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Insights

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"WITHOUT PREJUDICE" DISMISSAL LETTERS AND TERMINATION DATES, MORE "UBER" EMPLOYMENT STATUS ISSUES, DISCRIMINATION/FLEXIBLE WORKING AND GENERAL NEWS ROUNDUP

Mar 23, 2023

SUMMARY

Our March update includes new cases on whether a "without prejudice" letter attaching a settlement agreement and referring to a termination by mutual agreement can be an effective dismissal letter, the role of written contracts in deciding employment status, and the circumstances in which refusing a flexible working request can constitute sex discrimination. We also feature a news roundup including annual increases to statutory maximum awards at the tribunal, with the maximum compensatory award going into six figures for the first time, the increase in waiting times for tribunal hearings, and news of three employment related private members' bills currently making their way through parliament.

CAN A "WITHOUT PREJUDICE" LETTER TERMINATE EMPLOYMENT AND DETERMINE THE EFFECTIVE DATE OF TERMINATION (EDT)

Although this was originally a case about an unfair dismissal claim being out of time, it raised two other important issues, which were:

- the test for determining when a dismissal letter is valid and enforceable. In this case the letter was marked "without prejudice", attached a settlement agreement and referred to a termination of employment by mutual agreement – was a letter like this still effective to dismiss the claimant?; and
- what determines the EDT? Is it the date specified in the dismissal letter (assuming the dismissal is valid), or is it the date on which the employment contract terminates in accordance with its terms under lawful contractual principles?

In terms of background, the claimant was employed in a role requiring manual labour and lifting. He suffered back injuries and, during late 2018 and the whole of 2019, was off work for an extended period. During the course of 2019, it was agreed with occupational health professionals that the claimant's inability to carry out lifting work was likely to be permanent, and he was rejected by the respondent's permanent health insurers. In January 2020 the respondent indicated verbally it was considering terminating the claimant's employment and raised the possibility of a settlement agreement.

On 7 February 2020 the claimant received a letter from the respondent dated 5 February and headed "without prejudice". The letter (incorrectly) said it had been agreed that the claimant's employment would terminate "by mutual agreement". The letter went on to say that the claimant's employment would terminate on 7 February 2020 and, at least in part, looked exactly like a dismissal letter, indicating when the claimant's employment would terminate, his final day of employment with the respondent, that he would receive a PILON, outstanding holiday pay, and his P45. The letter then changed tone, offering an ex-gratia payment in return for signing a settlement agreement, a draft of which was included with the letter.

On 14 February 2020 the respondent paid into the claimant's bank account sums representing a PILON and outstanding holiday pay.

The claimant rejected the settlement agreement offer, although he accepted the PILON and holiday pay. The claimant brought claims at the tribunal, including an unfair dismissal claim. However, the claimant brought his claims based on an EDT of 14 February 2020, which he claimed was the date on which the employment contract was lawfully terminated, being the date on which he received his PILON.

The tribunal scheduled a preliminary hearing and did not accept the claimant's position. The tribunal agreed with the respondent that the EDT was 7 February 2020. The unfair dismissal claim was therefore (just) out of time. The tribunal took a robust view of the 5 February letter, holding that the language used was clear enough for it to be a letter of dismissal. The tribunal held that the legal test was whether the letter was "sufficiently clear that a reasonable employee receiving it would not have any real doubt about what it was telling him" and should reflect "..what an ordinary, reasonable employee…would understand by the words used." The tribunal was unconvinced by the claimant's more complex contractual arguments about the correct EDT. It said it was clear that the letter of 5 February was a dismissal letter and that the EDT was expressly and clearly stated to be 7 February 2020. Also, the claimant, legally represented throughout and aware that the respondent believed the EDT to be 7 February, could have presented his claim within the statutory time limit and it would have been reasonably practicable for him to have done so.

The claimant appealed to the EAT, broadly on the following grounds:

- The letter of 5 February was not an effective letter of dismissal - it was headed “without prejudice”, unclear, and ambiguous. It did not terminate his employment and 7 February was not his EDT;

- Even if the 5 February letter was an effective letter of dismissal, it was only a “purported” dismissal and was unlawful/in breach of contract. This was because it did not give the correct notice (or PILON) required under the claimant’s contract. Not only was this a breach of contract, it was a breach he had not accepted. Accordingly, as he had not accepted the breach, the contract continued until it was lawfully terminated on 14 February, when on the claimant’s argument the contract terminated lawfully because the PILON was paid. This contractual test should determine the EDT, not the date in the dismissal letter; and

- As the EDT was 14 February rather than 7 February, the claim was in time. Even if was not in time, it had not been reasonably practicable for him to present the claim with an EDT of 7 February.

