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Insights

WHISTLEBLOWING REASONABLE BELIEF, TRIBUNAL DISCRETION ON AMENDING CLAIMS, SHARE OPTION PROMISES IN SETTLEMENTS AND A NEWS ROUND-UP

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SUMMARY

Our employment law update for September covers a case on the limits of whistleblowing protection and fair dismissal procedures, an EAT decision on the consequences of delay in amending claims, and a High Court ruling on enforceability of share option promises in settlement agreements. We also include a news round-up on the CMA's new guidance for employers on competition law in recruitment and setting pay, the latest parliamentary developments on the Employment Rights Bill, and new government guidance on statutory neonatal care leave and pay.

WHISTLEBLOWING – REASONABLE BELIEF AND FAIR PROCEDURE

The starting point for any whistleblowing claim is that the individual making a protected disclosure must have a "reasonable belief" that the disclosure is (a) made in the public interest, and (b) tends to show one or more of the matters listed in section 43B(1) of the Employment Rights Act 1996 (ERA).

S43B(1) sets out five matters, including the two used in this case, which is that the disclosure, in the reasonable belief of the individual, tends to show that:

- a criminal offence has been committed, is being committed or is likely to be committed (s43B(1)(a)); and
- a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (s43B(1)(b)).

The individual making the disclosure does not have to prove the matters disclosed are true, or that they amount to one of the categories of wrongdoing, but the individual must subjectively believe

that the relevant wrongdoing has occurred or is likely to occur, **and that belief must be objectively reasonable.** It is the second part of this test, the belief being objectively reasonable, that came under scrutiny.

The claimant was a senior underwriter who believed an insurance claim made by a drilling company might be fraudulent. He was not convinced by the initial loss adjuster's report and reported his concerns to his employer several times, from November 2019 onwards. As a result, further investigations took place. Several reports were produced by both independent loss adjusters and lawyers - the conclusion throughout was that the claim was legitimate.

Despite these steps, the claimant continued to maintain the insurance claim might be fraudulent. He escalated the matter by trying to link the fraudulent claim to unrelated bribery issues involving the same drilling company, and alleging that his managers, and by extension his employer, might actually be complicit in the fraud.

In November 2020, the claimant was set his personal objectives for 2021. After discussion, he accepted the objectives, albeit with some reluctance. Throughout the early part of 2021, the respondent raised concerns about the claimant's performance whilst, at the same time, the claimant continued to raise concerns over his belief that the 2019 insurance claim was fraudulent.

In May 2021, the claimant was placed on a performance improvement plan ("PIP") to address concerns about his performance. He continued to allege his senior managers and others were complicit in the alleged fraud and took the view that the performance issues were a punishment for him raising legitimate concerns. The claimant did not engage with the PIP because he thought it was a punishment, and the respondent was unhappy about the claimant's allegations of complicity, his refusal to accept the opinions of multiple experts, and his refusal to engage with the PIP. The claimant was ultimately dismissed in August 2021 on the ground that there had been a complete breakdown of trust and confidence between the claimant, senior management, and the respondent.

The tribunal held that the claimant's dismissal and alleged detriments (the unrealistic performance targets and the PIP) were not related to protected disclosures. The following points were made:

- The claimant's initial disclosures, made in November 2019 and May 2020, qualified as protected disclosures because, at that stage, it was objectively reasonable for him to hold the belief that there had been a "wrongdoing" under s43B(1) of the ERA;
- The claimant's later disclosures, including those made in September 2020 and May 2021, were not protected because, in light of the expert reports and independent checking that had taken place by that time, it was no longer objectively reasonable for the claimant to hold the belief he held;

- The claimant's later disclosures could also have been a means of deflecting from legitimate performance concerns expressed by the respondent, and the claimant seemed to characterise any reference to performance issues as retaliation for his disclosures – even though the performance issues were prima facie genuine;
- The claimant did not engage with the PIP and continued to make allegations of fraud against his managers and the respondent, all of which contributed to breaching the trust and confidence between the claimant and the respondent; and
- Although the EAT and the tribunal found that some of the performance objectives and the PIP were in fact detriments, they did not relate back to the initial protected disclosures, or in fact any disclosures – they related to his refusal to engage in the PIP, his continued allegations and his overall poor performance. Even if the detriments and dismissal had related to disclosures, they related to the later "unprotected" disclosures, not the early bona fide protected disclosures.

The EAT upheld the decision of the tribunal in relation to the whistleblowing claims.

