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Number 27 May 2018

Albion Chambers EMPLOYMENT AND PROFESSIONAL DISCIPLINARY TEAM NEWSLETTER

Shared Parental Leave

Three years in

Shared Parental Leave (SPL) was introduced in April 2015, and allows new parents to split 50 weeks of time off to care for newborns. At the time the government stated it would review the policy and its effect in 2018. It has done so, with disappointing results.

The Department for Business, Energy and Industrial Strategy revealed in February that around 285,000 couples are eligible every year for Shared Parental Leave, but take-up rates *"could be as low as 2%"*. The government also revealed that around half of the public are unaware the option exists – despite the policy being in place for over three years

Analysis

Why? Given that SPL enables parents to take leave separately, or at the same time, for a total period not exceeding 50 weeks, it should surely appeal to many more than are using it. Crucially, however, the pay for SPL is £140.98 per week or 90% of your average earnings, whichever is lower.

So, a stated aim of faciltating more time for families to be together after the arrival of a new baby, was always going to be something only the 'better off' families could do.

Another factor is that it is also more costly for employers to 'top-up' shared parental leave to full pay than it is to do the same for maternity pay, due to the higher levels of maternity pay reclaimable from HMRC.

Family income always feels squeezed when a baby arrives; new one-off expenses combined with a massive reduction in maternal income following maternity leave and/or a forthcoming increase in childcare costs. It is no surprise, therefore, that fathers and families are reluctant to take a significant, albeit temporary, cut in pay versus the preference for the significant, but less tangible, benefits of time at home with a new baby.

Other countries

The inevitable influence of 'less money coming in' on the take up of SPL is revealed by an analysis of other countries. In Sweden, paternity leave is paid at more than three times the UK rate and take-up amongst men is 90%, and in Germany, take-up of parental leave soared after the introduction of a two-month bonus for fathers taking leave.

Sarah Jackson OBE, chief executive of the charity Working Families is clear, and concerned, that many families simply cannot afford for fathers/second parents to take parental leave *especially* when a first child is in pre-school nursery care:

"Of those fathers who said they wouldn't use the scheme, more than a third said this was because they couldn't afford to… Those employers that can afford to should go beyond the minimum pay for SPL."

In addition, many fathers have not been in their jobs long enough to qualify for SPL, she added:

"If the Government is serious about equality at work and tackling the gender pay gap, it should consider also introducing a properly paid, standalone period of extended paternity leave for fathers."

This is more aligned with the Scandinavian system, and, in part, may explain the 90% statistic above.

Additional research

Research by law firm EMW in February 2018, based on a Freedom of Information request, suggested only 8,700 couples took advantage of the scheme between April 2016 and March 2017. EMW calculated that was 1% of eligible couples while the Department for Business said it was around 3% of those eligible. EMW suggested low take-up was partly due to the cultural stigma for men of taking time off work and concerns that they might come across as less committed to their job if they ask for leave.

This is no surprise based on what we anecdotally, if not empirically, know about the professional 'stigma' associated with time away from work for *any* reason to do with parenting (or, as it is more euphemistically referred to, 'childcare'). A year before the introduction of SPL, the charity 'Citymothers' carried out a survey of over 750 working fathers in the City and Canary Wharf and found that even though it was to be a 'right', those surveyed said it would not be exercised; there was such a deep culture of stigma that even a request for flexible working was thought to signal an end to a man's career.

The survey revealed that even though fewer than 30% said their experience of being a working father was positive, only a tiny number actually envisaged activating their right to SPL (at the same time over 50% said that 'missing out on their children' is their biggest daily - *daily!* - challenge).

A daily reality

So, yes, there is a financial reality behind the failure of the policy to bring about changes to parents taking leave, and there is also a deep-seated cultural fear of 'slipping

down the pecking order' as well. Welcome (*I can hear a chorus of women whisper though gritted teeth*) to our world.

That fear exists for women and it is the reality of maternity-related absence for thousands. So too is the financial car crash of returning to work having taken the hit of earning next to nothing for the majority of their absence to then have to find significant sums for nursery fees when savings have, inevitably, been depleted.

