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Albion Chambers EMPLOYMENT NEWSLETTER

EDT

Surely this has been settled by now

It was with some surprise that recent EAT authority, once again, addressed a technical matter in relation to the well trodden path of ascertaining the effective date of termination. Yes, we expect tribunal judgments dealing with factual determinations of EDTs, and the odd EAT decision dealing with the perversity of some of those decisions, but what else 'technically' is there to say about the EDT?

Well, Mr Justice Keith had some 27 paragraphs to say on the subject in his ruling in *M-Choice Uk Ltd v Aalder* [2011] UKEAT/0227/11.

A potted history

Ms Aalder was employed as a Business Development Director, beginning her employment on 1st February 2010. As part of her contract she was entitled to six months notice with the usual garden leave clauses. On 26th July 2010, she was notified by letter that her employment was to be terminated 'at the latest' on 1st February 2011. The eagle eyed amongst you will have already worked out that 6 months from the 26th July 2010 would have expired at the earliest on 25th January 2011, if that clause was determinative.

The claimant presented her 'ordinary' UD claim (adopting the language of the judgment) on 11th January 2011, so prior to the expiry of her notice period. Her employer seemingly reacted (I make no further comment about this as the claim is still live) by summarily dismissing the claimant on 21st January 2011, though paying her until 25th January 2011 (6 months from the date of the original dismissal letter). This dismissal was termed the 'automatic' UD claim, in the judgment. It was asserted to be automatically unfair as it was perceived to be in response to the lodging of the 'ordinary' UDL claim (s.104(1)).

When her employer summarily dismissed her, effective from 21st January 2011, the claimant had, in relation to that summary dismissal, fallen short of accruing her 1 year's service, by just under a fortnight.

The matter was listed for PHR, essentially to determine whether the Tribunal had jurisdiction to hear the 'ordinary' UDL claim. The central question was whether the 'automatic' UDL EDT of 21st January 2011, trumped her earlier 'ordinary' UDL claim's EDT so as to prevent her from pursuing her 'ordinary' UDL claim. However, this was not how the issue was packaged at the PHR.

The Employment Judge found in favour of the claimant, declaring that she could pursue the 'ordinary' UDL claim, limiting his judgment to that aspect only, but in doing so, curiously, treating the 'automatic' and the 'ordinary' UDL claims as two separate claims. In effect, the Judge did not consider the effect of the 21st January 2011 letter on the 'ordinary' EDT. Of course, the net effect was that both the 'ordinary' and the 'automatic' claims remained live. The employer appealed to the EAT.

Statutory framework

So as to avoid the readers' manicured fingers from having to turn yet another page in Butterworths, for convenience I set out the bare-bones of the statutory framework below.

As we know, 111(3) of the Employment Rights Act 1996 provides:

"Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination."

So, at first blush, bar the 'automatic' EDT, there is no problem. Furthermore, in relation to 'continuous employment', section 108(1) of the Act, provides:

"Section 94 [the right not to be unfairly dismissed] does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination."

- and in relation to automatic UDL, section 108(3)(g), provides:

"Subsection (1) does not apply if – … (g) subsection (1) of section 104 … applies …".

We then need to turn to how the Act defines the EDT; s. 97(1):

"Subject to the following provisions of this section, in this Part 'the effective date of termination' –

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the employee's termination takes effect …"

Therefore, it begs the question, what happens to an employee who presents a claim for UDL before their notice has expired? Section 111(4) declares as follows:

"In relation to a complaint which is presented as mentioned in subsection (3), the provisions of this Act, so far as they relate to unfair dismissal, have effect as if – … (c) references to the effective date of termination included references to the date which would be the effective date of termination on the expiry of the notice…"

At the EAT

On appeal, Mr Justice Keith clarified the status of the automatic and ordinary UDL claims, finding that rather than treating them as two separate claims, the only sensible footing was to view them as a single claim, expressed in the alternative. He expressed his rationale as follows;

"She was employed on a single ▸

contract of employment, and there cannot have been two different dates on which it came to an end. The fact that the company initially brought it to an end by giving her notice expiring on 1 February 2011, and subsequently purported to bring it to an end earlier by dismissing her summarily on 21 January 2011, does not affect that. Either her dismissal took effect on 1 February 2011 on the basis that the letter of 21 January 2011 had not had the effect of displacing the notice bringing her employment to an end on 1 February 2011. Alternatively, her dismissal took effect on 21 January 2011 on the basis that the letter of 21 January 2011 had displaced the notice she had received and brought her employment to an end summarily on that date. If she had been "dismissed" on both 21 January 2011 and 1 February 2011, what was her status between those dates?"

