**Employment Law Round-up September2017**

**Unfair Dismissal: Reasonable Investigations**

*NHS 24 v Pillar (EAT)*

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| The inclusion of previous incidents in an investigatory report which did not result in disciplinary action would not usally render a dismissal unfair.The case concerned a Nurse Practitioner employed to triage patient calls. In 2013 P directed a patient describing symptoms of a heart attack to an out of hours GP rather than the emergency services resulting in a Patient Safety Incident ('PSI'). Following an investigation and disciplinary meeting, she was dismissed.The employment tribunal was asked to determine whether two previous PSIs which did not result in disciplinary action should have been recorded in the investigatory report considered at the disciplinary hearing. Both earlier PSIs did not result in disciplinary proceedings, although one did involve a failure to spot a cardiac red flag. Whilst the employment tribunal found the decision to dismiss within the band of reasonable responses on the evidence, it found the use of the earlier PSIs was outside of the band of reasonable responses.The EAT, overturning the finding of unfair dismissal, identified this was not a case of totting up of warnings but of a lack of clinical competence. It found the approach to the investigation step in *BHS v Burchell* was generally aimed at its sufficiency not the gathering of too much information (although not ruling out that overzealous or otherwise unfair investigation could render dismissals unfair).<https://assets.publishing.service.gov.uk/media/59d3447be5274a449204f192/NHS_24_v_Mrs_Patricia_Friel_Pillar__UKEATS_0005_16_JW.pdf>

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| Changes to how the Insolvency Service Calculates Holiday PayThe Insolvency Service pays holiday pay (along with notice pay and redundancy pay, all subject to various caps) to employees whose employers are insolvent.It has announced that it will be changing the way it calculates holiday pay to include contractual-based commission. Its decision has retrospective effect, ie will benefit everyone who has ever applied for and received holiday pay from it. If someone applied for holiday pay from the Insolvency Service on or after 1 August 2011 (whether or not they've been paid it), the Insolvency Service will contact them directly to seek evidence of what extra payments they might be entitled to.If someone applied for holiday pay from the Insolvency Service earlier than August 2011, then they need to contact the Insolvency Service.But these extra payments will only be made if the employee indicated at the time on their form that they were entitled to contractual commission. If they did not, they cannot raise a claim now.See the [Insolvency Service website](http://danielbarnett.us6.list-manage.com/track/click?u=875913eab2272bcca46358ddf&id=f5e6539d32&e=aac95eedb2) for more details.**Acas Early Conciliation***De Mota v ADR Network & Another (EAT)*

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The rule requiring a separate early conciliation form for each respondent to a claim does not mean that the early conciliation certificate is invalid if has been issued notwithstanding a breach of that rule. In most employment tribunal cases, a claimant must provide ACAS with prescribed information before starting proceedings. The prescribed information is the names and addresses of the prospective parties. Rule 4 of the *Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014* says that if there is more than one prospective respondent, a separate form must be presented for each. Proceedings can't be started without a certificate issued by ACAS confirming that early conciliation has been completed.The Claimant named two respondents on his form, and ACAS issued a certificate naming both. But an employment tribunal held that it lacked jurisdiction to hear his claim because the certificate had been improperly issued.On Appeal the EAT held that the employment tribunal should have accepted the ACAS certificate at face value. The ACAS certificate was sufficient, even if issued in error, to give the employment tribunal jurisdiction.<https://assets.publishing.service.gov.uk/media/59ba347aed915d19636fef5e/Mr_V_C_de_Mota_v_1__ADR_Network_2__The_Co-operative_Group_Ltd_UKEAT_0305_16_DA.pdf> **Part Time Workers' Discrimination**

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*British Airways v Pinaud (EAT)*A part-time worker who worked more than 50% of full-time hours, but who was paid only 50% of full-time salary was treated less favourable treatment contrary to the Part-Time Workers Regulations 2000.Full-time crew worked a 6/3 pattern. Six days on, three days off, giving 243 available days and 122 days off each year. Part-timers worked a 14/14 pattern with ten available days required each fortnight. 50% of full-time availability (243) is 121.5 days. The part-timer had to be available for 130 days, 3.5% more. BA argued that the bidding system for work and bid choices created the anomaly but the EAT upheld that this was plainly less favourable treatment which could not be justified.Assessing justification, the ET suggested increasing part-time pay to 53.5% would "cure" the discrimination. The EAT held that this "simple expedient" oversimplified the matter. A freshly constituted tribunal would need to consider the impact by reviewing statistical evidence which had been disregarded by the ET in error.<http://www.bailii.org/uk/cases/UKEAT/2017/0291_16_0108.html>  |
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**Equal Pay – Comparator Group**

*Brierly & Others v Asda Stores Ltd (EAT)*

The EAT has upheld the employment tribunal’s decision at a preliminary hearing that a group of mainly female workers in Asda stores can be compared with a group of mainly male workers in Asda distribution depots for the purposes of the female staff's equal pay claims.