However, the Claimant did succeed at first instance in relation to his "ordinary" unfair dismissal claim. The respondent cross appealed on this point and the EAT in the main agreed with the tribunal that while the respondent had established a fair reason for the dismissal, the procedure used for reaching that conclusion was flawed. In particular:

- With regard to the claimant's failure to engage in in the PIP, there were many matters that had not been taken into account which, if investigated, could have led to a different outcome. For example:
  - the claimant had been an underwriter for nearly 17 years;
  - the personal objectives he was given were new in scope and nature;
  - he had not had regular appraisals;
  - it had not been made clear to him what targets he was expected to achieve; and
  - arguably, some of the targets were unattainable
- When the claimant was invited to a disciplinary meeting, he was not told in advance that the issue to be discussed was a breakdown in trust and confidence (he thought it was performance related). He had no time or opportunity to prepare a defence for this allegation. The claimant should have been given advance notice as to what was going to be considered at the disciplinary meeting, told it might lead to his dismissal, and been given an opportunity to prepare a defence/state his case.

However, the EAT also concluded that the tribunal had not adequately considered the issue of whether the procedural failings could have been addressed as part of the appeal process. As such, the respondent's cross appeal was upheld and the case remitted to a different tribunal as the original employment judge had retired.

Why this matters

The EAT provides useful guidance in this case on the objective test for "reasonable belief" in a protected disclosure. It is often taken for granted that the belief is reasonable, but this case shows that, even in a case involving multiple disclosures, there comes a point when repeating the same allegations can become objectively unreasonable.

The case also shows that, even if a whistleblowing dismissal claim fails, the "ordinary" unfair dismissal claim might not. While it is possible in this case that the appeal process may ultimately be found to have corrected the procedural defects, it is a reminder that even if the reason for the dismissal is legitimate, following a fair process remains critical. It also highlights the value of a thorough appeal process, particularly if there are concerns about the process followed for the original dismissal.

Argence-Lafon v Ark Syndicate Management Limited

BALANCING ACT: TRIBUNAL'S DISCRETION AND THE COST OF DELAY IN AMENDING CLAIMS

This case highlights the factors the tribunal will take into consideration when determining if an amendment to a claim should be permitted.

The claimant was employed by the respondent as a prison officer until her dismissal in December 2021. Acting as a litigant in person, she presented her tribunal claim on 19 March 2022. On the claim form, she ticked the boxes for unfair dismissal, sex discrimination and religion or belief discrimination.

Case management hearings were listed for 6 December 2022 and then 25 April 2023. At the first hearing, the claimant suggested that the claim form also contained a claim for automatic unfair dismissal for making protected disclosures. She was directed to provide further and better particulars which she submitted in January 2023. At the second case management hearing, the tribunal confirmed that this complaint would be included and all the complaints which the claimant sought to pursue were discussed and identified.

On receipt of the claimant's witness statement, the respondent discovered that the claimant wished to amend her claim to introduce new claims for disability discrimination and "ordinary" unfair dismissal. For the disability claim, the claimant relied on a note from the respondent's HR department which she had received during disclosure and which referred to an OH report in which

it was concluded that, due to her poor mental health, she was likely to be considered as disabled for the purposes of the Equality Act 2010. On 4 March 2024, the respondent raised this with the tribunal and made clear that they resisted the inclusion of any new matters not in the agreed list of issues.

A case management hearing took place on 8 March 2024 and a further hearing took place on 15 March 2024. The tribunal noted that the claimant had made an application to amend which would need to be considered at the next hearing and the claimant was directed to send a copy of her amended claim by 5 April 2024, and the respondent was directed to respond by 3 May 2024. A further case management hearing was then listed for 23 May 2024.

On 28 March 2024, the claimant requested an extension of time to 19 April 2024 to make her amendment application. The claimant duly made her application on this date, applying to add complaints of discrimination arising from disability and failure to comply with the duty to make reasonable adjustments. She also provided a proposed list of issues relating to the new complaint.

On 23 May 2024, the case management hearing took place. The tribunal refused the claimant's application to amend. The tribunal accepted that prior to disclosure the claimant was not aware that her mental health condition could amount to a disability. However, the application was made over four months after the OH note was provided to the claimant and the tribunal was not satisfied with the claimant's reasons for the delay. The tribunal also looked at the balance of hardship and injustice to each party and concluded that the balance for and against permitting the application weighed in favour of rejection.

The claimant appealed to the EAT which held, taking each ground of appeal in turn:

GROUND 1

- The claimant argued that the tribunal erred in holding that the proposed amendment did not involve a relabelling exercise and instead formed wholly new claims. In tribunal proceedings, this meant that the tribunal then had to consider the effect of the statutory time limits for presenting claims. The claimant argued that, as a result, the tribunal also erred in weighing the balance of hardship to the parties. The EAT did not agree that the tribunal had materially erred in its consideration of the amendment application and held that the tribunal had properly concluded that the proposed amendment would have a significant impact on the litigation and cause material disadvantage to the respondent. This ground failed.

