SLAUGHTER AND MAY

Employment Bulletin

February 2019

Our headline item is about protected **whistleblowing disclosures**. We also report on the Government's proposals to **extend redundancy protection** for parents. We look at cases on the **duty to make reasonable adjustments**, and **injunctions to enforce post-termination restrictions**, before concluding with some **horizon scanning.**

Contents

Defamation complaint was not a protected whistleblowing disclosure

Summary: The Employment Appeal Tribunal has decided that a hospital worker's complaint that he was being defamed by rumours about patient confidentiality was made to clear his name, rather than in the public interest, and therefore it could not be a protected disclosure *(Ibrahim v HCA International Ltd*).

Key practice point: This decision shows that a "breach of a legal obligation" under the whistleblowing legislation covers torts and that, for a disclosure to be protected, the whistleblower does not have to specify the particular legal obligation (in this case, defamation) allegedly being infringed. However, the disclosure must be in the public interest.

Facts: The claimant worked as an interpreter for patients in a private hospital. He asked his employers to investigate rumours that he was responsible for breaches of patient confidentiality, saying that he needed to "clear his name". When he was later dismissed, he claimed that it was because of his whistleblowing.

Before considering if the employee's dismissal was because of his whistleblowing disclosure, the Tribunal had to decide whether the disclosure satisfied the conditions for being a protected disclosure under the whistleblowing legislation. The Tribunal concluded that it was not protected, firstly because it did not "*tend to show breach of a legal obligation*" and, secondly, because it was not made in the public interest.

The claimant appealed to the Employment Appeal Tribunal.

Decision: The EAT dismissed the appeal, confirming the Tribunal's decision that the public interest element had not been met.

The EAT decided that the Tribunal had been wrong about the first point – the complaint was about a failure to comply with a legal obligation. "Legal obligation" is broad enough to include defamation and, although the claimant might not have used the word "defamation" at the time, it was clear that the substance of his allegation was that he was being defamed.

However, the appeal failed because the Tribunal had been entitled to conclude that the public interest element had not been satisfied. The claimant's concern was about the effect of the false rumours on his own position; he did not believe his complaint was in the wider public interest.

Analysis/commentary: This decision shows that, although the scope of breaches of legal obligation is wide, and an employee does not have to specify the particular obligation allegedly being infringed, the actual disclosure itself must be made in the public interest.

The EAT accepted that information about a breach of data protection law would have been in the public interest. However, what the employee had complained about here was that others had falsely accused him of breaching patient confidentiality, an allegation of a breach of a very different legal obligation - not to commit defamation. The evidence showed that the claimant was seeking to protect his personal interest by clearing his name, rather than having a reasonable belief that his disclosure was in the public interest.

However, as the EAT hinted, had the claimant framed his complaint in terms of a concern for the integrity of data protection systems at the hospital (and pointed out that it potentially affected every patient), the outcome might have been different. The case would then have looked more similar to *Chesterton Global v Nurmohamed*, where the Court of Appeal found that the public interest element was met even though the whistleblower was complaining about alleged financial irregularities in internal accounts affecting the bonuses of around 100 managers, including himself (see our Bulletin dated 14 July 2017).

Government's proposals to extend redundancy protection for parents

The Government has responded to concerns expressed by the Women and Equalities Parliamentary Select Committee (WEC), among others, about discrimination against new mothers and pregnant women in the workplace. A consultation paper, issued on 25 January 2019, asks for views on what changes it should make to the current framework for redundancy protection.

The legislation currently provides that, before making an employee on maternity leave redundant, an employer must offer a suitable alternative vacancy where one is available with the employer or an associated employer. The obligation arises when the employee is told that her role is at risk of redundancy. (Selection for redundancy because of pregnancy or maternity leave is automatically unfair dismissal.)

The consultation suggests extending this protection to cover not just those on maternity leave but also pregnant women and those returning from maternity leave. The Government's provisional view is that, as suggested by the WEC in its 2016 report on pregnancy and maternity discrimination, the starting point for the pregnancy protection should be when a woman informs her employer in writing of her pregnancy, and the additional protection should apply for six months after return to work.

The consultation paper also asks for views on giving similar additional protections to parents returning from adoption leave, shared parental leave and "longer periods of parental leave".

The Government has rejected two other recommendations from the WEC report:

- A system, similar to that used in Germany, under which employers have to get permission from a public authority before making pregnant women and new mothers redundant.

- An increase in the three-month time limit for pregnancy/maternity discrimination claims. The consultation paper points out that, in the first half of 2018, tribunals exercised their discretion to extend the time limit in all 25 of the out of time applications in these claims.

The consultation closes on 5 April 2019.

