SLAUGHTER AND MAY/

NEWSLETTER

OCTOBER 2020

EMPLOYMENT BULLETIN

QUICK LINKS

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Horizon scanning

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RISK THAT EMPLOYEE HAD COMMITTED CRIMINAL OFFENCE DID NOT MAKE DISMISSAL REASONABLE

Summary: The Employment Appeal Tribunal (EAT) held that the fact that there was a risk that a teacher had committed a serious criminal offence was insufficient in itself to make it reasonable to dismiss for that reason. The employer should have reached a decision on the facts as to whether, on the balance of probabilities, there had been misconduct. In addition, the employer should have notified the employee if it intended to rely on reputational risk as a reason for dismissal *(K v L)*.

Key practice point: Employers must set out clearly all grounds for potential dismissal when inviting the employee to a disciplinary hearing and allow the employee a fair opportunity to respond. Reputational risk secondary to misconduct is a separate ground of dismissal and raises considerations that are distinct from those in a misconduct dismissal.

Facts: K, a teacher, was charged with possession of indecent images of children, but the decision was later taken not to prosecute him. The Crown provided the school with a summary of the evidence but this was withheld from the decision maker (the Head of Service at the Council). Following a disciplinary hearing, the Head of Service concluded that there was insufficient evidence to show that K was responsible for downloading the images but that she could not exclude the possibility that he was responsible. The Council decided to dismiss him. In the decision letter, the Council said that the circumstances had resulted in an irretrievable breakdown of trust and confidence and an unacceptable level of risk to the Council of serious reputational damage.

K's unfair dismissal claim was rejected by the Employment Tribunal and he appealed.

Decision: The EAT allowed the appeal, substituting a finding of unfair dismissal.

It is established law that the employer must give notice to the employee of the grounds for dismissal. The letter inviting K to the disciplinary hearing was based on misconduct and gave no warning that reputational damage was a potential ground of dismissal. Reputational damage was mentioned only in passing at the hearing.

It was clear from the evidence that K thought that the complaint was about his conduct; he was not given an opportunity to address the reputational issue in any detail at the disciplinary hearing. In these circumstances, because the only ground for dismissal was misconduct, the Council was obliged to make a decision as to whether, on the balance of probabilities, the misconduct had been established. Had it done so, it would have been bound to conclude that misconduct had not been established. The Head of Service did not have a "*reasonable suspicion amounting to a belief that the employee was guilty of the conduct in question*" as required by *Burchell*, the leading case on misconduct dismissals.

The EAT went on to consider whether K could have been fairly dismissed had the complaint been based on potential reputational damage. In the EAT's view, the evidence was insufficient to support a dismissal on this ground. Although a summary of evidence

was given to the school, it was heavily redacted and, in any event, not made available to the Head of Service who conducted the disciplinary hearing. The EAT found that the risk of reputational damage had abated once the authorities had indicated that they had no plans to prosecute.

Analysis/commentary: Reputational risk can be a fair reason for a dismissal (under the "some other substantial reason" heading), even where the charges against the employee are unproven, provided there is a clear connection between the matters alleged and the potential for damage to reputation. A recent example is *Lafferty v Nuffield Health*, where the EAT held that a dismissal of a hospital porter charged with assault outside the workplace was reasonable. The employer, a private hospital with charitable status, had what the EAT regarded as reliable information because there had been a decision to prosecute.

Where the facts are not yet clear, employers should consider alternatives to dismissal, such as suspension on full pay. In *Lafferty*, the EAT found that this was not an option given the scrutiny faced by the employer as a charity, but suggested that large commercial employers would not be constrained in the same way.

