews v Kent & Medway Towns Fire Authority [2006] UKHL 8*. It made clear that whether a comparator is working under the same type of contract is determined by Regulation 2(3), which sets out four types of contract that are regarded as different to one another. The categories are broadly defined; provided the worker and comparator answer to the same description in one of the categories, they are to be regarded as employed under the same type of contract. There are not yet examples of what type of contract falls into the fourth, residual category but zero-hours contracts were not a type of contract for these purposes.

> A contract is not of a different type just because the terms and conditions it lays down are different. If a part-time worker's hours were seen as a distinctive feature of dissimilarity compared to that of a full-time worker, it would defeat the purpose of the legislation.

> The tribunal had erred in considering the ECJ case of *Wippel v Peek & Cloppenburg GmbH [2005] IRLR 211* to support the conclusion that a valid comparator had not been made out (further, *Wippel* concerned the Framework Directive, not the PTW Regulations).

The correct approach to the question of whether contracts are of the same type was set out in *Matthews*.

Sex discrimination

In *McNeil and others v HM Revenue & Customs UKEAT/0183/17*, a group of female employees, who claimed to have suffered indirect discrimination regarding their pay, appealed against a preliminary decision that a distribution analysis showing that women were clustered at the lower end of the pay scales while men were clustered at the higher end was not enough to establish that the women were at a particular disadvantage within the meaning of section 69(2) of the Equality Act 2010 when compared with their male comparators.

Union obtains declaration that shift pattern contravened daily rest entitlement under WTR 1998

South Yorkshire Fire and Rescue Authority (the Authority) operated a shift pattern at some fire stations known as "close proximity crewing" (CPC). CPC entailed a four-day shift, being on call at night. This all counted as working time, amounting to a continuous period of 96 hours. The Fire Brigade Union (FBU) brought an application for judicial review, seeking a declaration that the CPC shift pattern breached rest entitlements under the Working Time Regulations 1998 (*SI 1998/1833*) (WTR 1998) (see *Practice notes, Working Time Regulations: rest periods and rest breaks* and *Working Time Regulations: night work*).

A witness for the Authority admitted that the CPC shift pattern breached the right to a daily rest period of 11 consecutive hours in each 24-hour period of work (*regulation 10, WTR 1998*). The Authority sought to rely on an exemption for shift workers changing from one shift pattern to another (*regulation 22(a)*) but the court disagreed, finding that CPC involved one continuous shift and that, furthermore, the necessary compensatory rest had not been offered.

The High Court granted a declaration that the CPC shift pattern was contrary to the firefighters' rights under regulation 10. The court was sympathetic to the budgetary constraints faced by the Authority (which the CPC shift pattern helped to tackle) but this

could not override the clear breach of the statutory daily rest entitlement. Furthermore, a declaration was appropriate because the Authority had clearly decided to operate the CPC shift pattern in the knowledge that it was unlawful, and despite a previous employment tribunal finding to that effect.

The FBU also sought relief in respect of breaches of the limits on night working contained in regulation 6 of the WTR 1998. The court found that the CPC shift pattern exceeded those limits. However, it declined to grant relief because the primary method of enforcement of regulation 6 was in criminal law. It would not be right to declare the Authority in breach in the absence of safeguards including the formulation of a specific charge, the presumption of innocence, the burden of proof and the criminal standard of proof.

This is a useful decision for advisers dealing with public bodies. It highlights the circumstances in which, unusually, judicial review proceedings could be brought in respect of private law employment rights.

Case: *R (on the application of Fire Brigades Union) v South Yorkshire Fire and Rescue Authority [2018] EWHC 1229 (25 May 2018)*

Court of Appeal clarifies 'final straw' test in Constructive Dismissal cumulative breach cases

Kaur v Leeds Teaching Hospital

Ms Kaur (K) was a nurse at the Leeds Teaching Hospital NHS Trust (the Trust). In January 2015, she brought claims of constructive unfair dismissal, relying on a 'final straw' but her claims were struck out at a preliminary hearing, and the appeal against the dismissal was subsequently dismissed at the EAT. The Court of Appeal considered, amongst other issues, how cumulative breaches are to be taken into account.

The Court of Appeal found that the employment judge had been entitled to strike out the claim for constructive unfair dismissal as having no reasonable prospect of success. Mrs Kaur argued that the respondent’s instigation, handling and outcome (a final written warning, upheld at internal appeal) of its disciplinary process following her altercation with a colleague, was unreasonable such that it amounted to a repudiatory breach of the implied term of mutual trust and confidence. The Court of Appeal agreed with the employment

judge's striking out of this claim in which he endorsed the respondent's decisions and handling of the disciplinary processes.

Clarification of the law of constructive dismissal

It is well established that a series of acts, which may not individually amount to breaches of contract, can, when taken together, amount to a breach of the implied term of trust and confidence. By its very nature, a cumulative breach case of this type means that the 'final straw' itself may be relatively insignificant and may not always be unreasonable or 'blameworthy'. However, the last incident cannot be utterly trivial or innocuous, and it must contribute something to the breach.

Where an employee 'soldiers on' when the employer's behaviour crosses the threshold, so as to become capable of amounting to a repudiatory breach of contract, the employee will have affirmed the contract. Ordinarily, this means that the employee loses the right to resign in relation to the breach and claim constructive unfair dismissal.

However, the lord justices in this case confirmed the crucial proviso for constructive dismissal, that in a cumulative breach case, further contributory acts effectively 'revive' the employee's right to rely upon the whole series of acts, notwithstanding the earlier affirmation(s). An employee, in such cases, is able to resign and claim constructive unfair dismissal, so long as the resignation is in response to an act which is capable of contributing to the cumulative breach.

