SLAUGHTER AND MAY

Employment Bulletin

October 2018

Welcome to the October edition of our Employment Bulletin. This month, our headline item is an Employment Appeal Tribunal decision on what is meant by 'bad faith' for the purposes of a victimisation claim. We also consider when changes to terms and conditions can be made validly after a TUPE transfer. We look at a case which illustrates that "giving notice" is not always what it seems; examine the grant of an injunction requiring an employer to lift a suspension, before concluding with some horizon scanning.

Contents

Bad faith for the purposes of a victimisation claim means acting dishonestly

Summary: The EAT held that an employee was able to claim victimisation even though his discrimination allegation was made for an ulterior motive. The employee had not acted dishonestly (*Saad v Southampton University Hospital NHS Trust*).

Key practice point: This is a very restrictive interpretation of the 'bad faith' exception to victimisation protection under the Equality Act 2010. Whilst the EAT did not rule out ulterior motives being relevant to bad faith, it made it clear that, if an employee acts honestly, this would be likely to defeat any bad faith argument.

Facts: The employee was training to be a consultant surgeon. In 2011 he raised a grievance relating to an alleged racist remark that had been made four years previously by another surgeon who was the training programme director for the unit where the employee was working. In 2012 the employee was removed from the training programme, with the result that he could not qualify as a consultant surgeon in the UK.

The employee claimed in the Employment Tribunal for detriment for making a whistleblowing disclosure and for victimisation, based on the alleged discriminatory remark. The Tribunal dismissed both claims.

In relation to the whistleblowing claim, the Tribunal found that although the employee had believed that the comment had been made, that belief was not reasonable. The witness alleged to have reported the comment contradicted the employee's own evidence. The Tribunal found that the predominant purpose of the grievance had been to avoid the performance issues that the employee faced, and therefore it had not

been made in good faith as required under the (pre-June 2013) test for a protected whistleblowing disclosure. (The test was changed in 2013, removing good faith and replacing it with a new public interest requirement.)

On victimisation, Section 27(3) of the Equality Act 2010 provides: "*Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith*". The Tribunal concluded that the finding, for the whistleblowing claim, that the employee's belief in the allegation had not been reasonable and was not made in good faith meant it was also a false allegation made in bad faith for the purposes of the victimisation claim.

Decision: The EAT allowed the appeal on the victimisation claim. The question is whether the employee acted honestly in making the allegation; the existence of an ulterior motive, while potentially relevant, is not the focus. Unlike whistleblowing legislation, Section 27(3) has no prior stage where the Tribunal must first determine whether the employee believes in what they are saying; it is simply required to find whether the allegation was true or false. If it was false, the Tribunal then has to determine whether it was made by the employee in bad faith.

The Tribunal had found that the employee subjectively believed that the alleged racist comment had been made. He had made the allegation honestly and hence had not made it in bad faith.

The EAT substituted a finding of victimisation.

Comment: This is a significant case; the first reported EAT decision on the meaning of bad faith in Equality Act victimisation, and it makes it clear that it will not be enough for employers to identify ulterior motives in victimisation claims; they will need to show that the employee could not have reasonably believed in what they were saying.

There were policy considerations in the EAT's decision. Judge Eady QC gave the example of an employee who might feel reluctant to raise a complaint of discrimination, notwithstanding the fact they genuinely believed they had suffered less favourable treatment because of a protected characteristic. That reluctance to complain might recede if they then faced a complaint about their own conduct or performance and "*if raising an allegation of discrimination was in response to the complaint, the employee might well be seeking to deflect the criticism they faced but that does not mean that they are acting in bad faith*".

The EAT did not rule out the possibility that ulterior motivation for making the allegation might be relevant to bad faith; and confirmed that it would be relevant to remedy. The Judge did also comment that the more obviously false the allegation, the more a Tribunal might be inclined to find that it was made without honest belief. However, the onus will be on the employer to prove this – not a particularly attractive prospect – and it is unclear what level of ulterior motive would suffice. Based on this case, an allegation designed to further the employee's own financial interests would not be enough.

Ending of outdated allowance payments was not connected to previous TUPE transfer

Summary: The EAT upheld an Employment Tribunal decision that an employer's termination of contractual allowance payments that had been made for many years was because the allowance was an outdated and unjustified payment; it was not related to the previous TUPE transfer to the employer. Therefore Regulation 4(4) of TUPE (under which changes to terms and conditions can be void if the sole or principal reason for them was the transfer itself) did not apply (*Tabberer v Mears Ltd*).