This was Mr Justice Keith's first, but key, departure from the judicial methodology implemented at the Tribunal below.

He then posed the following, central question:

"What [is] the effect of the letter of 21 January 2011?"

First, a note of caution; though the case of *Patel v Nagesan* [1995] IRLR 370 (relied upon by Ms Aalder), if applying a generous interpretation, may hint that the 21st January 2011 would not prohibit the claimant from relying upon the 1st February 2011 date, it must be borne in mind that this authority simply deals with the jurisdiction of the tribunal to hear a UDL case. It is not authority for deciding upon the EDT for the purposes of continuous employment/ accruing the 'right' not to be unfairly dismissed. In this regard, Patel may have acted as a case-law siren to the unwary.

Further, on Ms Aalder's behalf it was argued that the effect of s.111(4)(c) was to cement the 1st February 2011 date, whatever may have happened in the interim. In effect, it was submitted that such an analysis accorded with Patel - that once the tribunal had jurisdiction to hear the complaint of UDL, its jurisdiction could not be interrupted by subsequent events.

This argument was resoundingly rejected, Mr Justice Keith relying upon *Roberts v West Coast Trains Ltd* [2004] IRLR 788, an authority dealing with the effect of subsequent events on an existent claim before the Tribunal. He summarised the facts and the effect of Roberts thus;

"…an employee presented a complaint of unfair dismissal following his summary dismissal. After the presentation of his complaint, an appeal which he had previously lodged under the disciplinary procedure was successful to the extent that the penalty of dismissal was reduced to demotion, with the period between his dismissal and demotion being treated as a period of suspension without pay. He never returned to work. The issue was whether he had been dismissed. It was held that he had not been. The effect of the decision made on the appeal was to revive retrospectively his contract of employment so as to treat the employee as never having been dismissed."

In addition, Mr Justice Keith relied upon the older authority of *Stapp v The Shaftesbury Society* [1982] IRLR 326. It is of note that this authority was not relied upon by the employer during the PHR! Though Stapp was decided within the parameters of a previous statutory regime, it dealt with a very similar factual matrix to that of Ms Aalder. The Court of Appeal was clear, that a summary dismissal, in such circumstances, had had the effect of immediately bringing the employment relationship to an end, resulting in the claimant failing to accrue a sufficient period of continuous employment so as to claim unfair dismissal.

Ms Aalder's legal team attempted to distinguish her case from that of Stapp. However, taking it shortly due to a lack of newsletter space, such attempts were also rejected by Mr Justice Keith.

The result

There we have it, a summary dismissal brings forward the EDT from an 'agreed' expiry of a notice period date, to an earlier time, even if such a ruling deprives a claimant of the right to bring an 'ordinary' unfair dismissal claim. However, a crumb of comfort for claimants in Ms Aalder's position; I foresee Tribunals taking a dim and sceptical view where circumstances appear to have been contrived to deprive a claimant of the right to claim. An employer may well face an uphill struggle in convincing a Tribunal that the summary dismissal was not automatically unfair by virtue of section 104(1).

Richard Shepherd

Cut pay and avoid liability?

Now that's magic

Tell the man on the Long Ashton Park and Ride that the law allows employers to cut pay without legal sanction and most would think that you had been at the cider. As employers look for ways to rationalise and save money in times of economic hardship, without necessarily needing or wanting to lose their experienced workforce and make redundancy payments, a reduced working week or a pay reduction are the most obvious and direct ways to reduce that biggest of overheads; the wage bill. What are the consequences if those are the options taken?

