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Albion Chambers EMPLOYMENT NEWSLETTER

TUPE

Service provision change and solicitors

These are difficult economic times and mergers and amalgamations are a frequent occurrence amongst solicitors' firms at present. Equally, as the providers of bulk work look for value in the market place, retendering processes are resulting in many firms taking over existing caseloads. Both of these scenarios could, in theory, attract the protection of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'), but as the courts continue to narrow the gap through which they are prepared to see valid TUPE transfers under regulation 3 (1)(b), how many of these 'transfers' are actually likely to be caught?

The legal framework

In addition to the strict implementation requirements of the European Acquired Rights Directive (now in the form of 2001/23/EC), the 2006 TUPE Regulations introduced the concept of service provision change through regulation 3 (1)(b);

"The Regulations apply to...

(b) A service provision change, that is a situation in which —

(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (3) are satisfied.

(3) The conditions referred to in paragraph (1)(b) are that —

(a) immediately before the service provision change —

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use."

The effect of these provisions has been to catch many outsourcing exercises and, in the other direction, the taking back in-house of previously outsourced services (regulations 3 (1)(b)(i) and (iii) respectively).

The provision which is most likely to have a bearing on the legal profession and the scenarios considered in the first paragraph of this article is regulation 3 (1)(b)(ii), where services undertaken for a client are passed to another firm or 'contractor' to undertake. Will the successful bidder acquire the old firm's workforce? The answer to that question would appear to depend upon the nature or identity of;

(a) the service or 'activity' undertaken; and

(b) the workforce used to provide it; and

(c) the identity of the 'client' and 'contractor'

(a) The service

In *Thomas-James and others v Cornwall County Council and others* 1701021/07, an employment tribunal in Bristol had to consider a re-tendering situation involving the provision of a telephone legal advice service, CLS Direct (akin to NHS Direct). Cornwall, which had been one of a few contract holders, did not re-tender when the contracts fell due for renewal. New contracts were awarded to a greater number of new providers based all over the country who received calls allocated randomly from a central hub. What of the Cornwall employees who had serviced the Council's contract? The Tribunal held that the necessary requirements of regulation 3 (1)(b)(i) were met save for the issue relating to the existence of the same 'activities'. Since the work was allocated randomly and since no identifiable nexus could be found between the work the Cornwall employees undertook and that which the new contractors undertook, TUPE did not apply. The Tribunal was nearly persuaded to split the employees amongst the new providers in proportion to the work undertaken before and after the transfer ('the percentage approach').

Was that approach right? If the *'activities'* were not the same because the telephone calls concerned new and different legal problems, would that approach not apply to just about every service industry; no two letters are the same (postal services), no two patients are the same (health services) and no two client files are the same (legal services).

But have the higher courts applied regulation 3 (1)(b) in this way? In short, yes, they are tending to do so more and more.

The current touchstone test is that to be taken from *Metropolitan Resources v Dulwich* [2009] IRLR 700; one needs to ask whether the activities are 'fundamentally or essentially the same' pre and post transfer. But does that help in all cases? If that test had been applied in Thomas-James, would it not have produced a different result? It is not easy to tell. We are encouraged to make a 'holistic assessment' of all of the facts in order to judge whether the service pre and post transfer is the same but, more recently, in *Ward Hadaway v Love* [2010]

UKEAT/0471/09 the analysis seems to have turned not upon the nature of the services undertaken going forward, but their size.

The Nursing and Midwifery Council ('NMC') had a contract with Ward Hadaway Solicitors in respect of its legal work. Following a re-tender, Capsticks won the work although the NMC took a fair amount of its work back in-house. Ward Hadaway continued to do the run off work but new work was sent to Capsticks under the new arrangement. The tribunal concluded that there had been no service provision change transfer and the EAT supported that view. Not only was there a change in location, but the size of the work undertaken by Capsticks going forward was also significantly reduced because of the NMC's decision to take some back itself.

