SLAUGHTER AND MAY/

NEWSLETTER

MAY 2022

EMPLOYMENT BULLETIN

QUICK LINKS

EMPLOYEE WHO ACCEPTED VOLUNTARY REDUNDANCY COULD CLAIM UNFAIR DISMISSAL

Summary: The Employment Appeal Tribunal (EAT) found that an Employment Tribunal should not have struck out an unfair dismissal claim from an employee who had requested redundancy. The Tribunal had failed to consider the claimant's allegation that the employer had manufactured a redundancy situation (*White v HC-One Oval Ltd*).

Key practice point: This decision confirms that offering voluntary redundancy will not necessarily avoid the risk of an unfair dismissal claim. The events which precede the request for voluntary redundancy may be relevant to the reasons for dismissal (in other words, whether it was a genuine redundancy) and to whether the dismissal was fair in all the circumstances. For this reason, in voluntary redundancy cases, especially where the redundancy package is enhanced or there have been any disputes or grievances, employers would typically have a settlement agreement.

Facts: The employer announced that it intended to reduce the number of employees carrying out receptionist and administrative work at several of its care homes, including where the claimant worked as a receptionist, and she was provisionally selected for redundancy. The claimant subsequently requested voluntary redundancy, which was agreed, leading to the termination of her employment. She submitted a tribunal claim for unfair dismissal, asserting that her dismissal was against a background of an outstanding grievance (that she had provided cover for an administrative position, in addition to her own duties, with no extra pay). She also claimed that her redundancy had been deliberately manufactured. She had been told that the administrator role would be considered on a job share basis, but she was offered only a receptionist role with additional duties but no increase in pay. A full-time administrator/receptionist role was offered to another individual who had been recruited shortly before the redundancy exercise, at a higher rate of pay. The Employment Tribunal struck out the claim as having no reasonable prospect of success, because the claimant had requested redundancy.

Decision: The EAT allowed the claimant's appeal and sent the case back to the Tribunal. The EAT explained that, even where an employee has volunteered for redundancy, that can still give rise to a dismissal. Under Section 98(1) of the Employment Rights Act 1996, the employer had to prove the reason for the dismissal and that it was a reason that was capable of being fair for the purposes of Section 98. The Tribunal was wrong to assume that the employer did not need to show that the reason was redundancy because the employee had requested it. The Tribunal had heard no evidence on the history. It had failed to consider the claimant's case that the redundancy had been deliberately manufactured. And even if the Tribunal was ultimately satisfied that the reason for dismissal was redundancy, it would still need to engage with the claimant's broader case on the fairness of the process that led to the dismissal.

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

EXTENSION OF BAN ON EXCLUSIVITY CLAUSES TO LOWER PAID WORKERS

On 9 May 2022, the Government published its response to its December 2020 consultation on measures to extend the ban on exclusivity clauses in employment contracts, which currently applies to zero hours contracts. The ban operates by making exclusivity clauses in employment contracts unenforceable. The Government confirmed that legislation will be laid before Parliament later this year to extend the ban to cover employees and workers whose guaranteed weekly income is on or below the Lower Earnings Limit (£123 per week for 2022/23). They will also have a right not to be unfairly dismissed and not to be subjected to a detriment for failing to comply with an exclusivity clause. This protection currently applies to those with zero hours contracts.

The Government is no longer proposing to introduce an exemption to the ban on exclusivity clauses based on high hourly earnings. (This was proposed in order to allow business to protect their interests where they employ "well paid individuals" who work only a few hours a week.) The Government has concluded that there is no strong evidence of a need for this but will keep it under review and will consider additional legislation if required.

The Queen's Speech published on 10 May did not include an Employment Bill (or any other employment measures) and there has been no indication from the Government as to when we might expect the various pieces of legislation set out in our Horizon scanning section below.

SETTLEMENT AGREEMENT WIDE ENOUGH TO COVER TUPE TRANSFEREE'S FAILURE TO PROVIDE INFORMATION TO TRANSFEROR

Summary: The Employment Appeal Tribunal (EAT) confirmed that, in a claim by an employee of the transferor for failure to inform and consult under TUPE, an award against the transferee for failing to provide information to the transferor was precluded by the employee's earlier settlement of claims against the transferee (*Clark v Middleton*).