Moving forwards

In February the Department for Business said it was normal for a policy such as SPL to take time to bed in and launched a £1.5million information campaign to increase awareness of SPL. Unfortunately, it rather hit a glitch – the campaign that is – when the minister promoting it, Andrew Griffiths - revealed during an interview on Radio 5 Live that he can't actually use it even though his wife is due to give birth in April!

As an elected official, Griffiths, along with other MPs, is not an employee and the right does not extend to him. Even though it was put to him in the interview that this was a rule he and others in office were able to change, it was not something that occurred to him. Yes, there is a big space between the 'never changed a single nappy' mantra of Mr Rees-Mogg and the 'I am not able to take SPL and I don't mind' of Mr Griffiths, but really, the authenticity behind the policy's aim and the 'new £1.5m' information campaign is questionable when the messanger has no interest in the message despite being the anticipated beneficiary.

Employers need more practical and effective help in publicising *and implementing* the scheme; parents need more literal and virtual support in accessing it without fear of greasing the pole.

Liz Cunningham

An invitation to challenge *Burchell*?

The Supreme Court has this morning (at the time of writing) handed down its judgment in the case of *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16. The decision represents the leading authority on what the editors of *Harvey* refer to as a dismissal for 'guilt by association', but it is also noteworthy for the strong hint, in particular in the concurring judgment of Lady Hale, President, that the Supreme Court is interested in exploring whether, after 40 years, the *Burchell* test remains good law.

The facts

The case concerned the former head teacher of a primary school who had a close (but not sexual or romantic) relationship with a man who was charged and then convicted of sexual offences towards children.

In January 2009, Ms Reilly applied for the position of head teacher at the school. The following month, having just stayed overnight at the jointly owned property, she witnessed the police arrive, search the house and arrest Mr Selwood on suspicion of having downloaded indecent images of children. Thereafter, Ms Reilly was successful in her application and became head teacher at the school at the start of the new academic year in September 2009. During the process of her application, Ms Reilly did not disclose Mr Selwood's arrest to the Respondent.

On 1 February 2010, Mr Selwood was convicted of making indecent images of children by downloading them onto his computer. He was made the subject of a three-year community order and of a sexual prevention order, which included a prohibition on him having unsupervised access to minors and a requirement to participate in a sex offender programme. Ms Reilly became immediately aware of the conviction but in the following months decided not to inform the governing body of the school. She continued her close friendship with Mr Selwood, going on holiday with him in April 2010. He named her as an authorised driver on his motor insurance policy.

In June 2010, through a local authority officer who was concerned there might be child protection issues, the school learnt of Mr Selwood's conviction and of his friendship with the Appellant. It suspended her on full pay and carried out an investigation. Ms Reilly claimed that after having taken advice from various quarters, including from a police officer, probation officers and officers of other local authorities, she made a judgment that she was under no obligation to disclose.

The Disciplinary Hearing

At a disciplinary hearing in May 2011, the panel upheld an allegation that, by having failed to disclose her relationship with a man convicted of sexual offences towards children, Ms Reilly had committed a serious breach of an implied term of her contract of employment and that such breach amounted to gross misconduct.

It considered that it should have been obvious to the Appellant that she needed to disclose her friendship with Mr Selwood to the governing body once it had become clear that he was to have been charged and convicted of a child sex offence. Her role as head teacher was to assist the governing body in discharging its functions, one of which was child protection. The panel was particularly concerned that Ms Reilly continued to refuse to accept that her relationship with Mr Selwood might pose a risk to pupils and the school, and that her failure to disclose it had been wrong.

As a result, she was summarily dismissed. Interestingly, the panel said that had the Appellant accepted her error, it would have considered an alternative sanction to dismissal.

At the ET and EAT

Having appealed her dismissal unsuccessfully, Ms Reilly brought complaints of unfair dismissal and sex discrimination in the employment tribunal. Both claims were rejected by the ET and her appeals against the dismissal of her unfair dismissal claim (and against the ET's findings on *Polkey* and contributory conduct) were dismissed by the EAT and Court of Appeal (by a majority).