Key practice point: Changes to a historic contractual term can sometimes be made post-TUPE transfer without falling foul of Regulation 4(4), where the term is no longer justified for reasons unconnected with the transfer.

Facts: The claimants were electricians who had originally been employed by Birmingham City Council. Their employment had been subject to a number of TUPE transfers, ultimately to the respondent employer, Tabberer. Whilst employed by the Council, the electricians had enjoyed payments of Electricians' Travel Time Allowance (ETTA). The original purpose of ETTA (which started in 1958) had been to compensate electricians for the loss of productivity bonuses as a result of having to travel to different depots. Both the travel to different depots and productivity bonuses had been phased out over time. The transferor employer had taken the decision to continue to pay ETTA, even though their view was that payment was unjustified. Initially, that decision had been taken because of a desire to avoid a dispute with the trade unions; later the transferor considered that there was a legal obligation to pay.

After the transfer of the business to the employer in 2008, the issue again arose as to whether there was any contractual entitlement to ETTA; however, after litigation on the issue the employer was satisfied that there was. As a result, the employer gave notice in 2012 that it was bringing the contractual entitlement to an end. The claimants argued that the reason for this variation to their contractual terms was the TUPE transfer and therefore the change was void under Regulation 4(4). The Tribunal disagreed, finding that the contractual variation was made because ETTA was an outdated and unjustified payment. The claimants appealed.

Decision: The appeal was dismissed. The Tribunal had found that the variation of the claimants' terms of employment was due to the employer's conclusion that ETTA was an outdated and unjustified allowance. That conclusion had not arisen purely on the occasion of, let alone because of, the transfer; it was a pre-existing belief that had been expressed by previous employers. After the transfer, the employer faced the same dilemma. The transfer simply explained how the employer came into the picture at all, not why they questioned the payment. The Tribunal was therefore entitled to find that this was a reason unrelated to the earlier transfer to the employer.

The letter to the workforce notifying them of the withdrawal of ETTA referred to the need for workplace fairness given that electricians were enjoying a benefit that had no justification and that other categories of workers did not have. This was not a reference to harmonising terms and conditions within an occupational group but to the need for fairness across different job groups, regardless of the transfer.

Analysis/commentary: The employer relied on cases such as *Enterprise Managed Services Ltd v Dance* (see our Bulletin dated 11 November 2011), where the EAT found that post-transfer changes to terms, driven by the success of pre-transfer changes designed to improve productivity, were not for a reason connected with the transfer.

However, although the employer in *Tabberer* was able to demonstrate a specific reason for the withdrawal of the contractual entitlement, beneficial to the business and unconnected to the transfer, it is clear that where an employer wishes to harmonise terms, as opposed to changing one 'rogue' term, it is likely that the transfer will be found to be the reason for the change.

It was clearly helpful that the employer had good records of its management decision-making and that the issue had been identified pre-transfer.

Letter giving "one month's notice" was not a resignation

Summary: The EAT held that a Tribunal was entitled to find that an employee's letter to her employer giving "one month's notice" was not a letter of resignation. The employee was expecting to take up a role in another department and the Tribunal was therefore entitled to interpret the letter as giving notice of intention to leave the former role rather than to resign from employment with the employer. The employer's refusal to accept a retraction of the notice was, therefore, a dismissal (*East Kent Hospitals University NHS Foundation Trust v Levy*).

Key practice point: Notice of termination given by an employee can in certain circumstances be retracted. If a notice is in any way ambiguous, employers need to clarify the employee's intentions before relying on it as a resignation.

Facts: The claimant had experienced difficulties in the Records Department in which she was employed by the Trust as an administrator and had successfully applied for a position in the Radiology Department, subject to pre-appointment checks. Having received her conditional offer from Radiology, and after an altercation with another employee in Records, she handed in a letter stating "*Please accept one Month's Notice from the above date*". Her manager responded the same day accepting her "notice of resignation" and referring to her last working day in Records.

