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EMPLOYMENT TRIBUNAL - REDUNDANCY RELATED CASES

2020 Furlough Cases

Companies in Administration

Furloughed Staff

Re Debenhams Retail Ltd [2020] EWCA Civ 600, Court of Appeal

At first instance it was found that participating in the government's *Coronavirus Job Retention* Scheme ("the Scheme") was likely to amount to adoption of the contracts of employment pursuant to paragraph 99(5) of Schedule B1 to the *Insolvency Act 1986* ("Schedule B1").

The joint administrators of Debenhams appealed to the Court of Appeal to reverse that decision and for a declaration that by paying employees furloughed under the Scheme, the administrators would not be taken to have adopted the contracts of employment. Since the first instance hearing, the administrators had received responses from all but 10 employees to their request to employees to consent to being furloughed under the Scheme and to receive only the sums paid by the government under the Scheme.

Only 4 employees refused to be furloughed, the remainder who responded agreed. As such, with the exception of amounts such as sick pay or holiday pay, the company's ongoing liabilities to employees were limited to the sums received from the government, making the impact cost neutral. The administrators estimated, however, that the holiday pay liability of the company for the next 3 months alone could total some £1.28 million.

The Administrators concentrated the appeal on the consequences of making payments to employees furloughed under the Scheme and whether that caused the contracts of employment to be adopted. The administrators argued that paying employees furloughed

under the Scheme did not amount to adoption of their contracts of employment. The appropriate test for adoption is whether the administrators can be taken to have wished or agreed to adopt the contracts of employment. It is an objective assessment of the administrators' state of mind, judged by their words and conduct.

There were various factors which tended to support the conclusion that the administrators had not adopted the contracts, including that the furloughed employees were not providing services to the Company; the furloughed employees' entitlement to salary was limited to the sums received from the government, making the process costs neutral to the administration estate and rendering the company simply a conduit for Government funds; and any decision whether to terminate the contracts of furloughed employees would be made only once the Scheme has ended.

Decision

The Court of Appeal identified key features of the Scheme so far as they related to the issue of adoption. These included that:

- Furloughed employees remain employed by their employer throughout the process;
- A furloughed employee must be instructed to cease all work for the employer;
- Except for working and attending work, employees remain bound by the terms of their employment contracts;
- Payments made to furloughed employees are treated as salaries or wages, subject to income tax in the hands of the employees and treated as income and expenses for the employer;
- Funds received under the Scheme must be used to pay employees;
- The Scheme guidance anticipates decisions being made on furloughed employees when the Scheme ceases;
- An administrator can access the Scheme if "there is a reasonable likelihood of rehiring the workers".
- The mere continuation of an employment contract does not lead inexorably to the conclusion that the contract has been adopted. The question is not whether the employment continues but whether the officeholder has adopted the employment contract. been adopted.

The question of law for the court to determine was whether the conduct of the administrator was such that he must be taken to have adopted the contracts, not whether his conduct evidences an election by the administrator. Whether an administrator wishes to adopt a contract, consciously or otherwise, is not, therefore, a relevant consideration.

The Court of Appeal identified the following facts which supported the conclusion that the administrators had continued the employment of the furloughed employees and therefore adopted the contracts:

- The administrators will continue to pay wages or salaries to the furloughed employees under the employees' contracts of employment, with the employees' entitlement to payments derived exclusively from their contracts and tax payable accordingly by both the employee and the employer;
- All the furloughed employees had accepted continuation of their employment on certain terms and would remain bound by their contracts of employment;
- The administrators are paying the furloughed employees with the objective of rescuing the company as a going concern.
- Although it was right that employees would not be providing services to the company whilst furloughed, this was not sufficient in itself to avoid adoption. It was perfectly possible for an employee's contract to be adopted notwithstanding that he or she did not provide services to the company;
- The fact that the Scheme might be cost neutral to the company did not negate adoption.
- Although decisions as to whether to rehire employees would not be taken until after the Scheme ended, the fact that the administrators had taken steps to keep the contracts of the furloughed employees in being in the meantime, with the necessary reasonably expectation that the employees would be rehired, is supportive of those contracts being adopted.
- It was clear that, in making use of the Scheme and paying furloughed employees, the administrators were treating the contracts as continuing and had adopted the contracts.
- The Court of Appeal noted the practical difficulties that might face administrators when considering furloughing employees under the Scheme. Whilst the vast majority of Debenhams accepted a variation of their contractual terms (leaving only holiday pay and sick pay as outstanding priority liabilities if the Scheme was used), other administrators might not be able to achieve this level of consent from employees and might therefore be faced with difficult decisions as to whether to retain furloughed employees, or place employees on furlough, rather than terminating their employment.