There has been much higher court authority which has dealt with cases in which services have been fragmented between new providers, and they seem to speak with one voice; unless the organised grouping worked for a defined client base which could be traced to a new transferee, it is unlikely that there will have been a service provision change (see, most recently, *Enterprise Management Services Ltd v Connect Up Limited* [2012] IRLR 190, *Eddie Stobart Ltd v Moreman & others* [2012] UKEAT/0223/11, *Argyll Postal Services Ltd v Stirling* [2012] UKEATS/0012/11 and *Hunter v McCarrick* [2012] IRLR274).

In the sort of situation where solicitor A, who works within an organised team, loses 60% of his work to a new provider X, and the other 40% remains or transfers to Y, the percentage approach might be a tempting answer to the TUPE issue. That type of approach was analysed by the EAT in *Kimberley Group Housing Ltd v Hambley* [2008] ICR1030. The EAT encouraged tribunals to remember that the overall principle is to focus upon *"the link between the employee and the work or activities which are formed"*. That would not necessarily help in the scenario considered above and the other decisions on fragmentation would tend to favour a simpler approach and probably one in which the finding was that there had been no transfer at all (see *Enterprise Management Services v Connect Up* [2012] IRLR 190 in which the same percentage split did not result in a transfer).

(b) the workforce

As to the workforce or 'contractor' (i.e. the potential transferor) regulation 3 (3)(a)(i) requires there to be an 'organised grouping' undertaking the service before there can be a TUPE transfer. 'Organised' means just that and an unintentional, incidental or 'happenstance' group is not enough (*Argyll Coastal services v Stirling* [2012] UKEATS/0012/11 and *Seawell v Ceva* [2012] UKEATS/00034/11). Such a situation is difficult to imagine within the context of most modern legal practices. Most solicitors either work in one department or another and for a particular client or they do not. The issue may arise when the position of support staff and ancillary personnel is analysed but probably not otherwise.

(c) The client or contractor

Care needs to be taken in identifying the 'client' too. It cannot be a different one for TUPE to apply. In *SNR Denton UK LLP v Kirwan and Jarvis PLC* [2012] UKEAT/0158/12 the EAT (the President sitting alone), the Claimant had been an in-house solicitor for a company which was struggling to survive. Her role was to dispose of the company's contracts. Its affairs were, however, taken over by Administrators and the Claimant was later made redundant. The Administrators had their own solicitors who continued to dispose of the company's contracts as the Claimant had done. Had she been TUPE transferred to the Administrator's preferred firm? The tribunal thought that she had, but Langstaff J disagreed; the 'client' had changed. She had previously worked for the company whereas the solicitors were working for the Administrators.

Other issues

If TUPE had applied to the Cornish employees in *Thomas-James*, would they have been pleased? Would they have happily relocated to Teesside where one of the new providers was based? I think not. Once the application of regulation 3 has been considered, that may not be the end of the conundrum.

In *Royden and others v Hammonds Direct and Barnett's solicitors* (ET 2103451/07), employees of the Birkenhead office of a law firm, LLW, claimed that they had been the subject of a TUPE transfer under regulation 3 (1)(b) to Barnetts, in Southport, when it won LLW's contract with a building society for the provision of conveyancing services which LLW had previously undertaken. However, they also claimed that Barnetts had repudiated their contracts (or that the transfer would have involved a substantial change to their working conditions to their detriment under regulation 4(9)) because they would have had to relocate to Southport. They resigned and claimed that they were entitled to treat themselves as constructively dismissed.

There was little doubt in that case that regulation 3 (1)(b) applied. The question for the tribunal was whether the new outsource provider could rely on the ETO (economical, technical or organisational) reason defence under regulation 7 (1)(b) of TUPE when it relocated work to its own offices. If TUPE had not applied, the employees would simply have received redundancy pay. TUPE was designed to protect employment, yet it was being used to secure potentially more generous unfair dismissal compensation. The employees had no intention of staying.

