New Case Law Update for Employment Committee Meeting 9th October 2015

Federacion de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL - ("Tyco") - Travel to Work can be Work

In this recent case, the workers of a security system installation and maintenance company brought a complaint in the Spanish courts, alleging that their employer is in breach of the Working Time Regulations 1998 by excluding from their 'working time' the time that is spent travelling to and from home, at the beginning and end of the day. The workers did not have any fixed place of work and travelled from home to the first customer of the day, then to various locations and back home again. . 'Working time' under the Working Time Directive ('the Directive') is defined as any period during which a worker is working; at the employer's disposal; and carrying out their activities or duties. The Directive also defines "rest period" as any period which is not working time. Under the Directive, workers are entitled to minimum rest breaks and, unless the worker has opted out, a maximum working week of 48 hours. Neither the Working Time Regulations nor the Working Time Directive state whether travel to and from a place of work, or between places of work, should be considered 'working time'. Employers generally include travel during the working hours as 'working time' and travel from home is usually excluded.

Last month, the European Court of Justice (ECJ) agreed that: the first and last journeys of the day were counted as 'working time' . The company had control of which customers the workers see and when, so the workers are at the company's disposal; the workers are effectively 'at work' on their first and last journeys of the day - the fact that the journeys happen to start and finish at home is something of a red herring.

This decision provides clarity for employers that travel time for mobile workers to their first appointment of the day, and from their last appointment, is 'working time'. This will affect all workers who have no fixed place of work, such as community nurses, community care workers and repair and maintenance workers.

The key concern amongst most employers will be the potential impact on cost, but this decision does not relate to pay. The Tyco decision considered the definition of 'working time' only for the purpose of calculating workers' entitlements to rest breaks and maximum working week. As such it will be possible to pay for travel time at a lower rate and it is important to note that the National Minimum Wage Regulations expressly exclude travel time from home. Unions may seek to put pressure on the government to change the National Minimum Wage Regulations, so that travel time to and from home is included in calculations for the purpose of paying the minimum wage (and the new 'living wage'). However, for the time being, this decision only applies to the calculation of working time for the purpose of workers' maximum working week and entitlements to rest breaks.

Beastall v Ministry of Defence ET/2404242/14 - Fair dismissal of Ministry of Defence worker who appeared as a medium while on sick leave

An employment tribunal has rejected the unfair dismissal claim of an employee who was caught making a public appearance as a medium while on sick leave. Employers are entitled to take extremely seriously allegations that an employee has been carrying out strenuous activities, such as public performances, while signed off as unfit for work.

At the disciplinary hearing, Mr Beastall argued that he had agreed to conduct the events at short notice to fill in for other performers. He said that a "simple word" would have been sufficient action by the employer. Further the disciplinary hearing panel believed that Mr Beastall had deliberately misled is employer when he strongly implied that he was not ready to go back to work.

Mr Beastall went to the ET and argued that there had been no occupational health advice, and in particular no investigation into whether or not the psychic medium event was therapeutic. The ET highlighted in the claimant's favour his previous good record and the size of the employer, which meant that high standards are expected of its disciplinary procedure. **The tribunal also stressed that the starting point for such an investigation should be that it is inherently unlikely that an employee with such a good employment record would risk everything by lying about the reasons for sickness absence**.

However, the ET concluded that the employer had compelling reasons to be suspicious of Mr Beastall's account of events. He had told his employer that he was not ready to go back to work, but had gone to the event the next day without informing his employer.

The tribunal held that the employer had taken a reasonable stance in not getting occupational health advice. **Occupational health departments are able to provide a current opinion as to an employee's capacity to work and a forecast of what adjustments might be needed. It is much harder for occupational health departments to conduct a forensic exercise to assess whether or not an employee was telling the truth about previous sickness absence**.

The tribunal accepted that occupational health departments are often involved in the disciplinary processes, however, this does not mean that the employer in this case was obliged to seek occupational health advice on the substantive misconduct allegation.

British Waterways Board v Smith [2015] UKEAT/0004/15 - Fair dismissal for derogatory comments against employer on Facebook

In this case, the Employment Appeals Tribunal (EAT) considered whether it was fair to dismiss an employee that made derogatory statements about their employer on Facebook when the employer had been made aware of the misconduct 12 months before the dismissal. It did not matter that the misconduct had taken place two years

before dismissal or that the employer had been aware of the misconduct throughout that period.