Analysis/commentary: The priority right to be offered a suitable alternative vacancy generally means that the employee on maternity leave does not have to go through any competitive interview process for the alternative role. However, it is unclear how, under the current law, employers should deal with a situation where there are more employees on maternity leave than suitable alternative vacancies. It is possible (but perhaps unlikely) that the role(s) could be suitable for only some of those on leave but, if that is not the case, then the employer presumably has to undertake a selection process. This scenario is more likely to occur if the protection is extended as proposed. The difficulties it presents cannot be avoided by taking those with protection out of the redundancy selection pool – this risks discrimination against male employees in the pool.

Employer had sufficient knowledge of disability to trigger duty to make reasonable adjustments

Summary: The EAT overturned a finding on the date when an employer had knowledge of an employee's disability (and therefore had a duty to make reasonable adjustments). The EAT held that the employer had the required knowledge three months before the date the Tribunal had decided the duty arose (*Lamb v The Garrard Academy*).

Key practice point: Employers need to use occupational health advice at an early stage in ill health cases, as the duty to make reasonable adjustments will arise as soon as they know, or ought to have known, of an employee's disability.

Background: An employer is not subject to the duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the individual has a disability and is likely to be placed at a substantial disadvantage. The definition of disability in the Equality Act says that the impairment must have a substantial and long-term effect on the individual's ability to carry on normal day-to-day activities, and the effect is "long-term" if it has lasted, or is likely to last, for at least 12 months.

Facts: The background leading up the claim was:

- February 2012 – the employee went on sick leave because of reactive depression and alleged bullying at the school where she worked.

- March 2012 - she raised a grievance about two incidents involving the school's deputy head.

- Early July 2012 - the head of HR prepared a report but the school regarded it as inadequate and did not look at the supporting material.

- 18 July 2012 - the employee told the school's Chief Executive she was suffering from PTSD, caused by childhood experiences, which could be triggered by difficult situations.

- 21 November 2012 - Occupational Health (OH) issued a report, stating that her symptoms probably began in September 2011.

The employee complained to the Employment Tribunal that her employer had failed to make reasonable adjustments, in particular that they should have commissioned a fresh investigation when they rejected the head of HR's report. It was accepted that she was disabled. The Tribunal concluded that, although the school had actual knowledge of her PTSD from 18 July 2012, it did not have constructive knowledge of her *disability* until 21 November 2012. It was only then that they knew (from the OH report) that her symptoms had begun over a year before, so that the long-term element of the disability definition was satisfied. Therefore, no duty to make reasonable adjustments arose before that date. The employee appealed to the EAT.

Decision: The EAT allowed the appeal. The Tribunal's finding that the school had actual knowledge of the employee's impairment when she told them she was suffering from PTSD in July 2012 was inconsistent with its finding of no constructive knowledge until November 2012. The school knew that the PTSD dated back to her childhood and therefore implicitly must have known it was sufficiently longstanding to satisfy the definition of disability.

The EAT agreed that, when the employee first raised her grievances in March 2012, the school could not reasonably have known that she was disabled. Although she was off work with reactive depression, the trigger appeared to be a workplace issue, and it was reasonable to expect that it could be resolved quickly. However, the position was different by early July, when she had been off work for four months and the grievance remained unresolved. If a referral had been made then, it was overwhelmingly likely that OH would have concluded that her impairment was long-term and that she was disabled.

The EAT also found that it would have been reasonable for the employer to have made the adjustment the claimant had asked for (reading the report prepared by the Head of HR, by the end of July 2012). If this had been done, its defects could have been cured and the investigation could have been completed sooner.

Analysis/commentary: An employer is under a duty to make reasonable adjustments only if it has actual or constructive knowledge that the employee is disabled and likely to be put at a substantial disadvantage. The point at which constructive knowledge is established can be difficult to ascertain, particularly when the employer has conflicting advice from OH and other medical professionals, or when the employee is being uncooperative. In this case, because the employer did not make an early referral to OH, it was unable to show that it did not know (or ought to have known) that the employee's medical problems met the definition of a disability.

If employers have good systems in place to enable them to find out the nature of an employee's health problem, they should be entitled to place significant weight on an OH opinion, provided that they do not simply rubber stamp it. In *Donelien v Liberata*, the Court of Appeal held that an employer did not acquire constructive knowledge in circumstances where OH had said the employee did not have a disability and the employer had taken its own reasonable (but not exhaustive) steps to verify that (see our Bulletin dated 16 February 2018).

High Court grants limited injunctions to enforce post-termination restrictions

Summary: The High Court granted an injunction to enforce post-termination restrictions in the contract of a business development manager who started a business in competition with his former employer. However, the Court did not grant injunctions to restrain the former employee from misusing confidential information, or on a springboard basis (*Argus Media Limited v Halim*).