The tribunal found that the ETO defence did apply but the case highlights the need for firms to be wary of what they might acquire with a new work stream; not just a new team of solicitors to service it, but a team that might seek to allege that working for the firm entitles them to resign and bring unfair dismissal claims. I suppose that we could also spare a thought for the client, who moved its business away from one underperforming team to another firm, only to find the same team turning up for work there too!

Conclusions

Regulation 3 (1)(b) and service provision change as a concept is under attack, both by the courts and government. On 17th January, Jo Swinson MP, a Junior Minister at the Department of Business, Innovation and Skills, launched a consultation process to consider, amongst other things, the abolition of regulation 3 (1)(b) altogether leaving the 'old' TUPE transfer as the only vehicle that would be caught by the Regulations. The proposal is part of the Coalition's Red Tape Challenge. Responses are to be in by 11th April.

Whilst transfers of work between solicitors firms undoubtedly still have to be carefully scrutinised to assess whether TUPE might apply to the staff who undertake the work, there is every expectation that regulation 3 (1)(b) will be assigned to the history books. The consultation paper, however, recognises that many public sector outsourcing exercises are planned and implemented over time periods measured in years not months and there is no indication that, if the proposal becomes law, it will happen any time soon. Service provision change is here for some time yet it would appear and we will have to leave it to the tribunals and higher courts to continue to find ways of shutting the door on the regulation before the government pushes the last few feet.

John Livesey

Issue estoppels and abuse of process

Three recent decisions

In *Hill v Governing Body of Great Tey Primary School* [2012] UKEAT 0237 12 2901 - 29/1/13 the EAT considered the Respondent's argument that the Claimant was precluded from re-opening the issue of whether the Tribunal had erred in its approach to Article 10 of the ECHR on the basis of issue estoppel. The Tribunal had determined that the dismissal of the Claimant had been unfair on procedural grounds, but it rejected an argument that the dismissal was automatically unfair because the Claimant had made protected disclosures in the public interest. This decision was not appealed. The case proceeded to a second hearing to determine remedy.

Following the remedy hearing, the Claimant appealed. In the grounds of appeal, it was argued that the Tribunal had adopted an erroneous approach to Article 10 and failed to give effect to the Claimant's Article 10 rights. The Tribunal had expressed the view that the rights under Article 10 had to have been exercised *"judiciously, responsibly and not recklessly"*. The Employment Appeal Tribunal was satisfied that the Tribunal had not adopted the proper test; the President highlighted the danger of a Tribunal attempting to explain, in its own home spun language, what are rather complex provisions. The proper approach to Article 10 was set out at para 45 of the Judgment.

The Respondent's response to this issue was to raise the argument of issue estoppel. Since the Tribunal's approach to Article 10 had been clearly stated at the liability hearing and since the decision had not been appealed, it prevented the Appellant from raising it on appeal. By reference to *Karl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853 and Thoday v Thoday [1964] P181, the Tribunal stated that a decision will create an issue estoppel if it "determines an issue in a cause of action as an essential step in its reasoning". The doctrine only covers those matters in which a judgment was necessarily established as the legal foundation or justification of its conclusion; the fact which, if found, precludes further argument to the contrary must be fundamental to the decision, and not subsidiary or collateral to it (*Blair v Curran* (1939) 62 CLR 464). In order to decide whether the Claimant was precluded from arguing that Article 10 would render unfair any hypothetical future dismissal at the remedy hearing, it was necessary to identify whether the Tribunal's approach to Article 10 at the liability hearing was a necessary step in its decision.

Having reviewed the Tribunal's decision, the EAT took the view that, to resolve the question whether there had been a breach of Article 10, or whether the qualifications in Article 10(2) were operative was not a necessary step in deciding if there had been a public interest disclosure. From the language used by the Tribunal, the EAT was not able to say that it was a material finding in reaching the conclusion on that point nor was it relied upon in reaching the Tribunal's decision on the fairness of the dismissal. The Tribunal had also expressly stated that it had not gone further to decide whether the decision to dismiss was in any event fair or unfair. Accordingly, the Tribunal's approach to Article 10 could not found an issue estoppel.