The court also confirmed its view that:

- The trust was entitled to proceed with the appellant's disciplinary process simultaneously with her dignity at work complaint (against the colleague involved in the altercation) as they arose out of the same facts
- An employee's exercising of their right of appeal is unlikely to amount to an unequivocal affirmation of contract
- An employer properly following its disciplinary process and/or the outcome of such a process, cannot amount to, or contribute to, a repudiatory breach of contract

The court confirmed that, whilst a tribunal ought to be slow to strike out a claim where there are disputed facts, there is no absolute rule against it. Whether it is appropriate in a particular case requires assessment of the nature of the disputes and the facts that can be

realistically disputed. Where there are real grounds for asserting bad faith on the part of the decision makers, oral evidence would be required.

Permission to appeal to the Supreme Court was refused.

Comment

Employers need to be aware that employees may later rely upon historical ‘complaints’ as contributing to a cumulative breach of trust and confidence, notwithstanding that the employer may have considered the complaints to have been addressed or even forgotten

TUPE applied where company "stepped into the shoes" of company after share purchase

Guvera Ltd v Blinkbox Music Ltd, Butler and others

In 2015, Guvera Ltd (G) bought the shares of Blinkbox Music Ltd (B) and one of its Directors became the sole Director of B. The Director was given 90 days to turn the business around. At the end of April, the Director resigned. B was set to become insolvent, and G was considering its options in purchasing B's assets. It wished to keep on 20 staff. On 12 May 2015 G sent in Mr King (K) to B. G made it clear that it wished to buy the assets of B *"without triggering major HR issues",* and that K should find a way to keep the best 20 staff. G made decisions about financial matters (including making no further payments to creditors). On 15 May, 54 employees of B were made redundant. K had taken charge of this. It was made clear to staff that G was in charge.

The ET found that there had been a TUPE transfer on 12 May 2015. The ET observed that a sale of share capital does not amount to a transfer of an undertaking, and that a parent company does not necessarily control the business of a subsidiary. There is a multi-factorial test to determine if a TUPE transfer had occurred. The ET concluded that G exercised control over key business decisions and redundancies, and it assumed day-to-day control of B, *"crossing a line beyond the element of de facto control"* which comes with being a corporate parent.

The EAT dismissed G's appeal. G assumed the powers of an employer. G attempted to argue that it had not assumed the responsibilities of the employer, for example by paying wages. The EAT stated that if this were the case, it would be a "*surprising result"* if a company could take control of a business and assume the powers of an employer and was then able to argue that the regulations did not apply to it as it did not pay wages. G "*stepped into the shoes"* of B, and a transfer occurred on 12 May.

Providing a Reference

Hincks v Sense Network Ltd

This case is helpful in considering the duty of care needed when an employer expresses an opinion in a reference.

Hincks v Sense Network Ltd

Mr Hincks was an independent financial adviser, and was the subject of a number of investigations into his conduct during his employment with Sense Network Ltd. He subsequently sought a reference from his former employers. The reference provided referred to a finding of an internal investigation which was critical of *Mr Hincks'* conduct, including the finding that he had "knowingly and deliberately" circumvented processes that required him to seek pre-approval before giving advice and making transactions.

He brought a claim against his former employer for negligent misstatement on the basis the reference had given a misleading impression of him as those opinions were based on a sham investigation. He argued that where a referee expresses a negative opinion that is based on the findings of an internal investigation, they were required to satisfy themselves that the investigation in question was both procedurally and substantively fair.

The Decision

The High Court dismissed his claim.

The Court noted that there would be "formidable difficulties" if reference writers were obliged to inquire into the fairness of previous investigations. Not only might this not always be possible, but it would also place a considerable burden on the reference writer.

The Court held that it was difficult to prescribe the standard of care to be exercised by a reasonable reference writer and that ultimately the nature of the duty would depend upon the specific facts of the case. However it identified the following certain common features of the duty:

- To conduct an objective and rigorous appraisal of facts and opinion, particularly negative opinion, whether those facts and opinions emerged from earlier investigations or otherwise.
- To take reasonable care to be satisfied that the facts set out in the reference were accurate and true and that, where an opinion was expressed, there was a proper and legitimate basis for the opinion.
- Where an opinion was derived from an earlier investigation, to take reasonable care in considering and reviewing the underlying material so that the reference writer was able to understand the basis for the opinion and be satisfied that there was a proper and legitimate basis for it.
- To take reasonable care to ensure that the reference was not misleading either by reason of what is not included or by implication, nuance or innuendo.

Using the analysis above, the court held that there was evidence to support the statements made by Sense Network Ltd and therefore the reference was neither inaccurate nor misleading.

Best Practice

- It is increasingly common practice for employers to provide standard factual references limited to dates of employment, job title and salary.
- In general there is no legal duty on employers to provide a reference, but where they are provided employers must take reasonable care to ensure that they are true, accurate and fair.
- Employers should make sure that any references given are in line with any workplace policy on whether or not to give references and the information to be included. References should be consistent to avoid the risk of allegations of discrimination or breach of the implied term of trust and confidence.
- Where a reference will contain negative opinions, employers should make sure that there is an objective basis for holding those opinions and may well involve the reference writer reviewing relevant documents. For example, in *Mr Hinks'* case the Court suggested that relevant documents included the statements prepared by the

parties during investigation, a record of the investigatory meeting, the termination letter, and any appeal and appeal decision. What is relevant will vary from case to case.

- The Court noted that unless the relevant materials identified a "red flag" which necessitated further inquiry, there was no duty to examine the procedural fairness of the investigation in question.
- Please note that the provision of references may be affected by statutory regulation in certain industries and sectors (for example the financial industry and education)