The EAT held on each point as follows:

- In respect of the dismissal letter, its construction was a question of fact for the tribunal, whose decision could only be overturned if it was perverse. The tribunal conceded that the letter was far from perfect, wrongly referring to termination by mutual agreement and marked “without prejudice”. However, this element of the letter was not sufficient to undermine the clear and unambiguous wording in the rest of it. The letter confirmed that the claimant’s employment terminated on 7 February. With regard to the letter being marked 'without prejudice', the tribunal was entitled to interpret it as having an “open” section, which set out the termination terms and arrangements, and a 'without prejudice' section, setting out matters regarding an ex-gratia payment and a settlement agreement. The letter was clear enough to represent a valid letter of dismissal and the tribunal’s interpretation was not perverse;

- In respect of the EDT, the relevant sections of the Employment Rights Act 1996 (ERA), which are ss95 and 97, and the case law supporting them emphasise that the EDT must be clearly defined and certain, not least because statutory rights (and tribunal deadlines) depend on it. The case law emphasises that “*contractual niceties*” and complexities take second place to clarity, and the 5 February letter was unambiguously clear that the EDT was 7 February 2020. The argument that the EDT was 14 February depended on a relatively complex analysis of contract law – the dismissal letter by contrast was simple, clear and in line with ss95 and 97 of the ERA; and

On the issue of lateness/limitation the EAT was unsympathetic, perhaps because the claimant had been legally represented throughout, and assisted by his union. The EAT held that the EDT was 7 February, which meant the claim was out of time, and there was no practicable reason why the claim could not have been presented within the statutory time limit. In particular, the claimant and

his lawyers were fully aware that the respondent believed the ETD to be 7 February, and there was no reason why he could have erred on the side of caution by presenting his claim a few days earlier.

WHY THIS MATTERS

This case emphasises that, when applying legal tests to ascertain whether a letter is a valid and effective letter of dismissal and, in particular, the date of the EDT, clear-cut statutory/common sense tests will be preferred over complex contractual analyses.

The statutory time limit issue was always going to be an uphill struggle for a legally represented claimant, who could perhaps have avoided the whole matter by filing the claim a few days earlier. The EAT was not receptive to the claimant's position in relying on 14 February 2020 being the EDT, particularly when he knew the respondent believed the EDT to be 7 February.

Meaker v Cyxtera Technology UK Limited

HOW IMPORTANT ARE WRITTEN CONTRACTS IN DETERMINING EMPLOYMENT STATUS?

This EAT case illustrates that, despite cases such as *Autoclenz* and *Uber BV -v- Aslam*, the written terms of a contract are still important and (depending always on the facts and circumstances) should always be taken into account when deciding employment status.

The claimant was a dentist who also owned a small number of dental practices. He sold his practices to a buyer in 2012 and entered into a contract under which he continued to work at one of the practices. The contract was a standard form provided by the British Dental Association (BDA), which stated that the claimant was not an employee, that he was an independent contractor, and that there was no employment relationship. The contract also included a substitution clause that required the claimant to find a locum to provide services in the claimant's place if he was unable to provide services for 20 days or more "through ill health or other cause".

The claimant's engagement was terminated and he subsequently claimed he was unfairly dismissed. However, to bring such a claim at the tribunal, the claimant had to be an employee. He argued at the tribunal that, over time, the relationship between the parties had evolved into one of employment due to integration, control and the requirement to provide services personally.

The tribunal, as a starting point, looked at the terms of the claimant's BDA contract to help ascertain the true nature of the relationship. The tribunal found the claimant not to be an employee and, in particular, gave weight to the contract, including the existence of the substitution clause which the tribunal held meant that the claimant did not have to provide his services personally. The tribunal was also influenced in its decision by the (high) level of bargaining power the claimant had, the fact

the contractual clauses were not intended to deprive the claimant of statutory rights, and the fact the claimant had himself previously asserted on multiple occasions that he was self-employed.

On appeal to the EAT, the claimant argued that the tribunal should not have used his BDA contract as a starting point for its analysis for determining whether he was an employee. The claimant argued that the previous *Autoclenz/Uber* cases had established that the test for employment status was essentially a statutory one, not a contractual one.

The EAT disagreed. It held that although it was correct to look at the broader picture, this did not exclude consideration of written terms of a contract, as long as those terms were not included to undermine or defeat statutory protections granted to workers and employees. The EAT held that, in the claimant's case, the clause in the contract that stated it was not a contract of employment was simply a reflection of the nature of the contract, not an attempt to avoid statutory protection. The EAT clarified that existing case law, such as *Uber*, should not be interpreted to mean that written contractual terms are simply irrelevant. They are relevant and still form part of the overall facts and circumstances to take into account when considering employment status.

