



Employment law update

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Brexit and Employment Law

- European Union (Withdrawal) Act 2018 provides for continuity
- No more ECJ references from UK – but court decisions still important
- Non-regression clause in future arrangement?
- Possible commitment to match future changes?

Stefanko and others v Maritime Hotel Ltd

- Written statement of terms to be given within two months of employment starting
- That continues to apply even if the employee leaves before the two months are up
- Currently does not apply to employment that continues for less than a month
- From April 2020 will be a day one right for all employees and workers

Employment Status

- **Pimlico Plumbers v Smith:** self employed plumber could claim discrimination – obliged to provide personal service
- **IWGB v Deliveroo:** genuine substitution clause blocked union recognition claim
- **Uber AV v Aslam** – Uber drivers obliged to perform work for Uber and are working when they turn on the app

Brazel v The Harpur Trust

- Term time only casual music teacher
- Had his holiday pay capped at 12.07% of his hours actually worked
- But normal WTR calculation (12 week average) leads to higher proportion than that
- EAT say no justification for capping his holiday – part-time workers can be treated more favourably

Royal Mencap Society v Tomlinson Blake

- Does a sleepover shift count as working time?
- Court of Appeal accepts that issue is whether a sleeping worker can also be working
- Holds that he or she is not – thinks it is obvious
- In line with Government policy at the time and recommendations of Low Pay Commission
- Permission for appeal to Supreme Court pending

Agoreyo v London Borough of Lambeth

- Primary school teacher suspended for alleged 'inappropriate force' with two disruptive children
- Resigns same day – claims breach of contract
- High Court upholds claim – employer's reason for suspension was unclear, and no exploration of alternatives
- In circs, with teacher asking for support which had not been given, decision to suspend was a fundamental breach of contract
- Heard by Court of Appeal 29 January

Safeguarding and disclosure

- Supreme Court upholds dismissal of headteacher for failing to disclose friend's convictions: **Reilly v Sandwell Metropolitan Borough Council**
- Failure was in breach of contractual duty to assist governing body in discharging its functions
- Court dodges issue of whether that involved breach of privacy

Talon Engineering Ltd v Smith

- Employee accused of gross misconduct (disparaging colleagues to a supplier)
- Union rep can't make scheduled hearing date – gives alternative 2 weeks later
- Employer refuses to postpone – hearing goes ahead in employee's absence
- EAT upholds unfair dismissal finding – irrelevant that employer complied with statutory right to be accompanied
- Employee 'could not be faulted' for refusing to attend hearing

Asda Stores Ltd v Raymond

- Driver dismissed for urinating in shared delivery yard
- Held to be unfair and discrimination 'arising' from disability
- Employer had claimed breach of health and safety rules – but failed to identify them
- Had not considered explanation (sudden urge linked to diabetes) but just assumed that the basic fact was enough

Patel v Folkestone Nursing Home Ltd

- Employee dismissed for being asleep on duty and falsifying patient records
- Is reinstated on appeal
- But appeal only deals with sleeping – does not mention falsifying records
- Employee refuses to return unless that is resolved
- Court of Appeal finds no express dismissal because appeal cancels it automatically
- But was a constructive dismissal – employer's failure breached trust and confidence

When notice is given

- Contractual issue – does employee have to read dismissal letter for notice to be validly given?
- Yes says Supreme Court in **Newcastle Upon Tyne Hospitals NHS Foundation Trust v Haywood**
- Notice sent to employee's home while she was on holiday did not start to run until she had had reasonable opportunity to read it
- As a result, the notice did not expire until after her 50-th birthday (£££!)

Afzal v East London Pizza Ltd

- Employer believes that employee does not have right to work in UK and dismisses him
- Does that without a disciplinary procedure – no right of appeal
- Held: Dismissal unfair. If appeal was held employer would have discovered that employee did have the right to live and work in UK after all

Hawkes v Ausin Group (UK) Ltd

- Army reservist signs up for 7 week training exercise
- Employer says they can't keep job open
- Held: fair SOSR dismissal
- Not unfair to decide to dismiss without hearing first – clear that employee was committed to go on the training

Morris v Metrolink Ltd

- Employee dismissed for using wrongly obtained material in representing employees in grievance
- EAT finds that was not a dismissal for trade union activities but for misconduct
- Court of Appeal overturns. The conduct was bound up with the union activities and could not properly be separated.