GROUND 2

- The claimant argued that the tribunal erred by failing to take into account a material factor relating to the timing of the amendment application, namely the claimant's explanation for the delay between finding out about the possibility of a disability discrimination complaint and when the amendment application was submitted. The EAT found that the judgment showed

that the tribunal did register and consider the claimant's explanation and disagreed that the reasons given were flawed. Therefore, this ground also failed.

GROUND 3

- The claimant argued that the tribunal erred by taking into account an irrelevant factor in relation to the timing of the application (being that the claimant had not applied to amend or add complaints of disability discrimination at either of the preliminary hearings in December 2022 or April 2023). She also argued that this should have been regarded as irrelevant in light of the tribunal's acknowledgment in the following paragraph of the judgment that the claimant had not appreciated that her mental health impairment could be relied upon in law prior to her sight of the OH note. The EAT found that the claimant's reading of this part of the tribunal's decision was not correct, and ultimately was not persuaded that the approach taken by the tribunal was contrary to the conclusion it subsequently reached in relation to this point. This ground failed.

GROUND 4

- The claimant argued that the tribunal erred in failing to take into account a material factor relating to the balance of hardship (being the significance/loss to the claimant of obtaining a declaration in relation to a complaint of discrimination). The EAT did not agree that the tribunal failed to take on board that the hardship of the claimant included the loss of the chance of a decision upholding her complaint that she had been the victim of discrimination due to disability and so this ground also failed.

The appeal was dismissed.

Why this matters

This case serves as a reminder of the exercise of balancing the hardship and prejudice to each party that is important to a tribunal considering an application to amend. It is also an important reminder of the considerable discretion that a tribunal has when conducting this evaluation and the limited scope for the EAT to intervene where judicial discretion has been exercised.

It also acts as a reminder of the significance that a delayed application can have. The four-month delay between the claimant becoming aware that she could make the application to amend and actually making the application, along with her inability to provide a good reason for this delay played an important role in the balancing exercise, as the tribunal found that allowing the application after such a delay would have resulted in significant hardship and injustice to the respondent.

CX -v- Secretary of State for Justice

SHARE OPTIONS IN SETTLEMENT AGREEMENTS – EMPLOYER MAKES PROMISES IT CAN'T KEEP

The High Court considered whether the claimant, a former employee of the respondent, retained the right to exercise share options after his employment ended.

The claimant was granted 400,000 share options in 2011 under an unapproved employee share option plan (the "Plan"). In 2014, he was told his employment would be terminated for underperformance. During exit discussions, the claimant claimed the CEO assured him that 44,800 of his options would remain exercisable based on future EBITDA targets. This assurance was reflected in a follow-up letter from the CEO to the Claimant and clause 16 of a settlement agreement entered into in October 2014.

Years later, the claimant attempted to exercise the options after the relevant performance targets were met. The respondent refused, arguing that the options had lapsed on termination and no formal approval had been granted by the respondent's remuneration committee to extend them as was required by the Plan rules. The respondent also argued that the claimant was not listed as a "good leaver" in its internal records, a term that was only formally introduced into the Plan in 2022.

The claimant brought a claim under the 2014 settlement agreement asserting his contractual right under the agreement to exercise the options. His primary case was that the defendant had exercised its discretion under the Plan to permit him to retain his options after termination. Alternatively, he relied on the doctrine of proprietary estoppel, claiming he had relied on the CEO's verbal and written assurances that he could retain his options to his detriment by remaining in employment longer and agreeing to restrictive covenants.

The court rejected the primary case. The settlement agreement alone did not create a binding legal right to exercise the options since the necessary procedural steps under the Plan had not been followed. Importantly, there was also no evidence that the respondent had exercised its discretion under the Plan, in particular there was no documentation or board approval and the surrounding circumstances were consistent with the exercise of the discretion, as required by the Plan, having been overlooked by all concerned.

However, the court did uphold the claimant's alternative claim under the equitable doctrine of proprietary estoppel. It found that the CEO's verbal and written assurances were sufficiently clear, that the claimant had reasonably relied on them, and that he had suffered detriment as a result. The court concluded that it would be unconscionable for the company to go back on those assurances. The appropriate remedy for the estoppel was left to be determined at a later hearing.

Why this matters

This case has important implications for employers, particularly those operating employee share schemes. It confirms that proprietary estoppel can apply to share options, extending the doctrine

beyond its traditional application in land disputes. Even where formal discretion under a share plan has not been exercised, verbal and written assurances, especially if recorded in settlement agreements, can give rise to enforceable equitable rights if employees rely on those assurances to their detriment.

