RPC

Employment update

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Underwood v Wincanton plc

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Any comments or queries?

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Whistleblowing: A dispute about terms of employment can be a matter of "public interest"

Underwood v Wincanton plc

The EAT has said that a dispute about terms and conditions of employment of a group of four employees was capable of being a protected disclosure under the whistleblowing legislation (under section 43B(1)(b) of the Employment Rights Act 1996 (ERA)); the dispute was a matter of public interest.

Facts

The claimant, Mr Underwood, was a HGV driver with Wincanton plc. In November 2013, Mr Underwood and three of his colleagues collectively submitted a written complaint about the way in which overtime was allocated among drivers. In June 2014, Mr Underwood was dismissed.

Subsequently, Mr Underwood submitted a claim. He contended, among other things, that: the November 2013 complaint amounted to a protected disclosure under section 43B(1)(b) ERA; that his dismissal related to this complaint; and, therefore, his dismissal automatically unfair.

To gain whistleblowing protection, Mr Underwood, amongst other qualifying conditions, needed to show the original complaint was made in the "public interest".

Outcome

The EAT made reference to the recent case of *Chesterton*. This case gave guidance as to the correct approach under the newly amended section 43B(1)(b) ERA, including whether the matter was "of public interest".

In the earlier *Chesterton* case, the allegation of inaccurate accounts had raised the question of whether there had been fraud, which the EAT noted was self-evidently a matter of public interest. The EAT pointed out that there was a suggestion that Mr Underwood (and those making the disclosure) had been raising concerns of vehicle safety and road-worthiness. This concern raised wider issues of road safety. And these issues might also be thought to be a matter of public interest. The EAT concluded there were not any grounds for distinguishing *Chesterton*.

The EAT also considered that the original Tribunal in *Underwood* had applied too narrow a definition of "public" in the "public interest" test. Referring to *Chesterton* it noted that "public" could be constituted by a subset of the public, even if that subset included persons employed by the same employer on the same terms. The conclusion that disputes relating to terms and conditions of employment could not constitute matters in the public interest was inconsistent with *Chesterton*. It followed that an employee could reasonably hold the belief that a disclosure relating to such matters could be within the public interest.

The claim was therefore allowed to proceed for a full hearing by an Employment Tribunal (ET).

Points to note

Both *Chesterton* and *Underwood* show that a dispute which involves individual employment contracts can be in the "public interest" and, therefore, be a qualifying disclosure securing

protection under the whistleblowing. The fact that the dispute relates to terms and conditions of employment does not take dispute out of the "public interest" arena.

Chesterton is being appealed to the Court of Appeal and is due to be heard in October 2016.

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TUPE transfer: if no employees are actively working on a service, can there be a transfer?

Inex Home Improvements Ltd v Hodgkins and others

A condition to the extended service provision change definition under reg.3(3) of the Transfer of Undertakings (Protection of Employment) Regulation 2006 (TUPE) is that there is immediately before the service provision change "an organised grouping of employees situated in Great Britain which has its principal purpose the carrying out of the activities concerned on behalf of the client". Or to phrase this condition more simply, there needs to be an "organised grouping".

If the "organised grouping" condition is not fulfilled there will not be a "relevant transfer" under the extended definition. The question before the *EAT* in *Inex Home Improvements Ltd v Hodgkins* and others was whether employees who were temporarily laid off at the time of the service provision change could be part of the "organised grouping".

Facts

Inex employed the claimants as a group to undertake various building works. Those works were subcontracted to Inex by Thomas Vale, in sequential tranches. Over November and December 2012, Inex completed the work for the most recently issued tranche of work. A further tranche had not been issued by this time; it was expected to be released in January 2013. Temporarily there was, therefore, no work for the claimants to undertake.

The claimants' terms of employment provided that employees could be laid off "where work is temporarily stopped or not provided". However, the temporary lay-off provisions could only be used where there was "a reasonable expectation of being able to provide work within a reasonable time".

In the circumstances and pursuant to their employment contracts, the claimants were laid off temporarily at various dates during November and December.

A new tranche of work (which was substantially similar to the preceding tranche) was issued in January 2013 to another contractor, Localrun.

Outcome

It was not disputed that the appointment of a different contractor, Localrun, to perform work under the newly released works order, being work similar to that undertaken by Inex, was a "service provision change" under reg.3(1)(b)(ii) TUPE. The issue before the EAT was whether the claimants' temporary absence from work, because of their temporary lay-off, meant there was no "organised grouping" immediately before the service provision change and, therefore, no relevant transfer.

On considering the issue, the EAT concluded: (i) a temporary absence from work, or cessation from work, did not in itself deny the employees who were involved in the relevant activities their status as an "organised grouping"; (ii) the purpose or reason for, as well as the nature and length of the cessation, are relevant to determining whether or not there was an "organised grouping" at the relevant time; (iii) whether or not the employees were part of an organised grouping was a question of fact for the ET; (iv) an organised grouping can continue despite a temporary cessation in activities; it is not necessary for activities to be carried on at the time of the service provision change.