Key practice point: This decision is helpful confirmation that a TUPE transferee and an employee of the transferor can settle the employee's contingent right to receive an award from the transferee for failure to provide information to the transferor. Care must be taken to ensure that the settlement wording covers the potential claim. It is also a reminder that the transferor's obligation to inform employees that the transfer is to take place includes a duty to provide the name of the transferee, even where it is known that the new employer is likely to be a newly-formed company.

Background: The key provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) in this case were:

- The transferor must inform employee representatives of the fact that the transfer is to take place - Regulation 13(2)(a).
- The transferor must inform employee representatives about measures the transferor envisages the transferee will take in relation to transferring employees - Regulation 13(2)(d).
- The transferee must provide information about any such measures to the transferor - Regulation 13(4).
- The transferor will have a defence to a Regulation 13(2)(d) claim where the transferee failed to provide information under Regulation 13(4), provided it gives notice of that defence to the transferee. The transferee can then be ordered by the Employment Tribunal to compensate employees - Regulation 15(8).

Facts: The claimant worked for a business which was transferred by its sole owner to a company formed by another employee of the business. Following the transfer, and the transferee proposing changes to the terms of employment, she resigned. She complained of a failure by the transferor to comply with Regulation 13(2)(d). She also brought unfair dismissal and wages and holiday pay claims against the transferee. The transferor claimed that its failure to comply was because the transferee had failed to comply with Regulation 13(4). Shortly before the claims were heard in the Tribunal, the claimant and the transferee reached a settlement through Acas, resulting in withdrawal and dismissal of her claim.

The Tribunal held that the transferor's defence to the claim succeeded, but that the effect of the withdrawal of the claim against the transferee was that the Tribunal was precluded from making an award under Regulation 15(8) against the transferee. The Tribunal also found that the transferor was in breach of Regulation 13(2)(a) in failing to notify the claimant of the identity of the transferee, but awarded no compensation.

Decision: The EAT upheld the Tribunal's decision on Regulation 15(8). The claimant's withdrawal email to the Tribunal stated that her "claims" against the transferee were being withdrawn and did not state that it was referring only to the unfair dismissal, wages and holiday claims. This, together with the subsequent dismissal and judgment, precluded her from seeking an award against the transferee.

However, the EAT found that the Tribunal should have made an award for the transferor's failure to notify the claimant of the identity of the transferee. Even though this is not stated in Regulation 13, the duty to inform employees of the transferor's identity is part and parcel of the duty to inform employees of the fact that the transfer is to take place. Even where, as in this case, it is known that the new employer is likely to be a newly-formed company, and who its proprietor would be, it still matters to know the name and identity of the legal person who would be the employer. The EAT sent this issue to a fresh Tribunal to consider what award should be made.

Analysis/commentary: The Tribunal had wrongly stated that the claimant could have brought a Regulation 13 complaint directly against the transferee. As the claimant was an employee of the transferor at the relevant time, it was only the transferor who had a duty to consult or inform the claimant about proposed transfer-connected measures which would occur once she was its employee. An award against the transferee for failure to provide the transferor with information is contingent on a claim being made against the transferor and the transferor then relying on the transferee's non-compliance as a defence.

COMPARISON POOL IN INDIRECT DISCRIMINATION CLAIM MUST BE ACCURATE

Summary: The EAT held that the Employment Tribunal, in rejecting an indirect discrimination claim relating to a requirement to work late shifts, had wrongly failed to address the specific provision, criterion or practice (PCP) about which the claimant had complained. It had included within the pool for comparison two individuals to whom the employer had not applied the same degree of compulsion to guarantee their availability for the late shifts (*Allen v Primark*).

Key practice point: An accurate formulation of the PCP is crucial to the identification of the pool of individuals who are affected by the PCP and, as a result, the question of whether it is discriminatory. This analysis is key for employers too when considering the introduction of a policy which may affect employees with a protected characteristic. In order to assess whether the PCP creates a disadvantage, the pool of employees chosen for comparison must include, and be limited to, those who are impacted by the specific policy.

