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Whistleblowing - Qualifying Protected Disclosures

Martin v London Borough of Southwark (EAT)

Tribunals should take a structured approach when assessing qualifying disclosures in whistleblowing cases.

The Claimant was a teacher who had expressed concerns that he and other teachers were working excess hours, breaching 'statutory directed time'. The tribunal held that none of the five 'qualifying disclosures' relied upon were protected disclosures, so dismissed the detriment claims. The EAT held that in each instance, the tribunal had erred in its approach, and remitted the case to a new tribunal. The EAT re-iterated the 5-stage test from a number of authorities for determining if there has been a protected disclosure:

1. There must be a disclosure of information;
2. The worker must believe the disclosure is made in the public interest;
3. That belief must be reasonably held;
4. The worker must believe that the disclosure tends to show one of the matters in s43B(1)(a)-(f) Employment Rights Act 1996, e.g. a criminal offence has been committed, environmental harm, endangering health and safety, etc;
5. That belief must be reasonably held.

The EAT stressed the importance of adopting a structured analysis to qualifying disclosures and working through all five stages, as it will clearly show which, if any, of the five necessary conditions are accepted or not, and it will also assist a tribunal to ensure and demonstrate that it has not confused or elided any elements of the 5-stage test.

The EAT noted that confusion had grown up about the distinction between disclosing 'information' on the one hand, and 'making an allegation' on the other, and re-stated the requirement for a statement or disclosure to have sufficient factual content and specificity to be capable of tending to show one of the matters listed in s43B(1).

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2020-000432.pdf (bailii.org)

Disability Discrimination – Knowledge of Disability

Stott v Ralli Ltd (EAT)

A tribunal was entitled to reject a discrimination claim about a dismissal for something arising from disability (s15 Equality Act), when the employer only knew about the disability after dismissal.

The Claimant was a paralegal in a firm of solicitors, dismissed in her probationary period for poor performance. She then raised a grievance, referring to disability, so making the Respondent aware of it. The grievance was rejected, as was a grievance appeal. The Claimant, representing herself, brought a claim alleging that her dismissal was discriminatory, but without complaining about the grievance and appeal outcomes. The claim was clarified through several preliminary hearings and at the final hearing. The tribunal held that the Respondent did not know, and could not reasonably have been expected to have known, about disability when dismissing.

The EAT held that, on the facts, the case was purely about the Claimant's dismissal, and not what happened afterwards. It was not wrong for this tribunal to have only considered if the dismissal was discriminatory, as the grievance and appeal were not part of the case before it. Knowledge or constructive knowledge of disability acquired after the dismissal could not assist the claimant. Complaints about a discriminatory dismissal and a discriminatory appeal could be different matters, unlike in unfair dismissal claims, where the whole process is part of the question of fairness. The EAT also made observations about the interaction between defences to s15 and s19 (indirect discrimination) Equality Act claims.

2019-000772.pdf (bailii.org)

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Worker Status

Stuart Delivery Ltd v Augustine (Court of Appeal)

A moped courier's ability to release a slot to other couriers via an app was not a sufficient right of substitution to remove the obligation on the courier to perform his work personally so that he was not a worker within the definition of s230 *Employment Rights Act 1996.*

The way the system worked was that the Claimant could circulate a notification via the Respondent's app to other couriers who had signed up with the Respondent. Any other courier, already approved by and signed up with the Respondent, could opt, if he chose, to fill the unwanted slot. The Claimant did not know which courier would be taking up the slot and he could not put forward any given individual to take up the slot. If one of the other couriers did not take up the slot, the Claimant would have to work it or face the adverse consequences of missing a slot.

The tribunal had been entitled on the facts as found by it to conclude that the Claimant was a worker within the meaning of s230.

Stuart Delivery Ltd v Augustine [2021] EWCA Civ 1514 (19 October 2021) (bailii.org)

Collective Bargaining – Unlawful Inducements

Kostal v Dunkley and others (Supreme Court)

Where collective bargaining negotiations have been exhausted, an employer can make an offer directly to employees covered by collective bargaining without being liable to a penalty under s145B Trade Union and Labour Relations (Consolidation) Act (TULR(C)A) 1992 for making unlawful inducements.

The Supreme Court unanimously upheld the appeal, with a 3-2 split as to why. The employer had made pay offers directly to its workforce, by-passing the recognised trade

union during collective bargaining, so workers' terms were determined outside the collective bargaining process - 'the prohibited result'.

In order for an offer made by an employer outside of collective bargaining to have the 'prohibited result' there must be at least a real possibility that the workers' terms would have (otherwise) been determined by a new collective agreement in that bargaining round (para 65).