Disagreement in the Court of Appeal

In the Court of Appeal, Black LJ held that the Appellant's association with Mr Selwood posed a risk to children and therefore she was under a duty to inform the school of it, so that steps could have been taken to protect them. The Childcare Act 2006 and the Childcare (Disqualification) Regulations 2009 set up a scheme requiring that certain providers of "early years provision" and "later years provision" be registered and expressly disqualified certain people from registration, including those who live in the same household as a person who has been made subject of a sexual prevention order. There was no suggestion that the Appellant was disqualified by those provisions, however they demonstrated the serious view taken of the risk to

young children not only from sexual offenders themselves, but also through others in contact with such offenders in certain ways. The focus of the disqualification regime was firmly upon the safety of children and the disciplinary panel had been correct to focus on the governing body's safeguarding and child-protection functions.

An "association" such as that between the Appellant and Mr Selwood, whilst falling short of living in the same household or being in a "relationship", did give rise to risk to children at the school, which should have been apparent to the Appellant as head teacher with safeguarding responsibilities. Disclosure was necessary so that the governing body could itself consider what protective steps were required in the light of it. The ET's view that the dismissal fell within the range of reasonable responses, taking into account both the failure to disclose and the failure to recant, would not be interfered with.

The majority view

Floyd LJ agreed that the appeal should be dismissed and held that two points were persuasive that the decisions of the disciplinary panel and the ET were justified. First, the focus in the present case was not on the question of whether harm would actually occur but on whether the existence of the association could form the basis of a reasonable belief that there was the potential of an enhanced risk of harm. Floyd LJ said that was a very low threshold and that, on the facts, the evidence of the nature of the association did cross that threshold. Secondly, it had not been for the Appellant to appropriate to herself the decision as to whether her relationship with Mr Selwood gave rise to a risk of harm. Her obligation to disclose existed in order to allow the school to take that decision for itself.

The minority – faithful to *Burchell*

Elias LJ dissented, on the basis that, as an employment issue, the normal Burchell rules should apply, even against the backdrop of the need for child protection. He held that it must first be demonstrated that the nature and circumstances of the relationship does indeed increase the risks from which children at the school need safeguarding, or at least that there is a realistic basis for believing that it might. Whilst not doubting that the disciplinary panel genuinely believed that the safeguarding role of the governors was engaged by this relationship, on the evidence identified by the ET there were not reasonable grounds to sustain that conclusion.

The Supreme Court's judgment

In the Supreme Court, the leading judgment was given by Lord Wilson, with whom Lords Carnwath, Hughes and Hodge agreed. It was agreed by Ms Reilly that she was under a contractual obligation to assist the governing body in discharging its duty to safeguard the pupils. The question was whether her relationship with Mr Selwood engaged the governing body's safeguarding functions. Parliament has itself recognised that sexual offenders towards children can represent a danger to children not only directly but indirectly by operating through those with whom they associate.

Although the registration provisions do not apply to maintained schools and, even if they did apply, would not have led to the disqualification of Ms Reilly, who did not live in the same household as Mr Selwood, they illuminate the democratic judgement about the danger posed to children by such an offender in operating through his close associates. Those associates, as Black LJ observed, can be quite unaware of the use which the offender makes of them in order to gain access. The particular case of the Appellant was that of a head teacher, likely to know more than any other member of staff about their pupils, their circumstances at home, their personalities, their routines at school and their whereabouts from day to day; and indeed likely to be more able than any other member of staff to authorise visitors freely to enter school premises.

Ms Reilly's wide-ranging inquiries show how near to the border-line even she, with understandable reluctance, recognised her case to be. The objective decision-makers on the panel ruled that the case fell on the side of the line which required disclosure. Mr Selwood was the subject of a serious, recent conviction; the basis of his sentence was that he represented a danger to children; and his relationship with the head teacher of a school created, to put it at its lowest, a potential risk to the children. That risk required assessment. It was not for the Appellant to conduct that assessment; it was a function of the governors.

Lord Wilson commented that had Ms Reilly disclosed her relationship to the school governors, it is highly unlikely that she would have been dismissed, still less that the ET would have upheld any dismissal as fair. Far more likely would have been the extraction by the governors of promises from her that e.g. she would not allow Mr Selwood to enter the school premises and that she would not leave information about the pupils in places where he might be able to gain access to it. He held that the tribunal was entitled to conclude that it was a reasonable response for the panel to have concluded that Ms Reilly's non-disclosure not only amounted to a breach of duty but also merited her dismissal. Her refusal to accept that she had been in breach of duty suggested a continuing lack of insight which, as it was reasonable to conclude, rendered it inappropriate for her to continue to run the school.

