SLAUGHTER AND MAY

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# Pensions and Employment: Employment/Employee Benefits Bulletin

Legal and regulatory developments in Employment/Employee Benefits

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## Cases round-up

Age discrimination: "*You're not 25 anymore*"

In **Clements v Lloyds Banking plc & ors**, the EAT confirmed that a senior employee had suffered age discrimination when he was told by his manager that "*you're not 25 anymore*". The employer's conduct of a performance meeting and proposals to move the employee in to a new role had also amounted to constructive dismissal. However, the EAT was satisfied that despite the ageist comments, age discrimination played no part in the repudiatory breach of the implied term of trust and confidence which led to the constructive dismissal.

C, who was in his 50s, was employed by LB as Head of Business Continuity. On 5th January 2012 a meeting took place between C and his manager (S). At the meeting, S raised concerns with C's performance, and suggested that C should perhaps move to a different role within LB. S also said (twice) to C that "*you're not 25 anymore*". C subsequently resigned on notice, alleging that LB had breached the implied term of mutual trust and confidence by making the discriminatory comments to him, seeking to push him out of his role for a younger replacement, and continuously denying what S had said to him on 5th January 2012.

The Tribunal upheld C's age discrimination claim based on the repeated comment "*you're not 25 anymore*". The Tribunal also upheld C's constructive dismissal claim, based on S's conduct of the 5th January meeting by seeking to move C on from one role to another without adopting any proper process to do so. However, it found that there was no age discrimination in C's dismissal; the main driver for C's resignation was his view that S wanted to get him out of his role for no good reason. C appealed, alleging that the discrimination was in fact a cause of the dismissal.

The EAT dismissed the appeal, upholding the Tribunal's decision. It rejected C's argument that it made no sense to extract the ageist remarks from the course of conduct which amounted to a breach of the implied term of trust and confidence and led to his resignation, since they were intrinsically linked. The EAT noted that the Tribunal had been careful not to say that the discriminatory words were actually part of the repudiatory breach. Rather, what it said about 5th January meeting was that S's approach was not a proper way to go about telling C that there were concerns about his performance serious enough to call into question whether he should remain in his current role.

Comment: The outcome in this case was quite unusual (and favourable for the employer), in that there was no finding of discriminatory dismissal even though an act of direct age discrimination was committed, then lied about, and was closely interlinked with the other complaints which led to the constructive dismissal. This turned in large part on the particular facts of this case. Employers should always ensure that they avoid any ageist or other discriminatory comments as part of a performance management process.

Dismissal for refusing to accept contractual changes connected to TUPE transfer

In **General Vending Services Ltd T/A GVS Assist v Schofield**, the EAT overturned a finding of ordinary unfair dismissal where an employee was dismissed for refusing to accept changes to his contractual terms following a TUPE transfer. The Tribunal had unduly focused on the employee's reasons for rejecting the contractual changes, rather than the reasonableness of the employer in proposing those changes.

S was employed by GVS as an engineer to repair coffee machines, having TUPE-transferred to GVS from a different company. Two years after the transfer, GVS consulted its employees about a proposed re-organisation which would require the workforce to become more specialised and to be available seven days per week for clients. In particular, GVS sought to reduce wages, sickness pay, overtime payments and holiday pay. Five of the thirty engineers – including S - refused to take up the new contracts and were

dismissed. Four of these claimed that their dismissal was unfair.

The Tribunal found that none of the dismissals were automatically unfair under TUPE. Although they were connected to the TUPE transfer, there were economic, technical and social reasons entailing a change in the workforce (given the changes in the way in which GVS required the employees to work). It went on to find that three of the dismissals were fair under the ordinary unfair dismissal test, but that S's dismissal was unfair, as the changes to holiday pay and sickness pay were especially important to S, given that he had a poor sickness record.

The EAT allowed GVS's appeal and overturned the finding of unfair dismissal in relation to S. It found that the Tribunal had given undue prominence to the sick pay and holiday pay issues, and that this approach was not supported by the evidence available to GVS at the time the decision was made. The EAT confirmed that the test for unfair dismissal in these circumstances focuses on the employer's reasonableness in reaching the decision to dismiss, not the employee's reasonableness in opposing the changes. The position of the employees, collectively, should be considered as part of this exercise – for example, it is relevant how many other employees accepted the change. However, the position taken by individual employees is not determinative of the fairness of their dismissal.

Comment: This decision is useful for employers facing the need to impose contractual changes. It confirms that the correct focus is on whether the employer acts reasonably in imposing the changes, not whether it is reasonable for the employer to accept them. Even if it is reasonable for an employee to refuse to accept a change in his terms, it may still be reasonable for the employer to require those changes, from an unfair dismissal perspective.

### Zero-hours contract worker was not an employee

In **Saha v Viewpoint Field Services Ltd**, the EAT confirmed that on the facts of this particular case, an individual working under a zero-hours contract was not an employee, as the requisite mutuality of obligation was not present in the arrangement.

S worked as a telephone interviewer for VFS, a market research agency. The arrangement required S to confirm her availability each week (although VFS required commitment of at least two shifts per week), and VFS would then allocate any work according to availability. If no work was available S would not work (and would not be paid); equally, S could cancel her availability even if work was available for her. S worked under this arrangement for six years. Although her hours were ad hoc, they ranged between 7 and 43 hours almost every week.