Mr Smith worked for the British Waterways Board (BW) as a manual worker in a team responsible for the maintenance and general upkeep of canals and reservoirs. Its disciplinary policy provided that it could dismiss employees for gross misconduct and cited serious breaches of its policies as an example of gross misconduct. The social media policy prohibited "any action on the internet which might embarrass or discredit BW (including defamation of third parties, for example, by posting comments on bulletin boards or chat rooms)".

In 2011, Mr Smith had posted a comment relating to drinking alcohol whilst on standby. Mr Smith's manager had known about this since 2012 and had discussed it with the BW HR team. The BW HR team had not raised them with Mr Smith or investigated them further. The comment, and others found during a subsequent search by the HR team, referred to supervisors in derogatory terms and to Mr Smith drinking alcohol whilst on standby.

At a disciplinary hearing on 4 June 2013, BW summarily dismissed Mr Smith for gross misconduct. BW found that Mr Smith had made derogatory comments about BW as an employer and that he had claimed to be drinking alcohol whilst on standby, bringing his capabilities into question and leaving BW open to condemnation in a public forum.

The ET found that Mr Smith had been unfairly dismissed. Although BW had followed a fair procedure, the decision to dismiss fell outside the band of reasonable responses which a reasonable employer might have adopted. This was because BW had not taken into account the mitigating factors of Mr Smith's unblemished service record and that BW had been aware of the comments for some time. In relation to the drinking alcohol whilst on standby incident, the tribunal found that there had been no emergency on the night in question (and therefore no impact on Mr Smith's colleagues and no risk to life or property) and that BW had not had any subsequent difficulty with employees drinking alcohol whilst on standby.

The EAT allowed the appeal by BW, and substituted a finding that the dismissal was fair. The ET had wrongly substituted its own views for that of the employer when it held that BW did not give weight to the mitigating factors. This was a matter for an employer to decide and BW's decision had been within the range of reasonable decisions open to an employer. Also, the ET had also wrongly made its own findings of fact in relation to Mr Smith drinking alcohol whilst on call, by inferring that the incident had no impact and that BW had no issues with employees on standby drinking alcohol.

This case shows that an employer that has failed to respond to an employee's earlier act of misconduct will not necessarily lose the opportunity to take action at a later date.

Way v Spectrum Property Care Limited

In this recent case , the Court of Appeal looked at the approach that should be adopted where an employee claims that a previous final written warning was given in bad faith.

In this case, Mr Way was dismissed by Spectrum Property Care Limited ('Spectrum') for sending inappropriate emails. Spectrum would not have dismissed Mr Way for that misconduct alone, but did decide to dismiss Mr Way because he was subject to an earlier final written warning for breaching the company's policy on recruitment. When the earlier warning had been issued, Mr Way was informed that any further misconduct would result in dismissal. He was also informed of his right of appeal, but he did not do so.

Mr Way argued that his dismissal was unfair, because the earlier warning had been given in bad faith and, therefore, Spectrum was not entitled to rely on it. Mr Way said that his line manager had sanctioned the breach of recruitment policy which had resulted in the written warning, and had issued the warning in order to cover up his own involvement in the flawed recruitment process. Mr Way also alleged that he was told that he would lose his job if he appealed against the final written warning and it would be best for him "…forget about the whole thing and move on."

Overturning a decision of the Employment Appeal Tribunal, the Court of Appeal (CA) said that taking into account a warning which was issued in bad faith would be unreasonable and unfair. The CA disapproved of the Employment Appeal Tribunal's finding that the earlier warning had been given in bad faith but could, nonetheless, be relied upon because (amongst other reasons), Mr Way had failed to appeal against the final warning. The Court of Appeal remitted the case back to the employment tribunal to decide if, in fact, Mr Way's earlier warning was issued in bad faith.

The Court of Appeal has, therefore, confirmed that tribunals – and, by extension – employers are entitled to rely on earlier final written warnings; **unless** the warning was issued in 'bad faith' or without good grounds. In those circumstances, the earlier warning will **not** be valid and cannot be relied on.

In terms of what is meant by 'bad faith', previous case law has said that examples of this could include a warning which was given with an 'oblique motive' or which was 'manifestly inappropriate' (*Wincanton Group PLC v Stone, 2013*).

McElroy v Cambridgeshire Community Services NHS Trust ET/3400622/14.