Background: Indirect discrimination under Section 19 of the Equality Act 2010 occurs where a PCP puts persons with whom the claimant shares a protected characteristic at a particular disadvantage and puts the claimant at that disadvantage (and the employer cannot show the PCP to be a proportionate means of achieving a legitimate aim).

Facts: The claimant was required, as a manager, to guarantee her availability for late shifts on Thursdays. Following maternity leave, she made an application for flexible working. The employer declined to accommodate her request and she resigned, claiming constructive dismissal and indirect sex discrimination. The Tribunal identified the comparison pool for the discrimination claim to be five of the six department managers in her store (one manager who had a separate arrangement with the employer was excluded). Based on that pool, consisting of three men and two women, the Tribunal found that women were not at a particular disadvantage and therefore the claim failed. The claimant appealed.

Decision: The EAT upheld the appeal and sent the case back to the Tribunal. The Tribunal's approach to determining the comparison pool was incorrect because it had wrongly defined the discrimination complaint. The Tribunal had approached the claim on the basis that the claimant was being asked to work late on a Thursday which her childcare did not permit. In fact, the PCP was that she was being required to guarantee her availability for those shifts. On that basis, the pool should not have included two male managers who had worked late on Thursdays (albeit reluctantly as they had childcare issues) but were not required to do so. There was a material difference between the position of the claimant and that of the two men. The failure to address the PCP accurately made the comparison pool unsafe.

Analysis/commentary: The EAT noted that there might be some force in the employer's argument that excluding the two men from the comparator group, leaving a pool of only three, might be artificial. However, the EAT thought this would suggest that the choice of pool (not merely the inhabitants of that pool) was incorrect and that a broader, UK-wide, pool might have been more appropriate.

INFORMATION COMMISSIONER'S GUIDANCE ON RELAXATION OF GOVERNMENT COVID-19 MEASURES

Following the relaxation of the Government measures on COVID-19, the Information Commissioner's Office (ICO) has published guidance: *Data protection and COVID-19 – relaxation of government measures*. The key point from the ICO's guidance is that emergency practices adopted to keep staff safe now need to be reviewed to decide if the information being collected is still necessary. Employers are advised to consider:

- how the continued collection of extra personal information would keep their workplace safe;
- whether previously collected information is still needed; and
- if there are any other ways to achieve the desired result without collecting personal information.

Employers are advised to ensure that their processing continues to be reasonable, fair and proportionate to the current circumstances, taking into account the latest Government guidance. There is a link to ICO guidance on when processing is "necessary" - a requirement for all the lawful bases for data processing (contract, legal obligation, vital interests, public task and legitimate interests), with the exception of individual consent.

The guidance makes a specific reference to the collection of vaccination data. If employers previously relied on "legal obligation" as the lawful basis for collection, they will need to identify another lawful basis if (as will generally be the case) the legislation is no longer in place. In addition, vaccination status is health data which, as "special category data", requires compliance with an extra condition for processing. The guidance adds that if the use of this data is likely to result in a high risk to individuals (such as denial of employment opportunities), or the processing will be on a large scale, then the employer will need to complete a data protection impact assessment.

The ICO notes that data protection law does not prevent employers from keeping staff informed about potential or confirmed COVID-19 cases amongst colleagues, but employers should avoid naming individuals wherever possible and should not provide more information than is necessary.

CORRECT APPROACH TO "LAST STRAW" CONSTRUCTIVE DISMISSAL CASES

Summary: The Employment Appeal Tribunal (EAT) held that a constructive dismissal claim based on the "last straw" principle should be reheard because the Tribunal had not considered whether, in the light of the history, the employer's failure to make a payment for back pay to an employee by an agreed date formed part of a pattern of mistreatment (*Craig v Abellio Limited*).

Key practice point: An employee can resign in response to a series of breaches of contract or a course of conduct by their employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence. The history leading up to the "final straw" is significant in the assessment of whether, viewed objectively from the employee's point of view, there has been a breach of trust and confidence.

