SLAUGHTER AND MAY

Employment Bulletin

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Our headline item is the Court of Appeal's decision that a **dismissal** was **TUPE-related** despite being for personal reasons. We report on another Court of Appeal case, on **misconduct suspension**. We look at the Government's consultation on **confidentiality** clauses, as well as liability for breach of the **Agency Workers Regulations**, before concluding with some **horizon scanning.**

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Dismissal based on working relationship problems was TUPE-related

Summary: The Court of Appeal has decided that an employee, dismissed on the day of a TUPE transfer because of difficulties in her working relationship with a colleague, was automatically unfairly dismissed *(Hare Wines Ltd v Kaur*).

Key practice point: This decision confirms that the fact that there was a personal reason for a dismissal will not necessarily prevent a finding of automatic unfair dismissal, on the basis that the sole or principal reason for the dismissal was the TUPE transfer.

Facts: The employee worked for H&W Wholesale, whose directors were H and W. When H&W began to experience financial difficulties, H and W decided that it would cease trading and the business would be transferred under TUPE to Hare Wines (whose sole director was H). The employee was dismissed by a letter from W on the day of the TUPE transfer.

The employee brought claims, against H&W and Hare Wines, that she had been automatically unfairly dismissed because the sole or principal reason for her dismissal was the transfer. In the Tribunal, there was a dispute over the reason for the dismissal. The employee argued that Hare Wines did not want her because she had a strained working relationship with a colleague, who was set to become a director of Hare Wines.

Hare Wines denied this and defended the claim on the basis that she had objected to the transfer, because she did not want to work for her colleague.

The Tribunal and EAT decided that the dismissal was automatically unfair under TUPE, because the sole or principal reason for the dismissal was the transfer. The employee had been dismissed because Hare Wines had anticipated that there would be ongoing difficulties in the working relationship between her and the colleague and, therefore, decided that it did not wish her contract of employment to transfer.

In the Court of Appeal, Hare Wines argued that the transfer merely provided the occasion for the dismissal, rather than being the reason for the dismissal – the other six or seven employees had transferred, and the Tribunal had found that the reason for the employee not doing so was a difficult working relationship.

Decision: The Court of Appeal dismissed Hare Wines' appeal. The Tribunal had rejected evidence that the employee had objected to being transferred, and it was entitled to find that the transfer was the reason for the dismissal:

- The employee was dismissed on the day of the transfer. Although proximity is not conclusive, it is strong evidence in the employee's favour.
- The poor relationship with the colleague had endured for some time without H&W looking to terminate her employment. They only did so, at the request of Hare Wines, immediately before the transfer. It was the transfer that made the difference between the poor working relationship being tolerable and not.

Analysis/commentary: Clearly, employers should avoid the temptation of using a business transfer to dismiss employees with whom there is some ongoing difficulty, as it is very likely to result in an automatically unfair dismissal. The employee only needs to produce some evidence to show that the dismissal was automatically unfair - the burden of proof then shifts to the employer to prove the reason for the dismissal, and that it was not automatically unfair. The fact that there was a personal reason for a dismissal will not prevent a finding that the reason was the transfer.

The dismissal of an employee, before or after a transfer, where the sole or principal reason is an economic, technical or organisational (ETO) reason, will be potentially fair (subject to the normal legal requirements of fairness under the Employment Rights Act 1996). If there is not an ETO reason, it is sensible to assume that the dismissal will be automatically unfair.

The employer also argued unsuccessfully that the employee had objected to the transfer. Tribunals will be reluctant to find that an employee has objected without clear evidence.

Suspension to allow for misconduct investigation was not a breach of trust and confidence

Summary: The Court of Appeal overturned the High Court and reinstated a County Court decision that the suspension of a teacher, to allow for an investigation into alleged misconduct, was not a breach of trust and confidence (entitling the teacher to resign and treat herself as constructively dismissed). The High Court had incorrectly said that the suspension had to be a "necessity" (*London Borough of Lambeth v Agoreyo*).

