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LAW UPDATES

Issue 5

There have been four key employment law developments over the last couple of months. These include cases on liability for personal injury following a TUPE transfer and the impact of taking previous conduct into account in unfair dismissal claims.

Transferee is liable for personal injury arising post-transfer where breach of duty by transferor occurred pre-transfer.

The Claimant was an electrician who brought a personal injury claim against his new employer, British Gas, to whom he had transferred under TUPE. He suffered an electric shock while dealing with a light fitting.

The High Court found that had it not been for the TUPE transfer, the Claimant's old employer would have been vicariously liable for the failure of their employee to carry out periodic inspections of the light fitting with due care (which if done properly should have picked up the fault). This liability transferred to British Gas under TUPE. The whole purpose of TUPE is to provide protection to employees in the event of a change of employer and to ensure that their rights are safeguarded.

Why this matters? While this decision is unsurprising, it is the first case in which the court confirmed that the transferee is liable in circumstances where the breach of the employer's duty occurred before the transfer but the injury arises after the transfer. This case highlights the importance of ensuring that adequate indemnity protection between the transferee and transferor is negotiated as part of a TUPE transfer.

Baker v British Gas Services (Commercial) Ltd and another

Previous conduct not leading to disciplinary action can be taken into account in a subsequent decision to dismiss.

The EAT has held that previous incidents that had not been the subject of disciplinary action could be taken into account by the employer in a later disciplinary matter which resulted in dismissal, and would not make the dismissal unfair.

A nurse practitioner whose job was to take telephone calls from members of the public and decide on appropriate next steps was dismissed for gross misconduct after a third serious patient safety incident. The first two incidents had not been treated as disciplinary matters, but had been dealt with through training and coaching. Details of these incidents were included in an investigative report prepared for use by the disciplining officer. At first instance the employment tribunal said that details of these incidents should not have been included in the investigative report and that this, together with the lack of transparency in dealings with the nurse, meant that the dismissal was unfair on procedural grounds.

The EAT found the tribunal's decision perverse and held that exclusion of this information from the report would have been a serious omission given the background of risks to patient safety. It was for the disciplining officer to determine how to treat that background information and to decide if it would be fair to rely on it in deciding whether to dismiss the employee.

Why this matters? The EAT distinguished this case from those where there is an expired written warning. It is clear from case law that a dismissal will be unfair if an expired written warning is a determining factor in the employer's decision to dismiss. This is because the expiry of the warning creates a "false expectation" on the part of the employee that it will not be taken into account in any decision to dismiss. However, in this case, the EAT made it clear that there could be no such expectation on the part of the employee.

NHS 24 v Pillar

Only the mental processes of the decision-maker are relevant when considering the fairness of a dismissal.

A Royal Mail employee blew the whistle, but retracted the allegations following pressure from her line manager. The line manager then raised a number of concerns about her performance. The employee was eventually dismissed on performance grounds; the decision to dismiss being taken not by the line manager, but by another manager. The issue here was whether the employee was dismissed because she blew the whistle.

The Court of Appeal held that in determining the reasons for dismissal the tribunal is obliged to consider only the mental processes of the person who actually took the decision to dismiss. The dismissing manager was unaware of the true facts and their decision to dismiss was not because the employee blew the whistle. Even if there was a deliberate attempt by the line manager to bring about the employee's dismissal because she blew the whistle that motivation could not be attributed to Royal Mail as it was not shared by the dismissing manager.

The Court recognised that there may be circumstances in which the tribunal looks further than the mental processes of the person taking the decision – so called "manipulation" cases, but these would need to involve the manipulator having some responsibility for the process or possibly a senior manager near the top of the management hierarchy manipulating the evidence before the decision-maker.

Interestingly, as the Claimant had succeeded in their whistleblowing detriment claim, the Court concluded that there was no obstacle to the Claimant recovering compensation for dismissal which was the consequence of a detriment (although the Court accepted that this would involve an analysis of any inconsistency with the whistleblower provision that a dismissal cannot amount to a detriment).

Why this matters? The important point of principle is that the right not to be unfairly dismissed depends on there being unfairness on the part of the "employer". Unfair conduct on the part of those not involved in the decision-making is immaterial unless it can properly be attributed to the employer. This case may give force to arguments in whistleblowing detriment cases that compensation should include losses flowing from the dismissal.

Royal Mail Ltd v Jhuti

Individuals influencing a decision may be joint decision-makers

The EAT has provided guidance on the principle that only a participant in the decision-making who is acting with discriminatory motivation is liable and that an innocent agent acting without discriminatory motivation will not be liable.

The difficulty with this authority is that it benefits those employers who operate a deliberately opaque decision-making process. The EAT held that a tribunal should not allow an employer to hide behind its more junior officers taking responsibility for decisions dictated to them by "invisible" senior officers. The EAT in this case found that tribunals could avoid unfairness in circumstances where the identity of the decision-maker is masked by allowing appropriate amendments to be made to the pleadings once the correct person has been identified.

Why this matters? Employers who operate an opaque decision-making process should take heed from this case that the courts will carefully consider the facts, including the influence exerted by others within the organisation on the "decision-maker". Depending on the level of influence, the courts may conclude that the influencer was in fact a decision-maker.

Round up of other developments

Brexit:

On 19 October 2017, Theresa May published a letter to EU citizens living in the UK making it clear that citizens' rights are her first priority, and that EU citizens living lawfully in the UK will be able to stay. A streamlined digital process is being developed for those applying for settled status in the UK and, as part of this, for those who hold Permanent Residence there will be a simple process for them to swap their status for UK settled status.

Criminal Finances Act 2017:

On 30 September 2017, two offences (a UK offence and a foreign offence) of corporate failure to prevent the facilitation of tax evasion came into force. The offences are committed where a relevant body (i.e. body corporate or partnership) fails to prevent a person associated with it (which includes an employee or a person who performs services for a company) from facilitating tax evasion. There is a statutory defence if the relevant body had in place reasonable preventative procedures. Sanctions include an unlimited fine, confiscation orders and serious crime prevention orders.

Parental Bereavement (Pay and Leave) Bill:

This Bill allows for regulations to be made giving employees who lose a child below the age of 18 (including a still birth after 24 weeks) the following rights: (i) at least two weeks' leave; (ii) at least two weeks' statutory bereavement pay (for those employees with at least 26 weeks' service); and (iii) the right to be protected from detriment, redundancy and dismissal as a result of taking this leave.