SLAUGHTER AND MAY

Employment Bulletin

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Dismissal was automatically unfair even though whistleblowing reason was hidden from decision-maker

Summary: The Supreme Court held that a decision to dismiss taken in good faith, for a reason constructed by the employee's line manager, was nevertheless automatically unfair because the manager's real reason was the employee's whistleblowing disclosure. The reason for the dismissal could be attributed to the employer, even though the manager deliberately hid it from the decision-maker.

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Key practice point: This decision increases the likelihood of an employer being liable for the actions of a rogue manager. Employers should ensure that all whistleblowing disclosures are followed up and check whether an employee facing a potential dismissal has made a disclosure or brought a grievance.

Facts: J suspected that some of her colleagues had breached her employer's/Ofcom's regulatory rules. J informed her line manager, W, who questioned J and encouraged her to retract her allegations in writing, on the basis that she had misunderstood the rules. W subsequently began criticising J's performance and instituted a performance process, in a way which J attributed to her earlier allegations. J was later signed off sick and she raised a formal grievance about her treatment by W.

An investigating officer (V), who knew nothing of the background, was appointed to consider whether J's employment should be terminated as a result of her performance. When she asked J to comment, J referred to her previous allegations. V raised this with W, who stated that J's concerns were based on a misunderstanding of the rules and gave V a copy of J's email retracting her allegations in support of this. V concluded that J's performance was unsatisfactory, and she was dismissed.

The Employment Tribunal rejected J's claim that her dismissal was automatically unfair on the grounds that the reason was her whistleblowing disclosure. The Court of Appeal confirmed this, concluding that W's conduct could not be attributed to the employer.

Decision: The Supreme Court overturned the Court of Appeal's decision and found that the dismissal was automatically unfair on grounds of whistleblowing.

The Supreme Court decided that, whilst it is generally necessary to look only at the reason for dismissal given by the decision-maker, where the real reason is hidden from the decision-maker behind an invented reason, it is the Court's duty to look through the invention to find the real reason for the dismissal. Therefore, where a person senior to the employee decides that the employee should be dismissed for one reason, but hides it behind an invented reason, which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

Analysis/commentary: The Supreme Court made it clear that its decision about attribution of knowledge would have wider implications, applying to "ordinary" (as well as automatic) unfair dismissal. On the other hand, the Court noted that the facts of this case – a decision to dismiss taken in good faith, not just for a wrong reason but also for a reason which the employee's line manager had dishonestly constructed - were "extreme".

However, a similar (but less unusual) scenario arose in a case decided shortly before the Supreme Court gave its judgment. In *Cadent Gas Limited v Singh*, the Employment Appeal Tribunal found that the dismissal of an employee for misconduct was automatically unfair, even though the dismissing managers were not motivated by his trade union activities. Another manager, with whom the employee had had difficulties in the past relating to his trade union activities, was involved in the early investigatory stages. His leading role in the investigation was such that it was appropriate to attribute his motivation to the employer, even though the other managers did not share that motivation.

Employment Tribunal decides that TUPE applies to "workers"

Summary: The London Central Employment Tribunal decided that TUPE applies to "workers" as well as "employees" (*Dewhurst v Revisecatch & City Sprint*).

Key practice point: Although the decision is not binding, it is an issue for consideration by employers when assessing how they engage their workforce. It may also have an impact on negotiations where there is a change of contractor or sale of a business involving workers who do not fall into the self-employed or employee categories.

Facts: A contract to supply couriers was transferred under TUPE from City Sprint to Revisecatch from February 2018. The claimants brought claims against both contractors for holiday pay and failure to inform and consult under TUPE. A previous claim by one of the claimants against City Sprint for holiday pay, based on his status as a "worker", had been successful.

The Tribunal had to decide as a preliminary issue if the claimants were covered by TUPE, which applies to an "employee" - "*an individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services*".

Decision: The Tribunal decided that the claimants were within the definition of employee in TUPE. The Tribunal Judge said that the words "*or otherwise*" had to be taken to add something to the usual definition of employee and this approach was consistent with the EU Directive on which TUPE is based. "Workers" have protection from discrimination under the Equality Act 2010 and some employment rights under the Employment Rights Act 1996 and should therefore receive the safeguarding of rights on a transfer which the Directive and TUPE are designed to achieve. The Tribunal's view was that the exclusion from the TUPE definition of those providing services under a "contract for services" applies only to independent contractors who are in business on their own account.