Abuse of Process

In *Mills v London Borough of Brent* [2012] UKEAT 0545 11 1202 the Claimant had presented two claims of race discrimination against the London Borough of Brent. The Employment Judge had, of her own motion and entirely correctly as a matter of law, substituted as a Respondent the School where the Claimant had then worked. On day three of the four day hearing, the Claimant withdrew her claims (although no Order was made formally dismissing them).

The Claimant later issued a third claim against the London Borough of Brent and added a claim of public interest disclosure based upon the same facts. On the same day she also made a complaint about the alleged harassment and bullying of the Claimant by the Judge at the earlier hearing. This was investigated and dismissed by the Regional Employment Judge. The Claimant then submitted the complaint to the Judicial Appointment and Conduct Ombudsman.

Meanwhile, the third claim was listed for a PHR to decide whether the claim should be struck out as an abuse of process. An application for an adjournment to await the Ombudsman's report was refused. The Tribunal struck out the Claimant's third claim for the following reasons:

- The reason for the Claimant having withdrawn her complaint was not supported by the evidence uncovered during the Regional Judge's investigation;
- The interests of justice were best served by striking out the claim because there was no evidence that the Claimant was not allowed to put her case at the full hearing;
- The issues to be determined were very stale and memories would have inevitably faded in the six years from the first act complained of by the Claimant;
- It would be against public policy for the Claimant to be allowed to re-run her original claim;
- The claim was as clear an abuse of process as the Tribunal had seen.

The Claimant appealed. The EAT held that:

- The allegations of bias by either Employment Judge were not made out;
- It did not matter that there was a different Respondent to the first two claims than there was to the third given the privity of interest between the respective parties and the fact that all the claims were based on identical facts. The Tribunal had been entitled to take these factors into account alongside the fact that the claims had been withdrawn voluntarily on day three of four. It had been entitled to strike the claim out as an abuse of process under rule 18(7)(b); the principle in Henderson v Henderson [1843] 3 Hare 100 had no application to the case. Although there was no dismissal of the earlier two claims, the re-opening of the same facts could not be justified.

Christou and Anor v London Borough of Haringey [2013] EWCA Civ 178 involved a claim of unfair dismissal by members of the social work team responsible for the care of Baby P, a child who had died as a result of chronic abuse. As a consequence of the death of Baby P, the Council's local Safeguarding Children Board conducted a serious case review. Following investigatory interviews, the Claimants had been disciplined under the Council's simplified procedure which usually dealt with minor misconduct and they were given a written warning. Following the criminal trial of those responsible for the abuse of Baby P, a report was commissioned into safeguarding arrangements for children in Haringey and a new Director of Children's Services was appointed. Upon his appointment, he requested an investigation to take place, to include an examination of the role played by the Claimants, notwithstanding the fact that they had already been disciplined. The investigation concluded that the original disciplinary proceedings had been "blatantly unsafe, unsound and inadequate". As a consequence, fresh disciplinary proceedings were instituted against them. There were no new facts relied upon, but the charges were directed at alleged failings of substance,

rather than the procedural complaints which had formed the basis of the charges in the simplified procedure. This resulted in the more severe sanction of summary dismissal for gross misconduct.

The primary submission of the Claimants before the Tribunal was that it was unfair to have subjected them to a second disciplinary process at all with the consequence that the dismissal was necessarily unfair. The Tribunal rejected that argument and its decision was upheld by the Employment Appeal Tribunal. The Claimants appealed to the Court of Appeal.

By the time of their appeal to the EAT, the Claimants were also advancing the double jeopardy argument on the basis that the doctrine of res judicata applied to the simplified procedure, with the effect that the Council were estopped as a matter of law from reopening the disciplinary process at all. The EAT rejected that submission and held that the simplified procedure did not constitute an adjudication between the parties so as to engage the res judicata doctrine. A second and related ground was that conducting the second procedure constituted an abuse of process; all of the charges brought within the second procedure ought to have been brought as part of the initial disciplinary procedure if they were to have been brought at all. The EAT rejected that argument too; the simplified procedure did not constitute litigation so as to found a relevant "process" for the purpose of this doctrine.