Lady Hale's concurring judgment

Lady Hale agreed entirely with the reasons given by Lord Wilson, adding that reporting the connection would have enabled a serious discussion to take place about how the risks might be avoided. She said that there was no reason to think that it would have been a resigning matter as issues could have been identified and solutions found, however, it was the absence of full and frank disclosure and discussion which was the cause for serious concern, and it was the absence of any acknowledgement of what Ms Reilly should have done which makes the decision to dismiss her reasonable, indeed some might think inevitable.

Burchell in the cross hairs?

What is interesting about Lady Hale's judgment is that she wished to note that the case might, if argued differently, have presented an opportunity for the Supreme Court to consider two points of law of general public importance which had not been raised at this level before. First, whether a dismissal based on an employee's "conduct" can ever be fair if that conduct is not a breach of the employee's contract of employment.

Put another way, can there be "conduct" within the meaning of section 98(2)(b) of the Employment Rights Act 1996 which is not contractual misconduct? Can conduct which is not contractual misconduct be "some other substantial reason of a kind such as to justify the dismissal" within the meaning of section 98(1)(b). Lady Hale said that it was not difficult to think of arguments on either side of this question but the Supreme Court had not heard them and was only asked to decide whether there was a duty to disclose and there clearly was.

The second point of law of general importance would have been whether the

approach to be taken by a tribunal to an employer's decision, both as to the facts under section 98(1) to (3) ERA 1996 and as to whether the decision to dismiss was reasonable or unreasonable under section 98(4), first laid down by Arnold J in *British Homes Stores Ltd v Burchell (Note)* [1978] ICR 303 and definitively endorsed by the Court of Appeal in *Foley v Post Office* [2000] ICR 1283, is correct. As Lord Wilson pointed out, the three requirements set out in *Burchell* are directed to the first part of the inquiry, under section 98(1) to (3), and do not fit well into the inquiry mandated by section 98(4). Lady Hale said that the meaning of section 98(4) was rightly describe by Sedley LJ in *Orr v Milton Keynes Council* [2011] ICR 704 (at para 11) as "both problematic and contentious" and she commented:

"Even in relation to the first part of the inquiry, as to the reason for the dismissal, the Burchell approach can lead to dismissals which were in fact fair being treated as unfair and dismissals which were in fact unfair being treated as fair."

In the absence of any such argument, however, it followed that the law remains as it has been for the last 40 years and Lady Hale expressed no view about whether that is correct, although she did recognise that there may be very good reasons why no-one has challenged the Burchell test before the Supreme Court. First, it has been applied by Employment Tribunals, in the thousands of cases which come before them, for 40 years now and it remains binding upon them and on the EAT and Court of Appeal. Destabilising the position without a very good reason would be irresponsible. Second, Parliament has had the opportunity to clarify the approach which is intended, should it consider that *Burchell* is wrong, and it has not done so. Third, those who are experienced in the field, whether acting for employees or employers, may consider that the approach is correct and does not lead to injustice in practice.

Whether or not Lady Hale's judgment is an invitation to challenge the status quo, it remains to be seen whether employment lawyers and their parties will consider that they have a suitable case that might provide the Supreme Court with the sort of very good reason that would be needed for upsetting the apple cart.

Simon Emslie

Back to Basics

Recognising a redundancy situation

As the Employment Tribunal caseload increases, many practitioners are returning to practise in the employment law field. In addition, in response to the increases many firms are now actively developing trainees and junior solicitors into employment practitioners. Albion Chambers' 'Back to Basics' series aims to help in this regard by providing the foundation stones for building a successful, practical career in this sometimes less than-straightforward field.

Cited cases

- *Safeway Stores v Burrell* [1987] IRLR 2000
- *Packman Lucas Associates v Fauchon* [2012] IRLR 721
- *North Riding Garages v Butterwick* [1967] 1 All ER 644
- *Murray v Foyle Meats Ltd* [2000] 1 AC 51
- *Contract Bottling Ltd v Cave and another* UKEAT/0525/12/DM

'Redundancy', what could be simpler? Everyone knows what a redundancy is don't they? We all know someone who has been made redundant or who has taken voluntary redundancy. We'd certainly know it if we saw it wouldn't we? … or would we?