Facts: H was a business development manager for Argus, a price-reporting agency (PRA). His role was to promote price assessments in the European and African markets in fertilisers. He resigned on notice on 12 July 2018 and was on garden leave until his employment terminated on 31 August 2018. Argus alleged that H had formed a PRA in competition with it, in breach of the post-termination restrictions (PTRs) in his contract of employment, as well as express and implied duties of fidelity and confidentiality. They applied for injunctions, including a "springboard" injunction to cancel out the "head start" H had obtained in his competing business by unlawfully using confidential information while he was still employed.

Decision: The High Court decided to grant some, but not all, of the injunctions.

The High Court granted final injunctions to enforce the PTRs. The Court agreed with Argus that H was engaged in competition in breach of the PTRs. His claim that he was not competing because he was producing a regional (African) rather than a global report, was rejected. The businesses were sufficiently similar and comparable for them to be competitive.

The Court also found that H's actions while he was still employed crossed the line beyond legitimate preparatory steps and amounted to breaches of his duty of fidelity. He had attended marketing conferences very shortly after he left Argus and was able to make an impression on prospective clients with his marketing material and prototype and then, within a very short period, to move to his first PRA weekly report. The evidence showed that he was able to "hit the ground running" because he was in breach of the terms of his employment contract.

Argus successfully showed that the PTRs were not unenforceable restraints of trade. They went no further (either in scope or in length – nine months) than was reasonably necessary to protect its legitimate business interests in confidential information/business and customer connections, assessed at the time of the contract.

H argued that Argus had breached his contract by examining his e-mails during his garden leave and that as he had accepted that breach as ending his contract, the PTRs no longer applied. The Court rejected this, deciding that it was not a breach of privacy rights - it was authorised by the employee handbook and related to the employee's work interests.

The Court decided that an injunction on misuse of confidential information was inappropriate, however. The confidentiality clause in the contract was too wide, restricting the use of the employee's skill and general knowledge. The only way the clause could be given effect would have been to limit its application - an unsuitable basis for the definition of confidential information in an injunction. The Court also ruled out a springboard injunction. There was no evidence that H had poached key employees or customers and Argus had not shown that, without a springboard injunction, he would continue to earn an unfair competitive advantage.

Analysis/commentary: Although inevitably fact-based, this decision shows that final injunctions are less likely to be given where the clause is too wide and needs to be cut back in order to be enforceable.

The (unsuccessful) claim that the PTRs were no longer binding because of a repudiatory breach is a reminder of the need for employers to be cautious about their dealings with employees during garden leave.

Horizon scanning

What key developments in employment should be on your radar?

29 March 2019	European Union (Withdrawal) Act 2018 due to take full effect
4 April 2019	Gender pay gap reporting deadline
6 April 2019	Workers entitled to itemised pay slips
April 2019	Annual updates to employment rates and limits
9 December 2019	Extension of the SMCR to FCA solo-regulated firms
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment and to contain extra details
6 April 2020	Threshold for valid employee request for information and consultation lowered from 10% to 2% of employees
6 April 2020	Abolition of opt-out from equal pay protections of the Agency Workers Regulations
6 April 2020	Change in reference period for calculating holiday pay for workers with variable pay, from 12 to 52 weeks

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

- **Discrimination / equal pay**: *Hextall v Chief Constable of Leicestershire Police* (Court of Appeal: indirect discrimination and shared parental pay); *Chief Constable of Norfolk v Coffey* (Court of Appeal: perceived disability discrimination)

- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure); *Bamieh v FCO* (Court of Appeal: territorial jurisdiction)

- **TUPE:** *Hare Wines v Kaur* (Court of Appeal: whether transfer was reason for dismissal)

- **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/by-passing of collective bargaining); *Jet2.com v Denby* (Court of Appeal: refusal of employment)

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

- **Agency workers**: *Kocur v Angard Staffing Solutions* (Court of Appeal: parity of terms)

- **Constructive dismissal:** *Agoreyo v London Borough of Lambeth* (Court of Appeal: whether suspension was repudiatory breach of contract)

- **Employer's liability**: *Lungowe v Vedanta Resources Plc* (Supreme Court: parent company duty of care for subsidiary operations).

Jonathan Fenn
T +44 (0)20 7090 5025
E Jonathan.Fenn@slaughterandmay.com

Padraig Cronin
T +44 (0)20 7090 3415
E Padraig.Cronin@slaughterandmay.com

Phil Linnard
T +44 (0)20 7090 3961
E Phil.Linnard@slaughterandmay.com

Lizzie Twigger
T +44 (0)20 7090 5174
E Lizzie.Twigger@slaughterandmay.com

Dated February 2019