Unlawful inducements

- Unlawful to make an offer with purpose and effect that any of employee's terms no longer covered by collective bargaining
- **Kostal UK Ltd v Dunkley and others:** employer makes individual pay offers to employees when union negotiations break down
- EAT holds that offer was unlawful even though full recognition stayed in place for next year
- Expect an appeal - £400K at stake!

TUPE – Changing terms

- Change in terms void if transfer is the reason
- **Tabberer v Mears** – removal of travel allowance following transfer was held to be valid
- Allowance was removed because it was no longer appropriate, not because of the transfer
- Remember mechanism for changing terms will always be agreement

Asda Stores Ltd v Brierly and others

- Retail workers claiming equal pay with Distribution workers
- Are they in 'the same employment'? Do 'common terms and conditions apply'
- Court of Appeal says yes – pay is based on the work not the location
- Also – Asda is a 'single source' for the difference in pay

Lee v Ashers Baking Company Ltd



- No discrimination when bakers refuse to bake cake with slogan 'support gay marriage'
- All customers treated the same – it was the message not the person the bakers objected to
- Discrimination by association means association with other individuals, not concepts

Royal Mail Group Ltd v Efobi

- Employee rejected in internal recruitment multiple times
- Alleges discrimination – employer does not call evidence relating to individual decisions
- EAT says Tribunal should have taken account of that and placed burden on employer to prove absence of discrimination
- Court of Appeal overturns. Claimant must establish a ‘prima facie’ case raising inference of discrimination before the absence of explanation is considered

The Lord Chancellor v McCloud; Sargeant and others v London Fire and Emergency Planning Authority

- Two cases concerning similar transitional provisions in move to less generous pension scheme
- Aimed to protect those nearest retirement rather than those at much earlier stage of career
- Court of Appeal hold that both transitional provisions were unjustified age discrimination
- State was entitled to some leeway in deciding which social policy objectives it should pursue and how – but not if based on vague generalisations not backed up by evidence.
- No evidence that older judges needed pension protection more than younger judges.
- Not good enough to assert that it ‘felt right’ to protect older firefighters and no proper evidence had been presented explaining why older firefighters were in need of greater protection.

Wood v Durham County Council

- Employee has PTSD and depression – causing a ‘dissociative state’
- Dismissed after receiving a Penalty Notice for Disorder for shoplifting
- Argues disability discrimination
- EAT holds not disabled – employer’s conduct aimed at excluded condition of a ‘tendency to steal’

Williams v The Trustees of Swansea University Pension and Assurance Scheme

- Disabled employee forced to take early retirement
- Enhanced pension based on salary at time of retirement
- Disability had forced him to work part-time – pension would have been higher if disability had been sudden
- Court of Appeal says no ‘unfavourable’ treatment
- Actually treated favourably, even if some disabled employees would have done better still
- Upheld by Supreme Court – but no clarity on what ‘unfavourable’ means

Dunn v Secretary of State for Justice

- Employee develops depression and heart condition
- Application for ill-health retirement hampered by delays and Bureaucracy
- Takes more than a year to process – exacerbates illness
- Tribunal finds this was direct and disability-related discrimination
- EAT says no.
- What was the reason for the treatment? – not disability
- Was it because of ‘something’ arising from disability? – No.

City of York Council v Grosset

- Teacher dismissed for showing horror film to vulnerable teenagers
- Tribunal finds that was related to disability – cystic fibrosis leading to fatigue, stress and lapse in judgment
- Court of Appeal upholds finding of discrimination
- No justification because of employer's lack of support
- But Tribunal entitled to find that dismissal was fair – no contradiction, different standard of reasonableness

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