The case also highlights the importance of clarity and authority in the exercise of discretionary powers. Employers must ensure that any decisions in favour of departing employees to extend or modify share entitlements are properly documented and approved by the relevant governance bodies. Verbal and/or written assurances from senior executives (in this case, the CEO), can create binding obligations if they are relied upon by employees in a way that causes detriment.

Additionally, this case demonstrates that exclusion clauses in share plans (often referred to as “Micklefield clauses”) may not always protect employers. In this case, the Plan did contain such a clause, which sought to exclude claims arising from termination of employment. However, despite being broadly drafted, it did not prevent the estoppel claim, as the court found the loss arose from the broken assurance rather than from the termination of employment itself.

Dixon v GlobalData plc

NEWS

CMA GUIDANCE ON COMPETING FOR TALENT

Earlier this month, the UK Competition and Markets Authority (CMA) published new guidance (“Guidance”), "Competing for Talent", which sets out what businesses should do to comply with competition law when recruiting and retaining employees.

This is not normal employment law/HR territory as it relates to agreements between employers, as opposed to agreements between employers and employees, but it is relevant to employment lawyers and HR professionals.

Competition law can apply to recruitment and retention of staff and agreements between employers to fix levels of pay, control/restrict recruitment, or exchange sensitive information may constitute a breach of UK competition law.

The Guidance provides information for businesses in relation to:

- **no-poaching agreements** – where two or more employers agree not to approach or recruit the employees of another (or not to do so without the employer's consent);
- **wage fixing** – where there is an agreement between two or more employers relating to salaries or other employment benefits. This would include agreements to align wage increases or to set salary caps;

- **information exchange** – this is where employers exchange commercially sensitive information which could reduce uncertainty as to the operation of the market in question, and/or could influence the competitive strategy of other businesses. Examples could be confidential information relating to salaries or contractor rates, future pay rates and intended increases; and

- **collective bargaining negotiations** – the Guidance confirms that the CMA will not enforce competition law in respect of genuine collective bargaining, irrespective of whether staff are employed or self-employed. However, the Guidance states that, when preparing for collective bargaining, employers must not exchange sensitive commercial information unless strictly necessary and only where the objective cannot be achieved through alternative means, such as anonymised aggregation of data by an independent third party. If the scope of information sharing goes beyond what is strictly necessary for the collective bargaining (such as employers sharing recommendations as to proposed rates of pay), there is a risk of unlawful wage fixing or collusion.

The Guidance illustrates the CMA's interest in potential infringements of competition law in the employment world, particularly where there are agreements or collusion between employers.

Failure to comply with competition law can result in serious consequences for employers, including fines of up to 10% of global turnover, director disqualification, exclusion from public tenders, exposure to private damages actions, individual criminal prosecution, and/or imprisonment for engagement in cartel activity.

EMPLOYMENT RIGHTS BILL – THE HOUSE OF COMMONS REJECTS NON-GOVERNMENT AMENDMENTS BY THE HOUSE OF LORDS

The Employment Rights Bill (ERB) is nearing its final parliamentary stages. In July, the House of Lords had unexpectedly passed significant non-government amendments however these were rejected by the House of Commons on 15 September. In doing so, the House of Commons in particular confirmed that it considers it appropriate for protection against unfair dismissal to be available from the start of employment.

The approach of the House of Commons follows the recommendations made by Peter Kyle MP, the Secretary of State for Business and Trade, and is unsurprising given that many of the non-government amendments contradicted Labour's manifesto commitments and, in particular, day one unfair dismissal rights were a cornerstone of its proposed employment law reforms.

The ERB now returns to the House of Lords and it seems likely that the Lords will accept the House of Commons' position (on the basis of parliamentary convention that the Lords will not oppose the second or third reading of government legislation which is based on a manifesto commitment). However, the timings may cause a delay in the ERB receiving Royal Assent.

EMPLOYERS' TECHNICAL GUIDE ON STATUTORY NEONATAL CARE LEAVE AND STATUTORY NEONATAL CARE PAY PUBLISHED

In late August, the government published its technical guide on neonatal care leave (NL) and neonatal care pay (NP). This guidance is aimed at employers and relates to the statutory entitlements to NL and NP, which came into force on 6 April 2025. It follows on from a guide from Acas issued earlier in the year.

The technical guidance comprises a 35-page guide for employers which sets out detailed guidance and examples. It covers eligibility, the requirements for employees in terms of notice, details on when leave can be taken and information on the overlap with other forms of statutory leave. It also explains the information employers are required to provide to HMRC and gives links to other sources of support for employees.

RELATED CAPABILITIES

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MEET THE TEAM

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