The decision was upheld on the grounds that the executive board of Asda Stores Ltd exercised control over both retail and distribution divisions of the company. Differences in the way pay is set and the way in which the terms and conditions of different workers originated are not relevant to the equal pay rules. Comparability between two groups of workers is possible where there is one body which is a single source of pay and conditions for both groups and where that body could be responsible for the inequality and act to restore equal treatment.

To qualify as a comparator under the Equality Act, the workers must work for the same (or an associated) employer and either work at the same establishment or under common terms. The EAT ruled in this case that the depot workers are employed by the same employer under sufficiently similar terms to the retail workers to qualify as comparators. Asda has applied to appeal to the Court of Appeal.

<http://www.bailii.org/uk/cases/UKEAT/2017/0011_17_3108.htmll>

**Taxation on Termination Payments**

Redundancy pay, compensation and termination (ex-gratia) payments above £30,000 do not attract national insurance. Pay in lieu of notice (PILON) is also generally not taxable if there is no clause within the contract of employment that allows for PILON.

The tax position will change from 6 April 2018 when the following will come into effect:

* Employer Class 1A national insurance on any compensation amounts over £30,000 will be payable.
* If there is a payment in lieu of notice, the basic pay which the employee would have received during their notice period must have tax and national insurance deducted. Employer NI will also be payable. This will apply regardless of any contract terms relating to PILON.
* The disability exemption will not apply for injury to feelings, it will only apply if there is a psychiatric injury.

**Whistleblowing – What does “in the public interest” mean**

*Chesterton Global Ltd & anr v Nurmohamed (Court of Appeal)*

Since 2013 A worker will only be protected from detriment or dismissal if the disclosure is made in the reasonable belief that it was in the public interest.

Mr Nurmohamed was a senior employee of Chestertons, a privately owned estate agency. Chestertons terminated his employment after he made a number of complaints (which he would later allege to be disclosures) to his employer regarding what he perceived as dishonest accountancy practices, whereby costs and liabilities were overstated in the internal accounts. These accountancy practices impacted negatively on the commission payments awarded to him and 99 other senior employees. The Court of Appeal upheld the decisions of the tribunal and the EAT in concluding that Mr Nurmohamed’s disclosures were in the public interest, and therefore his dismissal was automatically unfair.

Chestertons argued that, for a disclosure to be truly in the public interest, it would have to serve the interests of non-employees. The fact that 99 other employees’ interests were also served by Mr Nurmohamed’s disclosure was mere evidence of a “multiplicity of workers sharing the same interest” rather than a public interest being served. The number of workers affected was, Chestertons argued, therefore not relevant. In upholding the decision the court found that the following factors were relevant to the determination of whether the disclosure made had been in the public interest.

* the numbers in the group whose interests the disclosure served – although not in itself a determinative factor;
* the nature of the interests affected and the extent to which they are affected by the wrong doing disclosed – a disclosure affecting a very important interest is more likely to engage the public interest than a disclosure of a trivial nature;
* the nature of the wrongdoing disclosed – especially where it is a deliberate act of wrongdoing; and
* the identity of the alleged wrongdoer – a disclosure concerning a more prominent wrongdoer is more likely to serve the public interest.

The court found that the public interest test was satisfied. A large number of employees was affected by the wrongdoing, which revealed a GBP 2-3 million mis-statement in the internal accounts. It was a deliberate act of wrongdoing, carried out by a prominent high-street firm. It was also stated that had the disclosure related to statutory, rather than internal, accounts, there would have been no question that it would have been in the public interest.

<https://www.employmentcasesupdate.co.uk/site.aspx?i=ed35613>

**TUPE Service provision changes - determining principal purpose of organised grouping**

*Tees Esk & Wear Valleys NHS Foundation Trust v Harland (EAT)*

The EAT has given guidance on the correct approach to determining the “principal purpose” of an organised grouping of employees within the meaning of the service provision change (“SPC”) rules under TUPE.

“CE” was a patient of Tees Esk NHS trust suffering from severe learning difficulties and needed extensive nursing care. He lived in Bankfields Court, a building of flats which hosted service users requiring specialist care. CE’s care initially involved a 27-strong team of qualified and unqualified carers.

Over time, CE’s care needs reduced as his condition improved. From 2012, his care team reduced to 11 people who worked flexibly, caring for CE and 17 other Bankfields residents as required. From 2014, CE’s condition had improved so that he needed one-to-one care only during the day and rarely any assistance at all during the night, when the staff on duty would care for other service users.