WHY THIS MATTERS

This is a decision which, albeit in fact-specific circumstances, supports the importance of written contracts in considering employment status, despite the *Uber* decision. The case clarifies that written contractual terms can be taken into account as part of the broader picture. Employers should therefore ensure that agreements are drafted carefully and accurately, as the starting point for consideration of employment status may still often be the contract.

It also reinforces/clarifies the rationale behind the *Autoclenz/Uber* approach, where the tribunal prefers to assess the factual relationship between the parties, rather than contractual wording. However, this approach will only apply where:

- the purpose of the contractual wording is deliberately to avoid statutory obligations (eg, by inserting spurious substitution clauses to avoid worker status under the ERA); and
- where the bargaining power between the parties is unequal, as was the case in *Uber* and *Autoclenz* (but not in this case).

Ter-Berg v Simply Smile Manor House Ltd and others

FLEXIBLE WORKING AND SEX DISCRIMINATION

This case provides a good illustration of indirect discrimination law, in particular the issue of detriment. It also shows how employees, especially those with young children, value the willingness of an employer to offer genuinely flexible working arrangements.

The claimant was employed full-time at the respondent's shop in Nottingham as an assistant store manager. Her five-day week was flexible however, and set out in a rota. In March 2020, the claimant went on maternity leave, intending to return to work a year later. In that same month, Covid-19 lockdowns began and the respondent's shop closed temporarily.

The claimant's childcare arrangements were not going to be straightforward. Her partner was required to work flexibly and was paid triple time for Sunday work, which they did not want to give up. The child's two grandmothers both worked at weekends. Because of these issues and the fact the claimant struggled to find or afford any alternative childcare at weekends, she could only work on weekdays and could not work weekends.

Accordingly, in November 2020, the claimant made a formal flexible working request reflecting both her inability to work weekends, and her wish to reduce her (weekday) working days from five to three. She requested that, when she returned from maternity leave, she be allowed to reduce her shifts from five to three days, and for those shifts to be weekdays only, so that she could look after her child at weekends. In March 2021, this request was rejected by the respondent. The claimant did not return to work as planned at the end of her maternity leave. She took accrued annual leave and was then placed on furlough.

The claimant appealed. Following an appeal hearing in late March, the claimant was offered in early April (as a final offer) part-time work for four days a week, but worked flexibly on **any** day of the week, including weekends. The employer to an extent had missed the point - the claimant could be flexible during weekdays but could not work at weekends without significant disruption and/or financial loss.

The claimant reiterated her request for a three-day working week and for those days not to include weekend days. She informed the respondent that, if these arrangements could not be accommodated, she might have to resign. The claimant instructed solicitors who wrote to the respondent. After the respondent received correspondence from the claimant's solicitors, it agreed to the claimant's initial request (having rejected it twice, once at the initial hearing and once on appeal) and informed her that she could return to work on 25 April 2021.

In May 2021, despite having been ultimately successful in her flexible working request, the claimant brought claims at the tribunal, including indirect sex discrimination and a breach of the flexible working provisions in the ERA. As part of her claim, the claimant argued that she suffered a detriment resulting from the respondent's original refusal of her flexible working request in March 2021. She was still subject to the same detriment at the date of the appeal decision in early April 2021, because she had been told again, as a "final" decision, that she had to return to work on a flexible basis on four days a week including weekends. The claimant asserted that a requirement to work on any day of the week, including weekends, constituted the application of a provision, criterion and practice ("PCP"), which caused her a detriment and indirectly discriminated against her because of sex.

The tribunal relied to a large extent to the 2014 case of *Little v Richmond Pharmacology Limited*, a case with similar facts. However, the tribunal was found by the EAT to have misinterpreted the *Little* case.

Broadly, the decision in *Little* supported the respondent's position that the claimant in this case had never suffered a detriment because, if any detriment had ever been imposed, it was reversed before the claimant returned to work. **How could the claimant suffer a detriment if she was absent from work when it was imposed and, by the time the time she returned to work, it no longer existed?**

Although the EAT held that the tribunal misinterpreted its effect, *Little* was relied on by the tribunal to hold that the claimant could not have suffered a detriment if, like *Little*, she was not at work to experience it.

The tribunal also relied on the 2013 case of *The Commissioner of Police for the Metropolis v Keohane,* in which it was held that for a detriment to have been suffered, there must be a real risk of an adverse outcome, even if it were later reversed.