These same arguments were advanced before the Court of Appeal. Counsel for the Claimants pointed out that there was no general public interest exception that could modify the strict application of the *res judicata* doctrine so as to justify the reopening of disciplinary matters which have already been determined. Whilst there was no absolute barrier created by an abuse of process, it was argued that reopening the matter should have been precluded given the express agreement of all parties to the use of the simplified procedure.

The Court of Appeal held that the doctrine of *res judicata* did not apply because it was wrong to regard the exercise of a disciplinary power by an employer as a form of adjudication. In *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 the House of Lords had held that the doctrine applied where a statute created a specific jurisdiction which established *'the determination of any issue which establishes the existence of a legal right'*. The purpose of the disciplinary procedure was not a determination of any issue which established the existence of a legal right, nor was the procedure properly regarded as determining a dispute. There was no independent body which made a decision upon the dispute between the parties; it was typically to enable an employer to inform himself as to whether an employee had acted in breach of contract or some other inappropriate way and if so, to determine how that should affect future relations between them. It was far removed from the process of litigation or adjudication where the doctrine applied.

An analogy was drawn with the case of *Mattu v University Hospitals of Coventry and Warwickshire NHS Trust* [2010] EWCA Civ 641, in which it was held that an employer's disciplinary procedures was not *'judicial proceedings'* within the meaning of Article 6 ECHR because the employer was not by that process determining civil rights.

The Court stated that is not the case that res judicata could never apply between an employer and an employee; it would be open to an employer, for example, to agree that the payment of a bonus should be determined by an independent arbitrator and there was no reason why the doctrine could not apply to any such determination. The critical question was not the formality of the procedures, but whether they were operated independently of the parties such that it was appropriate to describe their function as an adjudication between the parties. The Court held that, even if res judicata did apply, it would not follow that a dismissal effected in breach of the doctrine would be unfair. Section 98 still required a tribunal to find the reason, or principal reason, for the dismissal and to ask whether the employer acted reasonably in all of the circumstances in treating that reason as a fair reason. A tribunal cannot ignore the dismissal and the circumstances giving rise to it simply because if there had been no second process there would have been no dismissal at all. Plainly, the second procedure would be relevant to the question of fairness but it would not be decisive in every case.

In relation to the abuse of process argument, the Court of Appeal observed that abuse of process and res judicata are related doctrines operating in the area of adjudication. However, it may be of little moment whether the abuse of process doctrine applies or not since a tribunal, when considering whether such a dismissal was fair, would always have to ask whether it was fair to institute the second procedure.

Comment

In the context of tribunal litigation, just because an order has not been made formally dismissing a claim, tribunals will not allow claimants to have second bites at the same cherry (or third, as in Mills) even if an issue estoppel argument cannot be deployed. Those representing claimants need to be alert to these issues and the correct way around such a problem if it occurs (stated to be by way of an application for a review; see *Cokayne v British Association for Shooting and Conservation* [2008] ICR 185).

In the context of disciplinary procedures within employment, however, it would appear that the principle has very limited application indeed and unfair dismissal claims are unlikely to be determined by the cunning deployment of such arguments. The touchstone test under s. 98 will prevail.

Gemma Borkowski

Final written warnings

What is the standing of a final warning in an employer's decision to dismiss an employee who is accused of subsequent misconduct while the warning is still in force? That was what the Court of Appeal asked itself in the recent case of *Davies v Sandwell Metropolitan Borough Council* [2013] EWCA Civ 135.