In January 2015, Danshell Healthcare Ltd took over the contract for CE’s care and an issue arose over whether TUPE would operate to transfer any employees from Tees Esk to Danshell. Initially, Tees Esk adopted the position that all 11 employees who had been assigned to care for CE from 2012 would transfer. This was later reduced to the seven staff who had worked with CE for more than 75% of their shifts (including night shifts) in the year prior to June 2014.

The employees involved wanted to stay with the NHS trust and disputed that they would transfer under TUPE. Danshell also challenged Tees Esk’s analysis, arguing that there had not been an organised grouping of employees which had caring for CE as its principal purpose. It contended that CE’s care required no more than 3 FTE employees, not the seven from a team of 11 that Tees Esk had contended.

The Employment Tribunal (“ET”) concluded that:

* The service was personal care for CE and the activities carried out by the organised grouping were providing nursing assistance to enable him to live as independently as possible.
* There were 11 employees who ordinarily carried out those activities.
* Those 11 employees were organised deliberately by Tees Esk into an organised grouping of employees to care for CE, starting in 2005 and maintained until January 2015.

Analysis showed, however, that CE’s needs accounted for around 125 hours out of 375 hours worked by the 11 employees. The ET concluded that by January 2015 the principle purpose of the organised grouping had become diluted and was no longer the care of CE. That was now a subsidiary purpose and the principal purpose of the organised grouping by the time of the transfer had become the general provision of care to service users in Bankfields Court.

Consequently, the ET found that the employees did not transfer to Danshell and had remained employed by Tees Esk.

In dismissing the Trust’s appeal the EAT concluded:

* The ET’s findings had been permissible and it should not interfere with them.

* TUPE does not enquire about the transferor’s intention. This may be relevant to whether there is an organised grouping at all, but it is not relevant when determining its principal purpose.
* The assessment of the principal purpose should not be on a historical basis, but immediately before the SPC.

* In line with the ET’s approach, the grouping’s principal purpose immediately before the SPC was no longer the provision of care for CE. That had become a subsidiary purpose and the principal purpose had become provision of care to service users in Bankfields Court in general.

[**http://www.bailii.org/uk/cases/UKEAT/2017/0173\_16\_0303.html**](http://www.bailii.org/uk/cases/UKEAT/2017/0173_16_0303.html)

**Strike Balloting – Information and Timing of Strike Action on Voting Paper**

*Thomas Cook Airlines Ltd v British Airline Pilots Association [2017]**(High Court)*

Section 229(2D) of TULRCA states that a voting paper in a ballot for industrial action "… must indicate the period … within which the industrial action … is expected to take place.” This is a new provision, introduced by the Trade Union Act 2016, which took effect on 1 March 2017 and this is the first case where it has been considered by a court.

The British Airline Pilots Association (BALPA) balloted employees of Thomas Cook, following a dispute about pay and conditions for pilots. The voting paper stated: "It is proposed to take discontinuous industrial action in the form of strike action on dates to be announced over the period from 8th September 2017 to 18th February 2018" and asked: "Are you prepared to take part in industrial action consisting of a strike?" The members voted in favour of industrial action.

Thomas Cook applied for an interim injunction to try and stop the strike, arguing that the voting paper did not comply with section 229(2D). It argued that more information was needed. There was some evidence that BALPA's expectation about when strike action would occur was more specific than the five month window of time stated on the voting paper: it could have been just one day's strike in September 2017.

Hearing the injunction application, the High Court had to consider whether it was more likely than not that BALPA had failed to comply with section 229(2D). It decided it was not, and refused to grant an injunction.

The court considered the reality of industrial action, and accepted that the timing and intensity of it is likely to be affected by progress in negotiations with the employer.

The court decided that section 229(2D) does not require a trade union to identify specific dates on which industrial action is to be taken, and indicating the period within which it is expected to take place is enough to comply with the legislation.

The judge said: "It seems to me that the word "expected" in the subsection has to be read in the context of all of the uncertainties which are inherent in a trade dispute" and that "planning industrial action strategy is necessarily both a dynamic as well as a reactive process. It is one which is very much contingent upon (a) various factors which are not known before the ballot papers are sent out to members and (b) other variables which are entirely outside the control of the defendant, for example Thomas Cook's response to the ballot result. All of the above considerations go into the mix in planning the intensity and frequency of the industrial action. These are things that we only sensibly know after the ballot has actually taken place and as the negotiations develop."

He then added: "the subsection does not specify the level of detail into which the union needs to go, provided that there is a statement in the voting paper which complies with the subsection. .....one thing which the subsection does not require the trade union to do is to identify specific dates on which industrial action is to be taken, rather than the period within which it is expected to take place."

[**http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2017/2253.html&query=(thomas)+AND+(cook)**](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2017/2253.html&query=(thomas)+AND+(cook))