Subsequently, the offer of employment in Radiology was withdrawn due to the claimant's sickness absence record and she sought to retract her resignation. The Trust refused to agree to this and confirmed that her employment would terminate at the end of her notice period. The Employment Tribunal found that she had been unfairly dismissed.

Decision: The EAT rejected the Trust's appeal. The Tribunal had been correct to find that the claimant's notice had been understood as referring to termination of her position in Records before she moved to Radiology and not the termination of her employment.

Although the word "notice" in an employment context might generally signify an unambiguous notification of termination of the contract, this was not so in the particular circumstances of this case. The claimant had the offer of a position within another department and her notice could equally be taken to refer to notification of her departure from Records.

Given the ambiguity arising from her letter, the Tribunal had correctly applied an objective test when determining how the words would have been understood by a reasonable recipient of the letter. Based on the manager's immediate response to the letter, the Tribunal decided that the claimant's notification had been understood to relate to her departure from Records and not from employment with the Trust. The manager did not complete a staff termination form (expressly stated not to be used for internal transfers) and made no reference to the claimant leaving her employment more generally or to any outstanding issues regarding, for example, accrued leave entitlement; omissions that the Tribunal contrasted with the actions taken immediately on sending out the letter informing the claimant that her retraction was not accepted.

Analysis/commentary: There are two separate issues for employers to consider in relation to purported resignations:

- Is the resignation unambiguous, or could it be construed as something else (as in this case)?
- Even if it is unambiguous, are there "special circumstances" that mean that it would be wrong to take the "giving notice" at face value?

The Tribunal had found that, even if the employee's notice had been unambiguous, there were special circumstances (the fact that she was moving departments) that meant it would be wrong to take the claimant's letter at face value. (There was no appeal from that finding in the EAT.) Even though a party who has given notice of termination in the correct form has no right unilaterally to withdraw it, EAT case law has established that there are circumstances in which an employee should be given the opportunity to withdraw a resignation – typically, where words have been spoken "in the heat of the moment".

The EAT in *Kwik-Fit (GB) Ltd v Lineham* set out the approach that should be followed if these special circumstances exist. A reasonable period of time should be allowed to pass and if, during that period, the employer is put on notice that further enquiry should be made to see whether the resignation was really intended, then this enquiry should be "*ignored at the employer's risk*".

The special circumstances in this case were ones that are more likely to arise in a public sector employer; nevertheless, HR departments need to be aware that there may be situations where an employee's notice of resignation requires further investigation.

Employee granted injunction lifting exclusion from work

Summary: The High Court allowed a heart surgeon's application for an interim injunction against her employer lifting her exclusion from working at a hospital. The claimant had demonstrated that she had strong grounds to contend that the exclusion was a breach of contract and/or a breach of the implied term of trust and confidence (*Jahangiri v St. Georges University Hospital's NHS Foundation Trust*).

Key practice point: It is good practice (and a requirement of the ACAS Code of Practice on Disciplinary and Grievance Procedures) that suspension should be as brief as possible, should be kept under review and it should be made clear that it is not considered a disciplinary action. This case also shows the importance of following any contractual provisions, and documenting all decisions, very carefully.

Facts: The claimant was a heart surgeon working at the defendant NHS Trust's hospital in the cardiac surgery unit. The unit was the subject of a Review that had been put in place following alerts on mortality statistics. In August 2018, the Trust excluded the claimant from working at its hospital for two weeks, under its Staff Conduct and Capability Policy, following an allegation that she had indirectly approached an employee who was a witness in the Review, contrary to an instruction given to all surgeons not to obstruct the Review. This occurred at the same time as a disciplinary investigation into an allegation of misconduct against the claimant made by the witness. The claimant maintained that she had approached the witness in relation to the disciplinary investigation rather than the Review.

At the end of the two weeks, the Trust extended the exclusion and then, the next day, excluded her on a new basis – that she might hinder the Review.

Decision: The application for an injunction requiring the Trust to lift the suspension was granted. The claimant had demonstrated that she had strong grounds to contend that exclusion was a breach of contract

and/or a breach of the implied term of trust and confidence. Under the terms of the Policy, a decision to exclude could only be justified if it was necessary because her presence at work was likely to hinder the investigation into the misconduct allegations, not the Review. The evidence failed to demonstrate an adequate basis on which the Trust could reach that conclusion, as well as showing a failure properly to investigate.