In the face of unilateral pay reductions, employees can obviously resign and claim constructive dismissal. A pay cut is likely to be seen as the most obvious fundamental breach of contract, but resignation is an enormous step for any employee to take, particularly if they are then not likely to be able to walk straight back into alternative employment. Although there may have been a fundamental breach in his terms and conditions entitling him to resign, there may nevertheless have been a fair dismissal under section 98 (4) of the Employment Rights Act if proper procedures were followed and there was a decent consultation and explanation as to the reasons for the reduction. Experience dictates that this is not a risk taken by employees often and, even if it is, constructive unfair dismissal claims have a poor record of success in the Tribunal.

Alternatively, an employee can stand and sue in debt (*Rigby v Ferodo* [1988] ICR and *Bruce v Wiggins Teape* [1994] IRLR 536), though not many employees are aware of the steps that they should take to preserve their position and avoid waiver and affirmation arguments. As long as an employee makes his position clear (that he is having to accept the lower sum despite his protestations and regards it as a breach of contract), he is unlikely to be taken to have affirmed the breach by accepting the lower sum before he sues.

But what if the cut is engineered by means of a new contract? A sensible employer will sit the workforce down, explain the position that the business is in and tell them that, unless there are pay cuts, there may have to be job losses or other radical steps. With the cards on the table and decent lines of communication between management and the engine room, this should be fruitful. But not all employees may agree to sign the new contracts in those circumstances. What happens next?

An employer may then dismiss and offer reengagement under a new contract embodying its new terms. If the worker then capitulates and signs to continue the relationship, all well and good. However, he may issue an unfair dismissal claim on the back of such a scenario. In such a situation, an employer will tend to argue that the claimant was dismissed for some other substantial reason (SOSR), a fair reason under s. 98 (1) of the Employment Rights Act. However, the employer would not necessarily have felt confident of defending the fairness of the dismissal under s. 98 (4) unless the pay cut really was the last possible step that he could have been taken before closing the doors and calling in the receivers, following the case of *Catamaran Cruisers v Williams* [1994] IRLR 386. It was thought that Catamaran Cruisers only assisted an employer under s. 98 (4) in those very narrow and desperate circumstances. The EAT, in *Garside and Laycock v Booth* [2011] UKEAT 0003/2011 have recently disagreed and broadened the test.

In Booth, the employer faced financial difficulties in 2009 and predicted a low gross profit for the following year. It therefore decided to ask its employees to take a wage cut. The workforce was addressed in April 2009 and asked to vote on whether to accept a pay reduction of 5% in order to avoid redundancies. The employers did fairly well through the ballot box; 77 agreed, seven abstained and four declined. Two of those four who rejected the plan were later dismissed because they had faced allegations of gross misconduct at the time of the vote. Mr Booth with was one of the remaining two. Negotiations and the employer's persuasions proved fruitless and he was eventually dismissed on 5 October 2009 and his appeal failed. He brought his complaint to the Tribunal as an unfair dismissal claim.

The Tribunal believed that the employer had a fair reason for dismissal; SOSR. It did not, however, accept that the dismissal was fair under s. 98 (4). The Tribunal not only criticised the Respondent's consultation attempts, but also its failure to consider alternatives to the cuts in pay. Because the employers' financial situation was not considered 'desperate', it could not dismiss fairly.

The EAT disagreed. Most importantly, they believed that the Tribunal had misdirected itself in relation to the application of the Catamaran Cruisers case. The Appeal Tribunal stated that there was no rule of law that an employer may only offer less favourable terms in a situation where the survival of the business was at stake. Section 98 (4) did not say that. It says that 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.'

The EAT repeatedly referred to the use of the word 'equity' in the section and it was critical of the Tribunal's focus upon Mr Booth's position throughout its judgment; s. 98 (4) requires a tribunal to consider the employer's position and what was reasonable or equitable for it to have done in all of the circumstances. For example, it may be inequitable for an employer to have only sought to cut the pay of some of its employees (e.g. not its managers). Alternatively, it may have been inequitable for an employer to have ignored a majority vote by its employees in relation to a suggested course of action. Further, it may have been inequitable for an employer to have failed to consider any alternatives to a pay cut. There was no hard and fast rule either way and a fresh tribunal was set the task of reconsidering the issues in Booth, but what is clear from the decision is that Catamaran Cruisers should not be seen as laying down a more stringent test for an employer under s. 98 (4).