The Claimant was a science teacher in one of the Council's schools. In 2006 she was dismissed for alleged misconduct between November 2005 and February 2006. She had been given a final warning in March 2005 in respect of alleged misconduct during a lesson in October 2004. That warning was preceded by a period of suspension, investigation and a disciplinary hearing. She was notified that the warning was to remain on her record for a period of two years. The Claimant had lodged an internal appeal against the finding of misconduct at the disciplinary hearing and against the issuing of the final warning. She contended that the evidence showed that the events could not have occurred as alleged. Her first appeal hearing was aborted and re-scheduled for May 2005, but then postponed at the request of her trade union representative. The date for the hearing of the Claimant's appeal was never re-arranged or restored. Therefore, the final warning remained on her record at the time of the alleged subsequent misconduct and at the time of the Council's decision to dismiss her.

Final written warnings (continued)

In her claim for unfair dismissal, the Claimant challenged the status of the final warning. In the proceedings, the Council accepted that, absent the final written warning, it would not have dismissed the Claimant. The Employment Tribunal dismissed the claim. It expressed concerns about the deficiency in the Council's procedure and about the adequacy of the investigation undertaken before the issue of the warning, but went on to describe the circumstances in which it had been possible for the Claimant to further pursue the appeal against the final warning and found that she had chosen not to do so.

There had been a considerable litigation history by the time the claim reached the Court of Appeal. Indeed, on the way, there had already been an appeal to the Court of Appeal that resulted in a consent order remitting the case to the EAT on limited grounds. The Claimant had also made four unsuccessful requests to the ET for it to review its original decision. When the ET, in 2011, finally reheard the claim (after the EAT had remitted the case to re-consider its ruling on the status of the final warning) it unanimously reached the same decision as on the first occasion.

The only ground upon which permission had been granted to appeal from the EAT was as follows:

"Whether the final written warning on which the Council relied should be treated as a nullity in circumstances where, although there is evidence to support the decision to issue the warning, the employer has deliberately chosen not to consider evidence which, objectively viewed, might have caused him to believe that the misconduct alleged had been committed and therefore not to issue the warning."

The Court of Appeal confirmed that an employer can legitimately rely upon a final warning, provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it had not been 'manifestly inappropriate' to issue it. It disagreed with the Claimant that the Tribunal's role was to consider the validity of the warning. Mummery LJ held that a tribunal's function was not to re-open the final warning and rule on an issue raised by a claimant as to whether it should or should not have been issued and whether it was a legally valid warning or a "nullity". A tribunal's function is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.

Although the point was not formally part of the appeal, Lewison LJ referred to the EAT's ruling that the ET had made an error of law in having regard to the fact that the appeal against the written warning was not pursued to a conclusion and commented, obiter, that he would not wish to be taken as endorsing the view that it would always be unreasonable for an employer to take into account the fact that an appeal against a historic disciplinary sanction has been withdrawn or abandoned. Beatson LJ considered that, where there has been no appeal against a final warning, or where an appeal has been launched but not pursued, there would need to be exceptional circumstances for going behind the earlier disciplinary process and in effect re-opening it.

In another recent case, the EAT had to consider whether a tribunal, in reaching its decision that the Claimant's dismissal had been fair, had erred by failing to consider whether the final written warning given was manifestly inappropriate.

In Simmonds v Milford Club UKEAT/0323 /12, the Claimant was employed as the Respondent social club's Steward. His wife had also previously been employed by the Club, but had retired in 2009. The Claimant's duties included banking the takings and, in September 2010, he had been given a final written warning following an incident in which he allowed his wife to deposit the takings because he had been unable to park in the nearby car park. He therefore waited outside whilst his wife went into the bank to deal with the money. The fact that the Claimant's wife had deposited the money subsequently came to light when a query was raised about the money given to the cashier. This concerned the Respondent as its insurance did not cover money that was in the custody of someone who was not one of its employees and, at that point, the Claimant's wife no longer worked for the Club. The Respondent initiated disciplinary proceedings and issued the Claimant with a final written warning. His appeal against that sanction was dismissed.

He was then subsequently disciplined for giving six employees £15 each in cash as a Christmas bonus instead of a bottle (or bottles) to that value, as he had been instructed to do. As he had the final written warning on his record, he was dismissed. That decision was also upheld on appeal.