The Trust's approach to the exclusions was flawed in a number of respects:

- They should not have taken the decision to exclude without getting a clear account from the witness about the claimant's explanation for contacting her.

- The Trust had applied the wrong test under the Policy. Total exclusion had to be found to be "necessary"; they had taken the decision that exclusion was "appropriate".

- They failed to consider whether other measures short of total exclusion could deal with the perceived issue. An obvious alternative was to seek an assurance or undertaking from the claimant (or to impose a prohibition) that she would not contact the witness until the disciplinary process had been completed.

- There was a failure to document the process, to identify who made each decision and what material they had when the decision was made.

- The decision to extend the period of exclusion was made because it was expedient, not because it was necessary. The purported justification was that, as the investigation was nearly complete, it would be premature to lift the exclusion. In fact, as the investigator had completed interviews with all relevant witnesses, the risk of the claimant hindering the investigation was diminished.

The Trust had not satisfied the Court that the exclusion was necessary. The balance of convenience overwhelmingly favoured the grant of an injunction, therefore.

Comment: Although most private sector employers will not have such detailed contractual policies, the terms of a contractual right to suspend must be strictly followed and the reasons documented. Even then, there can be a breach of the implied duty of trust and confidence, if the decision to suspend is unreasonable.

The fact that this case involved a surgeon was significant, the Judge pointing out that when a skilled surgeon (about whom there were no concerns as to ability) is excluded the consequences "*reach far beyond the individual*". There was evidence that one patient's operation was cancelled because of her exclusion. However, it is clearly applicable in other situations; for example, in relation to investigations in the financial services sector, where there could be concern that the presence of an employee might hinder an investigation. Employers must consider carefully whether suspension is necessary, or whether there might be any alternative (and document that consideration). As was made clear in *Agoreyo v Lambeth BC* last year, recording in the suspension letter that suspension is a "neutral act" and no criticism of the employee is implied will not in itself mean that is the case or prevent there being a breach of trust and confidence.

Horizon scanning

What key developments in employment should be on your radar?

4th October 2018	Childcare voucher scheme to close to new entrants
1st January 2019	Revised UK Corporate Governance Code due to take effect Associated legislation due to come into force – including to require listed companies to report annually the ratio of CEO pay to the average pay of their UK workforce
29th March 2019	European Union (Withdrawal) Act 2018 due to take full effect
4th April 2019	Gender pay gap reporting deadline
6th April 2019	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6th April 2019	Workers entitled to written statements of terms and itemised pay slips
April 2019	Annual updates to employment rates and limits
Mid to late 2019	Planned extension of the SMCR to all FSMA-authorised persons

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

- **Employment status**: *Uber v Aslam* (Court of Appeal)
- **Discrimination / equal pay**: *ASDA Stores v Brierley* and *Sainsbury's Supermarkets v Ahmed* (Court of Appeal: equal pay); *Lee v McArthur* (Supreme Court: sexual orientation v religious discrimination); *Hextall v Chief Constable of Leicestershire Police* (Court of Appeal: indirect discrimination and shared parental pay); *The Trustees of Swansea University Pensions & Assurance Scheme v Williams* (Supreme Court: discrimination arising from a disability and the meaning of unfavourable treatment)
- **Holiday pay**: *The Sash Window Workshop td v King* (Court of Appeal: carry over of entitlement)
- **Whistleblowing**: *International Petroleum v Osipov* (Court of Appeal: liability of colleagues) *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure)

- **Data protection**: *Various claimants v WM Morrison Supermarkets PLC* (Court of Appeal: vicarious liability for rogue employee)

- **Trade unions**: *IWGB v UK* (ECtHR: challenge to recognition rules); *IWGB v CAC* (High Court: recognition by 'de facto' employer in outsourcing): *Kostal v Dunckley* (Court of Appeal: inducements); *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Restrictive covenants**: *Tillman v Egon Zehnder* (Supreme Court: non-competes and minority shareholdings)

- **Collective consultation**: *Seahorse Maritime Ltd v Nautilus International* (Court of Appeal: territorial scope of employer's obligations)

- **Employer's liability**: *Bellman v Northampton Recruitment Limited* (Court of Appeal: vicarious liability for assault after Christmas party*); Lungowe v Vedanta Resources Plc* (Supreme Court: parent company duty of care for subsidiary operations).

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