The decision comes hard on the heels of the Court of Appeal's musings about a similar situation in *Buckland v Bournemouth University* [2010] IRLR 445. The Court considered that there could well be a fair (non-constructive) dismissal in a situation where an employer suffers sudden and unexpected cash flow problems preventing the monthly wage run. Although not concerned with the same situation in Booth, both cases seem to underline the law's current willingness to help employers in hard economic times.

Even more recently, in *Slade v TNT* [2011] UKEAT/0113 (a case in which Booth was cited), the EAT upheld the fairness of a dismissal in circumstances where employees, who refused to have old terms bought out, were dismissed and presented with new contracts which omitted the buy out benefit. Although not a discrete pay issue, the general trend has clearly prevailed.

Fair dismissals can occur in circumstances other than those in which an employer faces potential closure or insolvency. Whilst it is obviously not a licence for arbitrary pay cuts, Booth is a decision which will give an employer more confidence in selecting the option of dismissal in the face of an intransigent employee who refuses to agree new terms and conditions.

John Livesey

Agency Worker Regulations

Below is a very simple guide to some aspects of the Agency Worker Regulations which was written especially with HR advisers in mind. It is not a legal analysis as such, but it is certainly something many of our instructing solicitors may want to share with their clients.

This guide is designed to assist your clients' HR departments and should be read in conjunction with the Regulations. This document is not a consideration of all the provisions of the Regulations. There is also detailed guidance to be found on the B.I.S. website:

http://.bis.gov.uk/assets/biscore/employmentmattes/docs/a/11-949-agency-workers-regulations-guidance.pdf.

New regulations came into force on October 1st 2011.

1. Why?

As a member state, the UK needed to change its domestic law to give effect to the European Directive made in 2008. The aim of the Directive is the protection of Temporary Agency Workers by ensuring that the principle of equal treatment applies.

2. Why does that matter to us?

Because anyone working within your organisation who satisfies the definition of an AGENCY WORKER has the right to 'the same basic working and employment conditions' as they would have if they had been recruited directly to do the job. If there is a breach of this right, the Employment Tribunal will make an award of compensation that will be a minimum of two weeks' pay.

3. What is a Temporary Agency Worker?

Someone who has an employment contract with the agency or 'any other contract with the agency to perform work or services personally'.

4. What does 'the same basic working and employment conditions' mean?

It means that during their assignment the temporary agency workers shall be entitled to the same provisions in respect of:

i. Pay
ii. Duration of working time
iii. Overtime
iv. Breaks
v. Rest periods
vi. Night work
vii. Holidays and
viii. Pubic holidays

as someone who was recruited directly by the organisation to occupy the same job. All rules within the user-organisation protecting pregnant women and in respect of discrimination must also be complied with when dealing with a temporary agency worker.

5. Does that right exist as soon as they start an assignment?

No, it exists after 12 weeks, though some rights are acquired after day one, namely the right to access the user–organisation's collective facilities and amenities (for example; car parking, canteens, child-care facilities) AND to be informed of 'relevant' vacant posts within the hirer organisation in order to be given the same opportunity as a comparable worker to find permanent employment.

Be careful; whilst there is a qualifying period of twelve weeks, to qualify the worker must work in the same role, with the same organisation ('hirer') for twelve continuous calendar weeks, or part of a week. Note that any part of a week during which a worker works during an assignment will count as a 'week' for this purpose. Weeks in which the worker is absent for pregnancy, childbirth and maternity during the 'protected period', maternity, paternity and adoption leave also count, but only up to the date when the assignment would otherwise have ended. So it is a good idea to have an end date to each assignment for each temporary agency worker.

6. What does 'continuous' mean?

Breaks in continuity for industrial action, annual leave, sickness or injury of up to 28 weeks are ignored BUT time off sick does not count towards the qualifying twelve-week period. If the worker moves to a different organisation ('hirer') the continuity will be broken, as it will if there is a break of more than six weeks or if the worker's role changes and s/he is now carrying out 'substantially different' work or duties.

7. The answer to question 4 above says that 'pay' is one of the basic working and employment conditions – what does 'pay' mean?