Analysis/commentary: Although only a Tribunal decision, this is the first reported case to find that workers are covered by TUPE. Although workers are not entitled to unfair dismissal protection under TUPE (because the definition of employee in the Employment Rights Act 1996 applies), they would (if the decision were to be upheld on appeal) have information and consultation rights under TUPE. Potential liability for failure to comply is up to 13 weeks' actual pay for each affected "employee".

Removal of extended absence trigger was disability discrimination

Summary: The Employment Appeal Tribunal held that an employer's failure to adjust its absence trigger point, despite having done so previously, breached the duty to make reasonable adjustments under the Equality Act 2010 and constituted discrimination arising from a disability (*Northumberland Tyne & Wear NHS Foundation Trust v Ward*).

Facts: W suffered from a disability (chronic fatigue syndrome) which made it more likely that she would have a higher absence rate than other employees. Initially, the employer adjusted its sickness absence policy to allow her five absences in a 12-month period before triggering the policy, instead of the standard three absences. After four years (during which her absences were within the extended limits), the employer withdrew the arrangement and applied its standard absence policy. Although other adjustments were put in place – reduced and flexible working hours - her absences exceeded the standard trigger points and she was eventually dismissed. The Employment Tribunal upheld her claim that the failure to continue to apply the extended trigger was a failure to make a reasonable adjustment and discrimination arising from a disability. The employer appealed to the EAT.

Decision: The EAT confirmed the Tribunal's decision.

Applying the standard sickness absence trigger to W put her at a disadvantage. The Tribunal had been entitled to find that the extended trigger was the adjustment that would have ameliorated the particular disadvantage caused by the employer's requirement for W to maintain a certain level of attendance and that other adjustments made by the employer did not have the effect of reducing the disadvantage.

The EAT commented that an adjustment made at a particular point in time will not necessarily continue to be reasonable indefinitely, but an employer seeking to argue that an adjustment is no longer reasonable would be expected to demonstrate some change in circumstances. There was no evidence that what had worked well for almost four years would not have continued to do so.

As for potential justification in relation to the claim for discrimination arising from a disability, the EAT's view was that it was hard to see how a dismissal could be justified if there was a reasonable adjustment that, if made, would have avoided that outcome. This was all the more so where the adjustment had already been in place for a number of years without difficulty and was removed without any particular reason.

Analysis/commentary: This decision confirms the principle, established by the Court of Appeal in *Griffiths v Secretary of State for Work and Pensions*, that absence management policies containing specific sickness absence triggers potentially put employees with disabilities at a disadvantage, meaning that the duty to make reasonable adjustments applies. Although there might be more than one adjustment that could be made to reduce disadvantage, an employer cannot rely on other adjustments that have been made if there are more effective ones that could have been made.

Written statement of particulars – are you ready for April 2020?

The Employments Rights Act 1996 requires that when an employee begins employment, the employer provides a written statement of the particulars of employment. This statement is often encompassed within the offer letter or the employment contract. The statement must also be updated with any changes to those terms within one month of the changes. A number of changes to this requirement will take effect from April 2020; our briefing explains what employers should be doing to prepare.

Horizon scanning

What key developments in employment should be on your radar?

1 January 2020	UK-incorporated quoted companies must start reporting their CEO pay ratios
31 January 2020	European Union (Withdrawal) Act 2018 expected to take full effect
April 2020	Annual updates to employment rates and limits
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 will be lowered from 10% to 2% of employees
6 April 2020	Abolition of the opt-out of the equal pay protections of the Agency Workers Regulations (the "Swedish derogation")
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks
6 April 2020	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies

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

- **Employment status**: *B v Yodel Delivery Network Limited* (CJEU: whether couriers have worker status under the Working Time Directive); *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers)

- **Data protection**: *Wm Morrison Supermarkets Plc v Various Claimants* (Supreme Court: whether employer was vicariously liable for deliberate disclosure of co-workers' personal data by rogue employee)

- **Discrimination / equal pay**: *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction); *Leicestershire Police v Hextall* (Supreme Court: entitlement to enhanced shared parental pay)

- **Trade unions**: *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits)

- **Vicarious liability:** *Barclays Bank plc v Various Claimants* (Supreme Court: whether employer vicariously liable for assaults by doctor engaged to carry out pre-employment assessments).

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