Facts: The claimant alleged that he had experienced a series of problems with his hours and pay and that when he was on sickness absence his employer paid the incorrect level of sick pay and failed to address his complaints. The employer initially rejected the grievance about sick pay, but the decision was reversed on appeal and the employer agreed to pay him £6,000 in back pay by a specified date. It failed to make the payment by the promised date and the claimant resigned claiming that it was "the last straw" in a pattern of treatment. The Tribunal dismissed the claim for constructive dismissal, finding that the delay in payment was an administrative mistake.

Decision: The EAT allowed the claimant's appeal and sent the claim back to be reheard. The Tribunal had failed to apply the legal principles applicable to a "last straw" constructive dismissal. It had not considered whether, in the light of the history, the employer's failure to make the payment, seen objectively by someone in the claimant's shoes, formed part of a pattern of mistreatment.

The employer argued that there had been no breach of the implied term of trust and confidence, merely a dispute about contractual terms, which had been resolved through the grievance. The EAT disagreed with that characterisation. The employee's claim of a long history of errors and mishandling of complaints went well beyond a genuine disagreement of terms. Even if the failure to make payment as agreed was a mistake and not a breach of contract in itself, it was still necessary to consider whether the failure could constitute a last straw in the light of all the earlier circumstances,

particularly as no explanation or warning of non-payment was given. It is clear from case law that it is not necessary for the last straw itself to be a breach or even a particularly weighty matter.

HORIZON SCANNING

What key developments in employment should be on your radar?

2022	Extension of ban on exclusivity clauses to lower paid workers
Expected date uncertain	Legislation to provide for: • Entitlement to one week's unpaid leave for employees who are carers • Extension of redundancy protections for mothers • Neonatal leave and pay • Extension of permissible break in continuous service from one week to one month • Right to request a more predictable contract • Single enforcement body for employment rights

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

- **Employment status:** *Griffiths v Institution of Mechanical Engineers* (EAT: whether trustee of professional body is worker for whistleblowing protection)
- **Employment contracts:** *USDAW v Tesco Stores Ltd* (Court of Appeal: whether implied term prevented employer from exercising contractual right to terminate on notice to remove entitlement to enhanced pay); *AMDOCS Systems Group v Langton* (Court of Appeal: whether employer was obliged to pay PHI escalator payments no longer covered by its insurance policy)
- **Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010)
- **Trade unions:** *Morais v Ryanair DAC* (Court of Appeal: whether workers are protected from detriment for participating in industrial action during working hours); *Tyne and Wear Passenger Transport Executive v NURMT* (Court of Appeal: whether employer can claim rectification of a collective agreement)
- **Restrictive covenants:** *Law by Design v Ali* (Court of Appeal: whether High Court was correct in upholding 12-month non-compete clause in a service agreement but finding that a wider restriction in a shareholder agreement was void)
- **Unfair dismissal:** *Fenten v Outform* (Court of Appeal: whether the employer advancing termination date on payment of contractual PILON was a dismissal)
- **Whistleblowing:** *Kong v Gulf International Bank* (Court of Appeal: whether dismissal for questioning colleague's competence on the subject matter of a protected disclosure was automatically unfair).

CONTACT

- PADRAIG CRONIN
- PARTNER
- T: +44 (0)20 7090 3415
- E: Padraig.Cronin@SlaughterandMay.com

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Phil.Linnard@SlaughterandMay.com

- LIZZIE TWIGGER
- SENIOR COUNSEL
- T: +44 (0)20 7090 5174
- E: Lizzie.Twigger@SlaughterandMay.com

- SIMON CLARK
- ASSOCIATE
- T: +44 (0)20 7090 5363
- E: Simon.Clark@SlaughterandMay.com

- LUCY DUANE
- ASSOCIATE
- T: +44 (0)20 7090 5050
- E: Lucy.Duane@SlaughterandMay.com

- PHILIPPA O'MALLEY
- ASSOCIATE
- T: +44 (0)20 7090 3796
- E: Philippa.O'Malley@SlaughterandMay.com

- DAVID RINTOUL
- ASSOCIATE
- T: +44 (0)20 7090 3795
- E: David.Rintoul@SlaughterandMay.com

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