AMENDMENTS TO EMPLOYMENT TRIBUNAL RULES TO INCREASE CAPACITY

Summary: The Government has made amendments to the procedural rules for Employment Tribunals, in an attempt to deal with the current backlog of cases, expected to be exacerbated by the withdrawal of the Coronavirus Job Retention Scheme at the end of this month. At the moment, cases are reportedly being listed for 2022. The proposals, most of which take effect immediately, include:

- There will be an amendment to the rules on pre-claim early conciliation of claims by the Advisory, Conciliation and Arbitration Service (Acas). Currently, the conciliation officer is under a duty to endeavour to promote a settlement for one calendar month from the date the claimant first contacts Acas. The conciliation officer can extend this period if there is a reasonable prospect of achieving a settlement. The new regulations amend this rule so that the early conciliation period will be six weeks, with no power to extend. This will come into force on 1 December 2020. This change may help the chances of a settlement being reached, although the availability of Acas resources remains a problem.
- Decisions recording claims that have been dismissed on withdrawal by one of the parties will no longer be included on the Government website of tribunal decisions (and will not therefore be searchable). Although this is intended to be an encouragement to parties to settle claims, it could be a barrier to early settlement of disputes, as the employer (or employee), previously concerned about publicity even if any claim was settled, may now have less of an incentive to settle before a claim is issued.
- "Legal officers" (who do not have to be legally qualified) will be able to carry out some administrative tasks currently performed by Employment Tribunal judges. These include considering acceptance or rejection of claim forms; extending time for employers to respond; ordering further information to be provided and dismissing claims by consent on withdrawal.
- Non-employment judges (such as High Court judges and judges from other specialist tribunals) will be able to sit as judges in Employment Tribunals.
- The scope for multiple claimants and respondents to use the same claim and response forms will be widened. Multiple claimants will be able to make their claims on the same form if their claims give rise to "*common or related issues of fact or law or if it is otherwise reasonable for their claims to be made on the same claim form*", rather than "*if their claims are based on the same set of facts*".
- There will be more flexibility for remote hearings, allowing more cases to be heard.

DELAY IN PAYING SALARY WAS REPUDIATORY BREACH ENTITLING CEO TO RESIGN

Summary: The High Court awarded damages for wrongful dismissal to a CEO who terminated his service agreement after his monthly salary remained unpaid three days after the usual payment date. The non-payment was a repudiatory breach of contract entitling him to resign (*Comberg v VivoPower International Services Limited*).

Key practice point: Whether a breach of contract is sufficiently significant to entitle the employee to resign is a question of fact. Here the evidence showed that the employer made a deliberate decision not to pay salary and this was enough to constitute a repudiatory breach, despite the lapse of just three days before the employee resigned.

Facts: C had acted as CEO of the company from January 2016 and had signed a Service Agreement in August 2016. In September 2017, after disputes with the founder of the holding company, C stepped down as CEO and gave 12 months' notice of termination of his Service Agreement. There were negotiations for an exit deal. C's monthly salary was paid as usual at the end of September 2017 but not at the end of October 2017. He sent emails about this on 1 and 2 November and, when payment was not made on 3 November, he terminated the Service Agreement, contending that the company was in repudiatory breach. The company alleged that the termination was ineffective and in turn terminated the contract for breach, citing both C's purported termination and performance issues. C brought a wrongful dismissal claim in the High Court.

Decision: The High Court upheld the claim. Noting that intentional non-payment of wages is usually a fundamental breach of contract entitling the employee to resign, the Court decided that withholding payment for three business days amounted to a repudiatory breach. Even if there had been no breach of contract by the end of the third business day, the evidence demonstrated that the company had intentionally decided not to pay C, making the breach an anticipatory breach of contract or a renunciation of the Service Agreement. C was therefore entitled to terminate the Service Agreement on 3 November.

The Court found that the company had failed to establish that it had or would have had an entitlement to terminate the Service Agreement. There was little evidence of allegations of mismanagement or misconduct against C up to June 2017. On the contrary, after over six months of C acting as CEO, the company entered into a Service Agreement. That demonstrated that, whatever controversy would subsequently occur, the relationship was sufficiently harmonious at that stage. In June 2017, C was granted a full bonus, which on paper depended on fulfilling key performance indicators. At face value, this indicated at least the absence of serious dissatisfaction with his performance at the time.