Points to note

Importantly, and running counter to current received wisdom, the EAT said that, when interpreting the service provision change provisions under TUPE, though the service provision change provisions were not found in the Acquired Rights Directive and purely a domestic provision, the principles relevant to the construction of the Directive (including its purpose) applied.

The purpose of the Directive being to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the employees concerned from being placed in a less favourable position solely as a result of the transfer. Further, when construing the service provision change provisions the purpose of TUPE, namely "protection of employment", must, also, be taken into account and the meaning of the provision construed accordingly to meet that legislative purpose.

This purposive interpretation by the EAT, arguably, runs counter to the literal interpretation adopted by the Court of Appeal in *McCarrick*.

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Unfair dismissal: how is the reasonableness of a dismissal determined?

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The EAT held that if allegations of bad faith are central to the ET's reasoning, they, the ET, have to put those allegations to the employer's dismissing officer in an unfair dismissal case.

Facts

The claimant was an employee of the respondent as a prison officer from November 2005 until his dismissal for gross misconduct in August 2013. The dismissal arose from an allegation that he had punched a prisoner in the back during a planned intervention which took place in January 2013. The claimant brought a claim for unfair and wrongful dismissal.

The ET upheld the claimant's claims of unfair and wrongful dismissal. The ET did not make a specific finding as to the reason for the dismissal; however its reasoning suggested that it had concluded that the employer had acted in bad faith and did not have a genuine belief in the claimant's misconduct. The ET further held that no reduction should be made in respect of the claimant's conduct.

Outcome

The employer appealed against the finding that the claimant had been unfairly dismissed and against the lack of reduction in the award for contributory fault.

The EAT noted that the ET's findings suggested that it had considered that the employer had acted in bad faith and was determined to find that the claimant had been guilty of gross misconduct (regardless of the evidence in the claimant's favour). The suggestion of bad faith had not been put to the employer's witnesses and that procedural error (given the centrality of the point to the ET's findings) rendered the decision unsafe.

Furthermore, the ET's conclusions demonstrated that it had fallen into the substitution mind-set. Rather than assessing the employer's conduct and decision-making against the range of reasonable responses, the ET applied the test of what it considered the reasonable employer would have done or decided. The ET also should have considered a *Polkey* reduction when there was a "finding of substantive unfair dismissal".

Points to note

This case highlights the importance of the ET's approach in finding whether or not the employer has established the reason for the dismissal. This requires a finding as to the collection of facts subjectively operating on the employer's mind at the relevant time, and the ET should then go on to determine whether the dismissal was fair or unfair. At this stage the test to be applied is that of the range of reasonable responses of the employer in the relevant circumstances. It is important that the ET does not set down one standard as being the reasonable employer's response, but rather looks at the range of reasonableness responses.

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Time when sleeping: is an on-call night worker entitled to National Minimum Wage (NMW) for all hours of the night?

Shannon v Clifton House Residential

The EAT held that an on-call night worker who lived at his place of work was not entitled to NMW for all hours of the night. He was also not entitled to accrued holiday pay for earlier years when he was not prevented from but did not ask for leave.

Facts

The claimant was employed by the respondent as an on-call night care assistant at a residential care home. The claimant's permanent residence was at his place of work where from 22.00 until 7.00 he was required to respond to any request for assistance by the night care worker on duty at the home. The claimant brought a claim against the respondent, submitting that Regulation 16 of National Minimum Wage Regulation 1999 (NMWR) applied to the claimant's salaried hours night work and that he was entitled to accrued holiday pay for earlier years when he did not take leave.

Outcome

The ET found that the claimant's home was his place of work and the time in question was spent at home. The ET therefore concluded that he was not working throughout each night shift but only on those rare occasions when he was called upon to do so by the night care worker on duty. The ET also found that where a worker could have requested paid leave but chose not to he cannot carry forward his entitlement to pay in lieu of holiday pay.

The claimant appealed.

The appeal failed. The EAT held that the claimant was only entitled to NMW for the hours which he was awake and working. The factors which the EAT took into account were that the claimant had lived in the residential home where he was employed, and the time in questions was time he was entitled to spend at home. The ET was entitled to take account of the fact that there was another night worker on duty and that in practice the claimant was rarely called upon. The EAT also agreed with the ET's decision on holiday pay as the facts do not support the proposition that the claimant was unable or unwilling to take leave due to reasons beyond his control.

Points to note

The EAT considered a number of decided cases in reaching its conclusion in relation to entitlement to NMW for time when sleeping. These cases demonstrate that mere presence does not itself necessarily entitle a worker to the NMW for the whole shift. The cases in this area are particularly fact-sensitive and do not all fully aligned in their reasoning; therefore caution should be taken when dealing with on-call night workers.

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