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Employment Newsletter

Introduction

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Disability Discrimination and “associative discrimination”

The EAT has recently held that the Disability Discrimination Act 1995 (“DDA”) covers not only those people who are themselves disabled, but also non-disabled people who suffer discrimination because of the disability of another person. In *EBR Attridge Law LLP v Coleman (No.2)* [2010] IRLR 10, Ms Coleman was employed by the firm of solicitors as a legal secretary. She was not disabled, but was the main carer for her disabled son. In 2005 she resigned and brought proceedings against the firm and one of its partners on the ground of unlawful disability discrimination.

Whilst the DDA, obviously, does protect disabled people against discrimination by reason of their disability, it does not contain provisions protecting non-disabled people from discrimination based on the disability of a third party. Ms Coleman claimed that it should. The European Directive, which the DDA implements, provides protection against discrimination “on grounds of disability”. The DDA should therefore be interpreted to provide wider protection.

The matter was referred to the European Court of Justice which held that the Directive did cover non-disabled persons. Mr Justice Underhill in the EAT has therefore set out in his judgement the additional wording that should be read into the

DDA to ensure compliance with the Directive. A new s.3A(5A) should be included as follows: “A person also directly discriminates against a person if he treats him less favourably than he treats or would treat another person by reason of the disability of another person.” The DDA definition of harassment has been similarly amended.

Possible victimisation claim if employer delays payment of compensation award

“What protection does the law extend to an ex-employee against acts of discrimination and victimisation by a former employer after the termination of their employment relationship?” This is the question posed by Lord Justice Mummery in the opening paragraph of his judgment given in *Rank Nemo (DMS) Ltd v Coutinho* [2009] IRLR 672. It is a difficult question to answer and Mummery LJ suggests that Parliament should step in and provide a “reasonably workable test” to determine liability for discrimination in cases where the employment relationship has ended. In the meantime, *Coutinho* provides guidance that there may possibly be liability where a former employer fails to pay compensation which has been awarded to an ex-employee.

Mr Coutinho worked for Vision Information Services (UK) Ltd. He was made redundant in

March 2004 and soon afterwards there was a transfer of the undertaking in which he worked from Vision to what became Rank Nemo (DMS) Ltd. Mr Coutinho brought proceedings for automatic unfair dismissal and race discrimination. He won his case and was awarded compensation of £72,000. The transfer was subject to the Transfer of Undertakings Regulations so the liability for the compensation fell on Rank. Rank did not pay, so Mr Coutinho went to the County Court to enforce the award (employment tribunals do not have the power to enforce awards made by them) and he obtained a County Court Judgment. Rank still did not pay. Mr Coutinho then attempted to start proceedings in the employment tribunal for a victimisation claim pursuant to the Race Relations Act 1976 (the "RRA") based on the failure to pay. He claimed that he was being treated less favourably by Rank than their other creditors and the reason was that he had brought a race discrimination claim. The failure to pay was "retaliation" on the part of Rank. However, the employment tribunal refused to accept the claim form on the basis that it did not have jurisdiction. The case went to the Employment Appeal Tribunal and has now been decided by the Court of Appeal.

The issue therefore was one of jurisdiction; could the employment tribunal hear Mr Coutinho's case? Rank argued that Mr Coutinho should have enforced the judgment by using the normal legal procedures open to all creditors. The employment tribunal does not have the authority to enforce directly the payments of awards and the law relating to victimisation should not be used to enforce judgments indirectly. Rank also argued that the provisions of the RRA in relation to victimisation were not satisfied. There was no employment relationship in existence and the treatment complained of was not connected sufficiently to his previous employment. Rank pointed to *D'Souza v Lambeth London Borough Council* [2003] IRLR 484, a House of Lords case in which the claimant brought a claim for victimisation when his former employer refused to reinstate him following his successful claim for unfair dismissal, race discrimination and victimisation, despite an order by the employment

tribunal to do so. The House of Lords held that the employment tribunal had no jurisdiction to hear the victimisation claim. Rank argued that the present case was essentially the same; both claims were based on a former employer's failure to carry out an order by the employment tribunal – *D'Souza* to reinstate and *Coutinho* to pay compensation. There was no jurisdiction in *D'Souza*, there should be none in *Coutinho*.

The Court of Appeal however disagreed and held that the employment tribunal could hear the claim. The case brought by Mr Coutinho was not to enforce the compensation award or the CCJ. The basis of the claim was that he was being discriminated against in that he was being treated less favourably by Rank than other creditors and the reason for the less favourable treatment was that he had brought a race discrimination case – a protected act. If this could be proven to be true; that the treatment by Rank was in retaliation for the claim, this could establish the link to the previous employment relationship necessary to bring a post employment victimisation claim under the RRA. *D'Souza* was distinguished on the ground that where there is a failure to reinstate, there is already a statutory remedy available under the unfair dismissal legislation. The Employment Rights Act 1996 provides for compensation in these circumstances and Mr D'Souza could not also go to the RRA for additional compensation.

Mr Coutinho's claim was sent back to the employment tribunal to hear the case.