In January 2012 VFS carried out an employment status audit and determined that its telephone interviewers should be self-employed. It therefore notified all the telephone interviewers (including S) that their contracts would be terminated on 30 days notice, but that it hoped they would continue working with VFS on a self-employed basis. S lodged a number of claims including unfair dismissal. The Tribunal found that S was not obliged to work when she did not want to, and VFS was not obliged to offer her work. It therefore concluded that S was not an employee, and struck out her claims.

The EAT dismissed S's appeal. Although VFS had seemed to have understood up until January 2012 that their telephone interviewers were employees, it was still open to VFS to argue that S was not an employee for the purposes of these claims. The EAT upheld the Tribunal's conclusion that there was no mutuality of obligation in this case.

The EAT also dismissed S's alternative argument that she was an employee for the duration of each specific assignment, and that she could construct sufficient continuity of service from each assignment to claim unfair dismissal. The EAT commented that this was not a viable way for S to put her claim, since it was not the termination of any particular assignment that she was complaining of, but the termination of the umbrella arrangement. It was only the termination of the umbrella arrangement which could give rise

to a viable complaint of unfair dismissal, and the umbrella arrangement did not amount to a contract of employment.

Comment: The EAT in this case stated that it had "*considerable sympathy*" for S, and offered that "*if it is any consolation…there can be no doubt that this is an area which is crying out for some legislative intervention…*". The Government has yet to respond to its consultation on the use of zero-hours contracts (see Employment Bulletin dated 16th January 2014, available here), although its response is expected shortly. It was reported recently by the Office for National Statistics that there were around 1.4 million zero-hours contracts in the UK (as at February 2014).

## Points in practice

### ICO guidance on handling complaints

The Information Commissioner's Office (ICO) has published new guidance on the process it will follow when dealing with complaints from data subjects that a data controller has failed to comply with the Data Protection Act 1998. A number of these points may prove helpful for employers, including:

- The ICO will only consider a complaint which the data subject can show that it has first raised with the data controller. This means that employers should have some prior notice of a likely complaint to the ICO, and the opportunity to deal with it before the ICO gets involved. It may also deter vexatious employees from prematurely threatening ICO enforcement action.

- When deciding whether or not to take enforcement action against a data controller, the ICO will take into account the severity of the potential breach, how the data controller has dealt with the concern raised, and any other relevant information.

The guidance in full is available here.

### Immigration checks on TUPE transfers: new Code of Practice

The Home Office has published a new draft Code of Practice on preventing illegal working. This is intended to replace the current Code, which was published in 2008.

Amongst other changes, the new Code increases the period for checking documents after a TUPE transfer. Under the current Code, there is a 28 day grace period from the date of the transfer for the transferee to carry out its document checks on the transferring employees. Under the new Code, the grace period is increased to 60 days.

The new Code is expected to come in to force on 16th May 2014, and will apply where the person was employed on or after 29th February 2008, and the breach occurred on or after 16th May 2014.

The new Code is available here.

## And finally…

### Tattoos in the workplace

The recent media reports of a British woman who was arrested and deported from Sri Lanka for featuring a tattoo of the Buddha on her arm have sparked a wider debate around the issue of tattoos, including in the workplace.

Many employers have a ban on visible tattoos in the workplace, especially where employees will come into contact with clients or customers and the employer is concerned about maintaining a certain image. In principle, there is nothing to prevent an employer from having such a policy. However, it should be aware of the potential for such a policy to have a discriminatory impact.

A ban on tattoos may constitute indirect age discrimination, given that statistics show that more than a third of 16 to 44-year-olds have tattoos, a much greater proportion than older people. Younger

employees may therefore be disproportionately affected by the ban. It would then be for the employer to objectively justify its policy. This would involve balancing the employer's interests in maintaining a certain image against the employees' right to freedom of expression - a difficult line to tread.

A ban on visible tattoos may also infringe an employee's right to manifest their religious beliefs, if the tattoo has some religious significance for the employee. An analogy may be drawn with the situation in **Eweida v the United Kingdom**, where the European Court of Human Rights held that there had been a violation of Ms Eweida's right to manifest her religious beliefs when BA's policy prohibited her wearing a cross openly at work.

Not all employers are anti-tattoos however, and some even use them as a marketing opportunity. This time last year the New York-based real estate firm Rapid Realty hit the headlines when it offered its 800 employees a 15% pay raise if they tattooed the company's logo onto their bodies. There were reportedly no size or location restrictions for the logo tattoos, and around 40 employees accepted the challenge.

In May 2013, a Canadian court declared a hospital's policy prohibiting its employees sporting "visible large tattoos" to be void and unenforceable. It found that there was insufficient evidence to support the employer's contention that patients had concerns about staff with tattoos, and therefore the policy represented an unreasonable infringement on employees' freedom of expression (**Ottawa Hospital v CUPE Local 4000**).

There is as yet no reported case in the UK which has considered a ban on visible tattoos in the workplace. But with tattoos becoming ever more common, it can only be a matter of time before the issue is litigated. Employers should therefore be aware of the risks when implementing workplace policies about tattoos.

521595524

**London**
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

**Brussels**
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

**Hong Kong**
T +852 2521 0551
F +852 2845 2125

**Beijing**
T +86 10 5965 0600
F +86 10 5965 0650