Where a union is applying to be recognised (and s145B still applies), an employer can make individual pay offers to employees because there is no possibility of agreeing terms through collective bargaining.

Where there is a recognised trade union, an employer can make offers directly to employees provided the employer has first followed and exhausted the agreed collective bargaining procedure, as there would not have been a real possibility, when offers were made, that terms could have been determined by collective agreement. What an employer cannot do with impunity (as the tribunal found in this particular case) is make offers to workers before the collective bargaining process has been exhausted.

In summary, the Court noted two means of protection for employers: the first is to ensure that the collective agreement clearly defines and delimits the bargaining procedure to be followed, the second is that if the employer's sole or main purpose in making an offer is not to achieve the 'prohibited result', it is not liable. If an employer genuinely believes that collective bargaining has been exhausted, any offers could not be said to be aimed at achieving a prohibited result.

Kostal UK Ltd (Respondent) v Dunkley and others (Appellants) (supremecourt.uk)

Unfair Dismissal – Reasons for Dismissal

Stone v Burflex (Scaffolding) Ltd (EAT)

It is wrong for a tribunal to identify a reason for dismissal which neither party had raised and without telling the parties prior to making a decision.

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Mr Stone raised a grievance about his level of pay. Following a meeting with management he was summarily dismissed. The appellant brought a claim for unfair dismissal under s104 Employment Rights Act 1996. Despite the employer's assertions that Stone was not dismissed but had resigned, the employment judge found that the appellant had been dismissed.

However, the employment judge decided that he had not asserted a statutory right (namely the right not to suffer unauthorised deductions from pay) and that the principal reason for his dismissal was not such an assertion but was related to the availability of work and was the withdrawal of a concession to provide him with alternative work and was therefore redundancy or some other substantial reason.

The EAT considered that, on all the evidence, the finding that the appellant had not asserted a statutory right was perverse and substituted a finding to the contrary. The finding as to the reason for dismissal involved an error of law in that the employment judge had identified a reason for dismissal which neither party had contended for without raising the matter with the parties before making a decision, so as to allow them to make submissions.

Stone v Burflex (Scaffolding) Ltd (UNFAIR DISMISSAL) [2021] UKEAT 2019 001183 (22 June 2021) (bailii.org)

Unfair Dismissal – Procedural Fairness

Gwynedd Council v Barratt & Anor (Court of Appeal)

The Court upheld a decision of an employment Tribunal that two teachers who were unsuccessful in applying for jobs at a new school which replaced the school at which they previously worked, and were accordingly dismissed as redundant by the local authority which employed them, had been unfairly dismissed.

The local authority, while not responsible for the decision not to appoint the claimants, remained their employer and was responsible for ensuring that a fair procedure was followed. Although there is not a general rule that a failure to provide for an appeal against dismissal will automatically render a decision to dismiss unfair, the Tribunal had

been entitled to reach the conclusion that, in the particular circumstances of the case, the decision to deny the claimants an appeal, along with other procedural defects, fell outside the band of reasonable responses.

The Council employed B and H to teach PE at a community secondary school. Owing to a reorganisation of the local education provision, the Council decided to close the school and replace it with a new community school at the same site. A temporary governing body for the new school was established to determine the staffing structure and appoint its teachers.

At the initial tribunal hearing the Tribunal expressed some concern as to whether there was a redundancy situation at all, but proceeded on the basis of the parties, statement that this was an agreed fact.

On the question of fairness of the dismissal the Council argued (i) that the decision of the old school to dismiss the claimants could not be criticised because the school was closing, (ii) the decision of the new school could not be criticised either in circumstances where TUPE did not apply, (iii) it was under no obligation when the new school opened to offer employment to the claimants, and (iv) the Council could not be liable for the decision of governing bodies which were independent in law.

In dismissing this ground for appeal the Court held that such a result could not be derived from the Education (Modification of Enactments Relating to Employment) (Wales) Order 2006. The order deems the governing body of a maintained school employing a teacher to be the employer for certain purposes, but that does not mean that the governing body is the de facto employer of the teachers at its school or that teachers have two employers.

The Court considered that the issue of the claimants' rights of appeal under Reg 17 Staffing Regulations was a distraction. Although Reg 17 provides additional protection to teachers in some circumstances, it does not give a local authority an escape route to circumvent the obligations it has as an employer under the general law. The Regulations do not produce the result that when a teacher is dismissed because of a reorganisation of a local authority's schools there is no respondent against which he or she can bring an effective claim.

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[Gwynedd Council -v- Barratt & Anr (judiciary.uk)]

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