How should mobility clauses be dealt with on a TUPE transfer?

Where an employee is transferred from one business to another following a TUPE (Transfer of Undertakings (Protection of Employment) Regulations 2006) transfer that employee's contract of employment is also transferred in its entirety. The new employer, the "transferee" takes over all the "rights, powers, duties and liabilities" in connection with that employment contract and the contract is treated as if it was made, from the outset, between the employee and the transferee. This protects the employee's position following a

transfer, but it can cause practical difficulties for the transferee. One such practical difficulty arose in *Tapere v South London and Maudsley NHS Trust* [2009] IRLR 972, which concerned the ambit of a mobility clause.

Ms Tapere worked for Lewisham PCT at their offices in Burgess Park, Camberwell. Her employment contract provided that Burgess Park was her place of work but also stated: "There may be occasions when you are required to perform your duties either temporarily or permanently at other locations within the trust". In 2007, Ms Tapere's employment was transferred to the South London and Maudsley NHS Trust. Her new employer wanted to change Ms Tapere's place of work from Burgess Park to Bethlem Hospital, Beckenham. Ms Tapere was very unhappy about this as she believed the increase in travel time that would result from the change would cause problems with her child care arrangements. When the change took place, she resigned and claimed constructive dismissal on the basis that, as well as other problems connected with the transfer, moving her place of work was a fundamental breach of contract entitling her to resign. (As an alternative, she claimed she was redundant).

The employment tribunal hearing the case dismissed her claim. It held that the mobility clause had transferred to the transferee and the range of the mobility clause was to be construed by reference to the transferee's locations rather than those of the original employer. Therefore the transferee could contractually require Ms Tapere to work at its other locations. The employment tribunal also held that, since the transferee was able to require its employees to work only at those locations it "owned or operated", the use of the words "within the trust" were meaningless.

Ms Tapere appealed and the EAT overturned the employment tribunal's approach to the application of the mobility clause. Judge Hand held that the "contract falls to be construed at the time that it was entered into". This meant that the scope of the mobility clause was to be construed by reference to the original employer's locations, not those of the transferee. In deciding what the contract meant, it is the intentions of the parties making the contract and the circumstances immediately

surrounding the making of the contract which are relevant. The words "within the trust" were not therefore meaningless; they defined the geographical area in which Ms Tapere could be required to work at the time she entered into the contract. If the employment tribunal's decision were allowed to stand, Ms Tapere's position following the transfer would be worse than it was before the transfer since the geographical area she could be required to work within was wider than that required by the original employer. This outcome would be the opposite of what the TUPE regs. were intended to achieve. The TUPE regs. are aimed at protecting employees following a transfer, not making their contractual position worse. Accordingly, the EAT held that the transferee had breached Ms Tapere's contract when it insisted she change her place of work to Beckenham.

The EAT also held that the concept of "substantial equivalence" did not apply in this case. In cases where, following a transfer, it is not possible to implement a contractual term, then an equivalent term can be substituted provided this does not increase the benefit or burden on the parties. The example given was the case of *MITIE Managed Services Ltd v French* [2002] IRLR 512. In this case, the transferring employment contracts included terms relating to a profit sharing scheme run by Sainsburys, the original employer. The new employer obviously could not provide the employees with a continued participation in Sainsburys share scheme, so were required to establish an equivalent scheme. However, in the present case, it was not a matter of the contractual term being impossible to implement. The term caused practical difficulties and this did not invoke the "substantial equivalence" provisions.

Finally, the EAT also had to consider the application of reg. 4(9) of TUPE. This provides that, where a transfer involves a "substantial change in working conditions to the material detriment" of a transferring employee, the employee "may treat the contract of employment as having been terminated". The effect of this is that the employee will be deemed to have been dismissed by the employer.

The EAT again held that the employment tribunal had erred in its approach. The two aspects to this regulation are 1) there must be a “substantial change in working conditions”, and 2) this must be a “material detriment” to the employee. The employment tribunal had considered the change of place of work to be a change in working conditions and the EAT confirmed this was correct. The EAT also said that whether or not there was a change in working conditions, and if so whether the change was substantial, were questions of fact for the tribunal. An employment tribunal would have to consider “the nature as well as the degree of the change in order to decide whether it is substantial”. However, the employment tribunal had gone on to compare the position of the employer to that of the employee in deciding whether the change had resulted in a material detriment to the employee. It had decided that the increase in travel time was not materially longer and therefore there was no material detriment to the employee. The EAT held that the employment tribunal should have considered the change only from the point of view of the employee. Judge Hand stated: “The questions that ought to have been asked were whether the employee regarded those factors as detrimental and, if so, whether that was a reasonable position for the employee to adopt?”

***Vento* guidelines updated**

In *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102, the court set out three bands of compensation to be awarded for injury to feelings, ranging from the least to the most serious of cases. These bands have now been updated to bring them in line with inflation. Following *Da’Bell v NSPCC* [2010] IRLR 19, the new bands are as follows:

- Band 1: £0 - £6000
- Band 2: £6000 - £18000
- Band 3: £18000 - £30000

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