The tribunal found against the claimant. It held that a PCP had not been applied to the claimant as she was absent from work/on furlough at the time her flexible working request was refused, and therefore she had not suffered a detriment.

The claimant appealed to the EAT on the grounds that (a) the tribunal had misinterpreted *Little* by saying she had to be at work to suffer a detriment and (b) had applied the wrong test, and too high a bar, to consider whether she had suffered a detriment. Overall, the claimant argued that, even though she had been on furlough when the detriment had been imposed, and had never worked in accordance with it, she had still suffered a detriment as a result of the respondent refusing her application.

The EAT was sympathetic to the claimant and acknowledged in terms of detriment that the respondent's initial refusal of her flexible working request in early March 2021 and the outcome of her appeal hearing communicated in early April must have caused her upset and distress even though she was on furlough at the time. It should be remembered that the claimant believed for over a month that her only option was to resign and that she might have difficulties finding a new role that accommodated her specific childcare requirements. The EAT may also have taken into account the fact that the respondent only acceded to the claimant's flexible working request when in receipt of correspondence from the claimant's solicitors.

The EAT held that:

- The tribunal had misinterpreted the decision in *Little*. In this case a PCP was applied and a detriment suffered from March 2021. The PCP and detriment were no less valid because the claimant was on furlough and did not actually experience the detriment in the course of her work. There was still a PCP and a detriment;

- The claimant had most likely suffered a detriment in terms of the distress caused by the refusals of her request, applying the test of whether a reasonable worker would take the view that the treatment in all the circumstances was to their detriment (established by 2003 case of *Shamoon v Chief Constable of the Royal Ulster Constabulary*). This again was despite the fact that the claimant was not at work when the PCP was imposed and the detriment suffered;

The EAT remitted the case back to the tribunal for reconsideration and determination.

WHY THIS MATTERS

It is a reminder that successful indirect discrimination claims must prove that a detriment has been suffered, that the threshold to establish a detriment is relatively low (and subjective), and most of all perhaps it is possible for an employee to suffer a detriment even if the employee is not present at work to suffer it.

Glover -v- Lacoste UK Ltd

NEWS ROUNDUP

ANNUAL INCREASE IN STATUTORY MAXIMUM TRIBUNAL AWARDS

In *The Employment Rights (Increase of Limits) Order 2023*, the maximum awards for various tribunal claims were increased based on the Retail Prices Index in September 2022. As inflation was running at the relatively high rate of 12.6% at the relevant time, some of the increases are substantial. They will apply to dismissals where the effective date of termination is on or after 6 April 2023.

The two increases which will most affect employers are:

- The limit on the unfair dismissal compensatory award will increase from £93,878 to £105,707, the first time this limit has gone into six figures;
- A week's pay for the purposes of calculating a statutory redundancy payment will increase from £571 to £643. This in turn will increase the maximum statutory redundancy payment from £17,130 to £19,290. This also applies the unfair dismissal basic award.

There are increases to other, more obscure awards and the legislation can be viewed on the government website. It is the schedule to the legislation that contains the increased figures.

INCREASE IN TRIBUNAL WAITING TIMES

Parliament confirmed that the average waiting time at the employment tribunal between receipt of a claim and a full hearing has steadily increased, from 31 weeks in 2008 to 49 weeks (virtually a year)

in 2021. These figures in part reflect the effect of the Covid-19 pandemic, which obviously slowed the tribunal system down considerably, and from which it is still recovering. It can also depend on the length and complexity of the claim. A one-day unlawful deductions claim will normally be listed more quickly than a 2/3 week hearing for whistleblowing and discrimination.

PRIVATE MEMBERS' BILLS AFFECTING EMPLOYMENT LAW

Although progress is slow, private members' bills which will have a significant effect on employers are making their way through parliament. Last month we covered The Amended Worker Protection (Amendment of Equality) Bill, which introduces new rules and penalties relating to workplace sexual harassment. This is scheduled for its second reading in the House of Lords on 24 March. In addition:

- The Workers (Predictable Terms and Conditions) Bill, which proposes new provisions in the ERA to give certain workers, agency workers and employees a new statutory right to request a predictable working pattern, goes through its third reading in the House of Commons on 24 March; and
- The Protection from Redundancy (Pregnancy and Family Leave) Bill, which provides additional protection to pregnant women and new parents from redundancy, is now at the committee stage in the House of Lords.

We will keep you updated in terms of when these Bills become law.

This bulletin was co-written with Trainee Solicitor Meg Royston.

RELATED CAPABILITIES

- Employment & Labor

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