The Tribunal found that, without the final written warning, the Claimant would not have been dismissed for the bonus incident. In relation to the misconduct that brought about the warning, it also made a finding that there had been no written procedures in place and no adequate briefing or induction of the Claimant by his predecessor to warn him that money should only have been handled by him. The majority of the Tribunal, however, held that it was reasonable for the Club secretary investigating the bank incident to have concluded that the Claimant must have known that it had been wrong to ask his wife to bank the money, particularly in light of his background as a publican, whether he had been specifically told so or not. The majority therefore found the dismissal to have been fair.

The EAT upheld the Claimant's appeal, holding that the majority of the Tribunal had failed to consider whether a final written warning, in the circumstances, was consistent with the Club's disciplinary procedure. The matter was remitted to the Tribunal for it to consider whether the final written warning was manifestly inappropriate and to consider the fairness of the dismissal in light of their conclusion on that limited question. The EAT endorsed the approach of the EAT in *Davies v Sandwell* in holding that a high level of scrutiny is required in these circumstances and that the test of 'manifest inappropriateness' is a higher threshold than the test applied to the reasonableness of a dismissal. Slade J, presiding, added that, in the EAT's view, if an employment tribunal has cause to consider that a relevant previous disciplinary sanction may have been manifestly inappropriate, it should hear evidence and decide on the facts whether the sanction applied was in fact manifestly inappropriate. However, it is only where there is a real concern that a sanction may have been inappropriate, that it will be necessary for a tribunal to engage in a factual inquiry and detailed scrutiny of the circumstances in which that sanction was applied.

Comment

In holding that an employer can legitimately rely on a final warning, provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it must not have been manifestly inappropriate to issue it, the Court of Appeal in *Davies v Sandwell* confirmed the well-established line of authorities and state of the law that was recently summarised by Langstaff J in *Wincanton Group plc v Stone* (formerly known as Joyce) and anor [2013] IRLR 178, at paragraph 37. Where, however, the Court of Appeal's judgment differed from Langstaff J's summary of the general principles was on the question of whether a tribunal could and should determine the validity of a final written warning. Langstaff J had said that, where a tribunal is satisfied that a warning was for an oblique motive or was manifestly inappropriate, then it will not

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be a valid warning. He added that, where a warning was valid, the tribunal should take account of any relevant proceedings, such as internal appeals, that may affect the validity of the warning, and give them such weight as it considers appropriate. In light of Mummery LJ's comments that it is not the function of the ET to rule on the legal validity of a final warning, however, the summary of general principles in Wincanton must now be considered to be wrong to that limited extent.

An aside; proper case management

Davies v Sandwell is also notable for the Court of Appeal's call for robust case-management with Mummery LJ saying that employment tribunals, practitioners and users alike should heed the constructive comments of Lewison LJ at paragraph 33 of the judgment.

When the claim was first heard, it had taken four weeks, with individual witness statements running to hundreds of pages and witnesses being subjected to cross-examination for days on end. Indeed, much of the evidence was of little or no relevance to unfair dismissal, which was the only claim.

Lewison LJ said that the function of an employment tribunal is a limited one. It is to decide whether the employer acted reasonably in dismissing the employee. It is not for a tribunal to conduct a primary fact-finding exercise. It is there to review the employer's decision. Still less is a tribunal there to conduct an investigation into the whole of the employee's employment history. Irrelevant evidence should be identified at the case management stage and excised. It should not be allowed to clutter up a hearing and distract from the real issues. Tribunals have powers to do this and should not hesitate to use them. They also have power to prevent irrelevant cross-examination and should not hesitate to exercise it. Lewison LJ added that "if the parties have failed in their duty to assist the tribunal to further the overriding objective, the ET must itself take a firm grip on the case. To do otherwise wastes public money; prevents other cases from being heard in a timely fashion, and is unfair to the parties in subjecting them to increased costs and, at least in the case of the employer, detracting from his primary concern, namely to run his business."

Simon Emslie