Basic pay, overtime, allowances for shifts or unsocial hours, payment for annual leave, bonus or commission payments, luncheon or childcare vouchers are all included.

But – pay does not include bonuses that are 'not attributable to amount or quality of work done'. So, the worker can be excluded from incentives and rewards that reflect long service or a long-term relationship between the hirer organisation and its permanent staff.

And – sick pay, pensions, occupational maternity pay, redundancy pay, share options schemes are not pay.

8. So, agency workers do not in fact have the same rights as permanent staff do they?

No, they don't.

The Regulations confer a right to equality of 'relevant terms and conditions' which means terms which are ordinarily included in the contracts of the employees or workers of the user–organisation. Look at the answer to question 4. So if the terms of employees or workers are individually negotiated, the right may not apply at all (though this is likely to be most unusual in most public sector organisations).

And remember – these regulations do not affect the law on whether someone is an employee or not. Employees have more rights than workers or agency workers, so often tribunal claims hinge on someone's status and whether they are a worker or employee of the agency or the hirer organisation.

The Supreme Court has recently confirmed that in order to get to the bottom of whether someone is an employee, a worker, a self-employed consultant etc, the question will be: what is the true agreement between the parties? That might be what is written down, but is not necessarily so and the actual reality of what happens on a day to day to basis will be scrutinised.

9. Who will be liable for a breach?

If a tribunal finds that there has been a breach of the equal treatment principle, both the agency AND the hirer organisation will be liable 'to the extent that it is responsible for the breach'. The Tribunal has the power to apportion liability between them.

There is 'defence' to an alleged breach available to the 'agency' in order to avoid liability for any breach of the Regulations by a hirer-organisation when the agency takes reasonable steps to obtain information about the hirer's terms and conditions.

This document is designed as a guide for HR personnel only and should be read in conjunction with the Regulations.

Liz Cunningham, Simon Elmslie

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Employment Team News

Albion Employment Team recognised again by Chambers and Partners and the Legal 500

The Albion Chambers Employment Team have been recognised again this year by both the Legal 500 and Chambers and Partners directories, three members of the team: the *'exceptional'* John Livesey with an *'enviable depth of knowledge'*, Liz Cunningham and Richard Shepherd are all recommended as being leaders in their field. Our administration team is also recognised as offering *'an extremely high standard of clerking'*.

Disciplinary Tribunals

Albion Chambers can also offer representation in a broad range of disciplinary tribunals. Our team members have experience of tribunals which have dealt with disciplinary issues in respect of police officers, members of the fire services, nurses, midwives, and other professionals. We have also represented private and public sector employees in 'normal', non-regulated disciplinary and appeal hearings. For further details, please refer to the 'Disciplinary Team' section on our website.

Monisha Khandker

We are delighted to welcome Monisha back to practice following her year's sabbatical during which she completed an LL.M in International Law of Human Rights and Criminal Justice at Utrecht University. The degree programme focused on international criminal law and procedure, international human rights law and mechanisms and transitional justice and reconciliation in post-conflict societies.

Monisha's thesis was entitled: 'Nullum Crimen Sine Lege and The International Crimes (Tribunals) Act 1973: Will Bangladesh Violate the Rule Against Retroactivity?'. This considered the validity of the forthcoming prosecutions in Bangladesh for war crimes, crimes against humanity and genocide committed during the liberation war in 1971.

During her studies she also a completed a five-month internship with the Radovan Karadzic Standby Defence Team at the International Criminal Tribunal for the Former Yugoslavia, at the Hague. Her role involved legal research on the treatment of expert witnesses at international tribunals and assisted with case preparation in the ongoing trial.

Redundancy Workshops

'Prevention is better than cure'

We have put together a variety of redundancy workshops, to be delivered by our employment law specialists. Redundancies have not been a mainstay of employment litigation during recent years, due for the most part to the buoyant economy. This means that in some organisations there may be a lack of familiarity with good redundancy practice. Bearing in mind that prevention is better (and less expensive) than cure, the workshops can be tailored to your organisation's specific individual needs.

The training has been developed for delivery to small legal and HR teams, wider HR and management groups, or, as a service to their lay clients, the delivery of workshops to firms' business clients, en masse.

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