Let's start with the foundations, the statute

Section 98 of the Employment Rights Act 1996 (ERA 1996) provides that a dismissal is fair if the employer can show that the employee was redundant and redundancy is defined in s.139 ERA 1996 as:

"(1) … an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —

[…]

(b) the fact that the requirements of that business —

(i) for employees to carry out work of a particular kind, […]

have ceased or diminished or are expected to cease or diminish."

On the face of it, a few key phrases jump to the foreground: "dismissal is wholly or mainly attributable to" and "work of a particular kind". Two phrases that we need to interpret, to pierce the fog of ambiguity.

What about the case law?

The issues relating to redundancy aren't new, and therefore there is a good body of case law that we can draw upon to assist. One of the older cases is *Safeway Stores v Burrell* (1987), it interpreted the statute as posing three questions:

- Has the Claimant employee been dismissed as defined?
- Was there, within the business, a reduced need for employees to do a particular kind of work? and
- Was the Claimant employee dismissed wholly or mainly because of that reduced need?

We also need to look more closely at 'work of a particular kind'. The court in *Packman Lucas Associates v Fauchon* (2012) sought to define this as follows:

"the employer's requirements for employees generally to carry out work of a particular kind as opposed to the requirement for the applicant to carry out work of a particular kind. The terms of the applicant's contract of employment [are] thus irrelevant"

This 'bird's-eye' approach is in line with authority that an ET must consider the overall requirements of a business rather than the allocation of duties between individual employees, as per *North Riding Garages v Butterwick* (1967). The court in that case observed that:

"If the requirement of the business for employees to carry out work of a particular kind increases or remains constant, no redundancy payment can be claimed by an employee, in work of that kind, whose dismissal is attributable to personal deficiencies which prevent him from satisfying his employer […]

For the purpose of the Act, an employee who remains in the same kind of work is expected to adapt himself to new methods and techniques […] but if new methods alter the nature of the work required to be done, it may follow that no requirement remains for employees to do work of the particular kind which has been superseded and that they are truly redundant."

More recently, the questions in *Safeway Stores* were approved in the House of Lords case of *Murray v Foyle Meats Ltd* (2000). However, Lord

Irvine noted that the "contract test" and "function test" were unnecessary glosses on the statute, and that only two questions had to be addressed:

"The first is whether one or other of the various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation."

But what about the particular person's role?

Murray was considered in *Contract Bottling Ltd v Cave and another* (2012) where the employer did not identify for the purposes of the pool which 'particular kinds' of work were overmanned, but there was nonetheless found to be a redundancy situation. Richardson J notes at para 20 that:

"It no doubt sometimes occurs that there is a diminution in the requirements of the business for employees to carry out work of several kinds. Such a state of affairs is capable of satisfying the first stage in the Murray *approach."*

In *Contract Bottling* the ET held there was no redundancy as:

"The focus was on reducing the wage bill not identifying specifically the requirements of the business and in which areas, if at all, the work of a particular kind had ceased or diminished",

However, Richardson J, on appeal, discounted this reasoning, and in doing so demonstrated that the identification of employees or specific redundant areas is not always a necessary factor for there to be a redundancy situation.

It is fair to say that *Contract Bottling* takes the definition of redundancy beyond the boundaries of what many clients expect.

Conclusions

When it comes to identifying a redundancy situation, whether a dismissed employee is redundant or whether the dismissal is for a different reason, one can never assume or act on gut instinct.

When taking an overview of the current case law, it can be appreciated that there are a number of tensions as between cases and also as between reality and the legal niceties of the appeal courts. But, it should also be remembered that with the new economies being increasingly challenged in the context of employment law, where roles and definitions are still being defined, the effects of that litigation may also impact upon how we define redundancy.

It would seem sensible to add 'redundancy' as a further Google Alerts search term; we have a feeling it may prove useful.

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Save the Date!
Employment & Professional Disciplinary Seminar
21 September 2018 at M-Shed.
(further details nearer the time)