An employment judge has held that the summary dismissal of a healthcare assistant for coming to work smelling of alcohol was unfair. The judge held that a reasonable employer would not have treated attending for work smelling of alcohol as gross misconduct or conduct justifying dismissal in the absence of either evidence of an adverse effect on the employee's ability to do his job, or in the absence of a previous warning given under the employer's disciplinary policy not to do so.

When deciding to dismiss, the employer had taken account of the employee's refusal, after disciplinary proceedings had been started, to attend an appointment with its occupational health service. The employee had not been told that this was being considered as a disciplinary issue before the disciplinary hearing. The employment judge held that a reasonable employer would not have taken account of a charge that had not been put to the employee when deciding to dismiss. Further, in light of the employer's policies, a reasonable employer would not have treated the refusal to attend the occupational health appointment as an act of gross misconduct, misconduct justifying dismissal or a contributory factor to such a conclusion.

Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed

In this case, the Employment Appeal Tribunal (EAT) has explored, for the first time, the threshold of the new requirement that 'whistleblowing' disclosures must be "in the public interest" in order to qualify for protection.

Prior to the insertion of the new 'public interest' test, a 'qualifying disclosure' for the purposes of whistleblowing legislation could include a breach of the whistleblower's own contract of employment; this was deemed too broad and, therefore, the new requirement for disclosures to have a 'public interest' element was introduced.

In the above case, Mr Nurmohamed, having been dismissed after making complaints about manipulation of the company's accounts (which he alleged drove down bonuses for him and 100 senior managers) successfully brought a claim for automatically unfairly dismissal and detriment on the grounds that he had made three protected disclosures.

The Employment Tribunal held that it was not required that a disclosure had to be of interest to the entirety of the public, as it was inevitable that only a section of the public would be directly affected by any given disclosure. They held that the disclosure was made with a reasonable belief that it was "in the public interest" as it was made in the interest of 100 senior managers.

Chestertons appealed the decision, stating that the disclosures had not been made "in the public interest", as 100 managers was not a sufficient section of the public and that, in fact, the disclosures were personal to Mr Nurmohamed, rather than public. The EAT dismissed the appeal, upholding the Tribunal's decision.

Of particular note is the fact that the EAT agreed with the Tribunal that the disclosures, in order to be in the public interest, did not have to affect the whole of the public, but only a small group (here, 100 senior managers were affected). Even though it was clear that Mr Nurmohamed had considered his own position, it was shown that he had also considered the position of these other senior managers as well, and that was sufficient.

Doran v Department for Work and Pensions

In this case Miss Doran was employed by the Department for Work and Pensions (DWP) as an administrative officer. In January 2010, she commenced a period of sickness absence due to stress, and asked if a return to work on a part-time basis could be considered. Approximately six weeks into Miss Doran's absence, a part-time arrangement was discussed and then offered, but Miss Doran did not pursue it further or discuss it with DWP again. After a further three months, Miss Doran was dismissed because of her long-term sickness absence. Under the DWP's attendance policy, it was unusual for absences to be supported if there was no indication of a return to work within six months.

Miss Doran brought an employment tribunal claim, alleging that the DWP had failed to make reasonable adjustments, contrary to the (now repealed) Disability Discrimination Act 1995. However, the employment tribunal rejected Miss Doran's claim, on the basis that the DWP's duty to make reasonable adjustments had not been triggered because Miss Doran had not informed it of a return date or given any other sign that she would be returning to work at any particular time.

The tribunal noted that a phased return to work suggested by occupational health could not be implemented until Miss Doran indicated she was going to return to work. In its view, she would not have become fit for work within six months, after which the DWP would normally consider dismissal. There was no known reason to extend this time-frame for Miss Doran.

Miss Doran appealed to the EAT, but the EAT upheld the employment tribunal's findings: the ball had been in Miss Doran's court to raise the issue of a lower grade role with a phased return to work.

This case therefore confirms that, in general, there must some indication of a likely return to work before an employer's duty to make reasonable adjustments, in relation to a return to work, is triggered.

Although this case was decided under the Disability Discrimination Act 1995, which has now been superseded by the Equality Act 2010, the same principles in respect of reasonable adjustments would apply. However, in addition, under the Equality Act 2010, it is likely that an employee in similar circumstances to Miss Doran would also be able to bring claims for 'indirect disability discrimination' and / or 'discrimination arising from disability'. In those circumstances, a defence of objective justification may be open to employers.