The Judge acknowledged that the company had very substantial problems, both in terms of market sector and internally, but warned that poor performance of a company does not necessarily indicate the same of its CEO.

RECURRING CONDITION DID NOT AMOUNT TO A DISABILITY

Summary: The EAT confirmed that an employee suffering from paranoid delusions did not have a disability for the purposes of the Equality Act 2010. Although there was a substantial adverse effect, it was not long-term (*Sullivan v Bury Street Capital Limited*).

Key practice point: The decision confirms that, in the case of a recurring condition, whether the requirement for a long-term effect is met will depend on whether it was likely that the condition would last for 12 months or that it would recur. The EAT also approved the use of evidence of the knowledge of colleagues to establish that the employer had no actual or constructive knowledge of the disability.

Facts: For the purposes of a disability discrimination claim, a disability is defined as an impairment which has a substantial and long-term adverse effect on day-to-day activities. "Long-term" means an effect that has lasted, or is likely to last, for 12 months. To ensure that those with recurring conditions are covered, if the impairment ceases to have the adverse effect, it is treated as continuing to have that effect if it is "likely to recur".

In 2013, S suffered from paranoid delusions that he was being stalked by a Russian gang. This affected his performance at work. However, his condition improved and it was not until April 2017 that it worsened and once again had an impact on his day-to-day activities. His employment was terminated in September 2017 on capability grounds. S brought disability discrimination claims. The Tribunal found that S's condition did not qualify as a disability because it did not have the necessary long term-effect. Although there was a substantial adverse effect in 2013 and again in 2017, in neither case was it long-term or likely to recur. S appealed.

Decision: The EAT dismissed the appeal. The EAT agreed that it is well established that "likely to recur" means "could well happen" and there is a low threshold for meeting that test. However, the fact that the 2017 episode was a recurrence did not mean that the Tribunal had to conclude that a further recurrence was likely. The triggering event in

2017 was discussions about S's remuneration. The Tribunal found that these were unlikely to continue indefinitely and that his condition would improve once they were resolved.

The Tribunal was also correct in deciding that, even if there had been a disability, the claims would have failed because the employer did not know, and could not reasonably be expected to know, of the disability. The EAT confirmed that an individual's knowledge in their capacity as employee may be relevant in determining whether the employer has the requisite knowledge, particularly where (as in this case) the employer is a small company. It was reasonable for the employer to rely on the lack of knowledge about S's disability of his fellow employees, in particular one who worked in close proximity to him.

Analysis/commentary: Although it was not the conclusion on the evidence in this case, the fact that a substantial adverse effect has recurred episodically will often suggest that a further episode is something that "could well happen", with the result that the condition will be regarded as having a long-term effect.

HORIZON SCANNING

What key developments in employment should be on your radar?

31 October 2020	Closure of the Coronavirus Job Retention Scheme
1 November 2020	Start of the Job Support Scheme
31 December 2020	Transitional arrangements under UK-EU withdrawal agreement expected to end unless extended
6 April 2021	Extension of off-payroll working rules to private sector - client rather than intermediary will be responsible for determining whether IR35 applies
6 April 2021	Changes to income tax treatment of some post-employment notice payments on termination

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers); *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes)
- **Discrimination / equal pay:** *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction); *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay); *Royal Mail Group v Efobi* (Supreme Court: test for shift of burden of proof)
- **Trade unions:** *Jet2.com v Denby* (Court of Appeal: refusal of employment)
- **Unfair dismissal:** *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits).
- **Working time:** *Chief Constable of the Police Service of Northern Ireland v Agnew* (Supreme Court: backdated holiday pay claims); *East of England Ambulance Service v Flowers* (Supreme Court: whether holiday pay must include regular voluntary overtime.

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