Key practice point: An employer can suspend an employee pending a misconduct investigation if that course of action is reasonable and proper – it does not have to be "necessary" to suspend.

Facts: The claimant was employed as a teacher at a primary school. Allegations were made that she had used unreasonable force towards children on three occasions. The head teacher looked into two of these instances and found that she had used reasonable force. However, the executive head teacher wrote to inform the employee that she was being suspended in light of the allegations. The letter stated that "*The suspension is a neutral action and is not a disciplinary sanction*" and made it clear that its purpose was to allow the investigation to be conducted fairly. When she was informed of her suspension, the employee resigned.

The employee brought a claim that, by suspending her, the Council had breached the trust and confidence term that is implied into employment contracts. The County Court dismissed the claim, the High Court reversed that decision, and the Council appealed.

Decision: The Court of Appeal allowed the Council's appeal – it was not in breach of trust and confidence. The question was simply whether it had "reasonable and proper cause" to suspend pending investigation, but the High Court had applied a stricter test – whether it was "necessary". In addition, the question of whether there had been a breach of trust and confidence depended on the particular facts - an issue for County Court to decide on the evidence. The High Court was not entitled to interfere with that decision.

In this case, it was obvious (and accepted by the employee) that the allegations of misconduct were serious and needed to be investigated. Bearing in mind the context - the Council's duty to safeguard the interests of young children - the employer's response was reasonable and proper.

Analysis/commentary: Although helpful in confirming that there is no "necessity" test in assessing whether a decision to suspend is a breach of the duty of trust and confidence, this decision also emphasises the fact-specific nature of trust and confidence cases. The context here was a public sector employer obliged to safeguard the interests of young children. Clearly, in teaching or other care professions, it is likely to be easier for employers to show reasonable and proper cause to suspend pending an investigation into misconduct.

One of the factors that caused problems for the employer in this case was the lack of evidence of any consideration of alternatives to suspension. Employers should always consider carefully whether suspension is necessary, or whether there might be any alternative (and document that consideration). Investigations can be protracted, particularly in regulated financial institutions, so employers should review suspensions regularly to ensure they are still appropriate.

There had been some discussion in this, and other recent cases, as to whether suspension is a "neutral act". The Court of Appeal regarded that expression as unhelpful, referring instead to the ACAS Code of Practice on disciplinary and grievance, which says that suspension should not be considered a disciplinary action and that this should be made clear to the employee.

Government consultation on preventing misuse of confidentiality clauses

Summary: The Government, in a consultation paper issued on 4 March 2019, is asking for views on proposals to improve the regulation of confidentiality clauses/non-disclosure agreements in employment contracts and settlement agreements. The consultation closes on 29 April 2019.

As signalled in its announcement in January on the proposed introduction of a statutory code of practice on sexual harassment at work (see our Employment Bulletin dated January 2019), the Department of Business, Energy & Industrial Strategy has launched a consultation on the use of confidentiality clauses, also known as non-disclosure agreements (NDAs), in employment contracts and in settlement agreements. The consultation asks for views on a number of proposals:

- Legislation that **no provision in an employment contract or a settlement agreement can prevent someone making any kind of disclosure to the police.** Although whistleblowing legislation (which confidentiality clauses cannot override) already provides for this (in the case of disclosures protected by the whistleblowing legislation only), the Government is concerned that the whistleblowing legislation is complicated and it is difficult for workers to be sure if a particular disclosure would be protected. The Government is wary of extending this exception to bodies other than the police, but asks for views.

- **All confidentiality clauses in settlement agreements, and all written statements of employment particulars, should be required to highlight clearly the disclosures that confidentiality clauses do not prohibit.** However, the Government does not think that there should be a specific form of words for confidentiality clauses/NDAs.

- **For a settlement agreement to be valid, the independent advice a worker receives should be required to cover any confidentiality provisions**.

- **A confidentiality clause in a settlement agreement that does not meet the new requirement for clarity as to what is not prohibited should be void in its entirety.** In practice, this would mean that an employee who breached the confidentiality clause in a settlement agreement could not be sued if it was not drafted appropriately. The consultation paper suggests that the main effect of this would be the reputational risk to the employer, once the confidentiality over the reason for the dispute was removed. The Government does not recommend making it an offence to suggest the use of confidentiality clauses designed to prevent the protected whistleblowing disclosures or the disclosure of a criminal offence.

Analysis/commentary: The Government accepts that confidentiality clauses have a proper place in the employment context, not only to protect confidential business interests, but also (in settlement agreements) "*to allow both sides of an employment dispute to move on with a clean break*". It is concerned primarily with a minority of employers using confidentiality clauses "*unethically*".

Although the paper is described as a consultation on measures to prevent misuse of confidentiality clauses in situations of workplace harassment or discrimination, the proposals are not limited to disclosures in that context. In addition, based on the proposals as they stand, the entire confidentiality clause in a settlement agreement would be void and unenforceable if it did not meet the requirement to highlight the disclosures it did not prohibit.

Hirer liable for 50% of compensation for breach of Agency Workers Regulations

Summary: The Court of Appeal decided that a hirer should have to pay 50% of the compensation for a breach of the right to equal pay under the Agency Workers Regulations 2010, even though it had put the agency in funds to make good the underpayment (*London Underground Ltd v Amissah*).

Key practice point: A mistake in assessing whether the Agency Workers Regulations apply to workers can result in the end user being liable for underpayment, even if they have relied on an assertion by the agency that the Regulations do not apply.

Facts: Workers were employed by an agency to work for LUL at London Underground stations from January 2011. The agency initially asserted, and LUL accepted, that the Agency Workers Regulations 2010 (AWR), which came into force in October 2011, did not apply, because of the "Swedish derogation" – an opt-out of the right to pay equality with permanent workers, in return for a contract guaranteeing pay between assignments. In due course, LUL decided that the AWR did apply, and it agreed both to pay the agency for the future on the basis that the workers would be paid at the equalised rates, and to pay it an amount covering the previous underpayment. The agency paid the workers the correct rates from mid-October 2012 until the termination of the agreement in January 2013, but it never paid them the difference for the earlier period.

The agency workers successfully claimed in the Tribunal, against both the agency and LUL, that they had been paid less than LUL employees, in breach of the AWR, for the period of the arrears. By the time of the hearing, the agency was insolvent.

The Tribunal concluded that LUL's liability was 50%, on the basis that, although the initial underpayment was entirely the agency's responsibility, because it had unrealistically maintained that the workers were excluded by the Swedish derogation, LUL acted too slowly in ensuring that the agency rectified the error.

However, on the separate question of what compensation was "just and equitable" for LUL to pay, the Tribunal found that, given the exceptional circumstances (the agency's dishonest failure to pass on the amounts and the workers' failure to seek a remedy until too late), it would not be right to require them to compensate the workers, because that would mean they would be paying twice.

The workers succeeded in overturning that decision in the EAT, but LUL appealed to the Court of Appeal.

Decision: The Court dismissed the appeal. The compensation had to be apportioned between the agency and LUL and, since the Tribunal had found that they were each 50% responsible, that apportionment had to be on the same basis.

Although LUL did the right thing by funding the agency to pay the arrears, and it was understandable that the Tribunal baulked at the idea that it should have to pay twice, that did not make it right to deprive the workers of the compensation due to them. There was no question of any misconduct on their part, and LUL had chosen to deal with the agency – hence LUL, rather than the workers, should bear the burden of the agency's dishonesty.

Analysis/commentary: This case is a reminder for hirers to establish at the start whether the AWR applies to any agency workers, and to challenge an assertion by the agency that it does not. Hirers may be liable for the consequences of getting it wrong if they are at fault in any way.

The Swedish derogation is to be abolished from April 2020, but there may still be issues as to whether the AWR apply.

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); *McNeil v HMRC* (Court of Appeal: establishing particular disadvantage to women in equal pay claims); *Owen v Amec Foster Wheeler Energy* (Court of Appeal: justification of denial of overseas assignment based on risk assessment)

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

- **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)

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

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