Administration

Carluccio's Ltd (In Administration), Re [2020]EWHC 886, High Court

Following Carluccio's going into administration, the administrators pursued a two-pronged strategy involving "mothballing" the business while, at the same time, seeking to find a buyer. As part of this approach, they wanted to furlough the employees and take advantage of grants payable under the Coronavirus Job Retention Scheme. This meant that they would not only have better prospects of achieving a sale but would also hope to avoid otherwise inevitable redundancies.

Carluccio's had no money to pay wages. The administrators therefore wrote to the employees, asking them to agree revised employment terms under which pay would be reduced to whatever was recoverable from the furlough scheme with Carluccio's having no obligation to make any payment until cash was received from HMRC. Of the nearly 1,800 employees, over 95% agreed to the arrangement. Four rejected the change, saying they wanted to be made redundant. The others did not respond.

Under the furlough scheme, money received from HMRC must go to specific employees who are furloughed and cannot be used for other purposes. This caused a potential problem for the administrators because of strict rules in an insolvency about the order in which debts are paid off. The danger was that those rules would override the requirement to use furlough money only for those who had been furloughed, meaning the administrators had to use it to meet other claims.

A solution for this problem was for the administrators to adopt the contracts of employment of relevant employees. If contracts are adopted, wages paid under them have a super priority and are payable even before an administrator's own fees. As administrators generally expect to be paid for what they do, adoption of employment contracts is practically equivalent to a guarantee. It ensures that, where administrators are seeking to rescue a business, employees will receive pay for the work they do during the course of the administration.

Adoption requires some positive action by the administrators, which typically would involve giving employees work or paying wages. The problem in Carluccio's case was that employees would be furloughed, doing no work and - at least until the HMRC grant came through - receiving no wages.

Decision

The administrators sought a direction from the High Court as to whether they could treat the contracts of those on revised terms as adopted and, if so, when that adoption would occur. The Court made a declaration that those contracts would be adopted when the administrators made an application for a payment under the furlough scheme, or when the employees concerned were paid under the revised terms.

2020 Redundancy Cases

Robert's Comments:

- Redundancy

Redundancy, like much of employment law, is an increasingly complex concept. Its legal definition often bears little relationship with the reality of the distress, mental and physical, caused to workers who have lost their jobs. It is not unknown for employers to dispense with unwanted workers on the pretext of a fake "redundancy" accompanied by minimally acceptable financial compensation. Such false redundancies can be attacked through an application of selected decided cases from the mass of case law.

Correct approach

Davies v DL Insurance Services Ltd UKEAT/0148/19/RN

D was made redundant by DL. He applied unsuccessfully for a number of alternative roles and brought claims in the ET for unfair dismissal for redundancy, reinstatement or re-engagement, and compensation. The ET found that D had been unfairly dismissed for redundancy. It awarded compensation, but it did not make a re-engagement order on the basis that it had not been given enough information to identify a suitable alternative role for D. D appealed to the EAT on the grounds that the ET had erred in giving inadequate reasons for its decision on re-engagement and failing to apply the correct legal test.

Decision

1. The appeal was allowed and the matter remitted to the same ET.

2. The ET had failed to ask itself the correct question in relation to re-engagement, and had failed to apply the correct approach by considering that, to avoid making an order, it was enough for the employer to say that D was not the best candidate.

Dismissal and reapplication

Gwynedd Council v Barratt UKEAT/0206/18

PE teachers at a number of schools were being reorganised into one large school. The large school was to be on their original site. The number of PE teachers was to be reduced. The local authority announced that all staff would be dismissed. The new staffing was to be decided by an application process and unsuccessful applicants would be made redundant. The claimants were not given an opportunity to make representations in respect of the decision to dismiss or to lodge appeals. The redundant workers complained of unfair redundancy dismissal. Their claims succeeded in the ET which found that the claimants had not been dismissed because a redundancy situation had arisen but because of the method that the employers chose to deal with the redundancy situation. The lack of appeal or review of the process of requiring the claimants to apply for their own jobs was substantively and procedurally unfair. The employers appealed to the EAT, partly on the basis that the normal fairness requirements in *Williams v Compare Maxim Ltd (1982)* did not apply because this was a reorganisation and not a redundancy.

Decision

1. The appeal was dismissed.

2. There was no error in the ET's approach to fairness.

3. Even where the principle in *Morgan v Welsh Rugby Union (2011)* can be relied on by an employer, this does not rule out at least some of the Williams guidelines.

Note: Morgan v Welsh Rugby Union: where an employer reorganises so that old roles disappear and are replaced by new jobs, this may legitimately rely on something like an interview process to assess employees' ability to perform in the new roles. The ET will look

to see whether a fair process was followed and whether there is any indication of bias. It will consider whether all aspects of the dismissal were within the band of reasonable responses.

Re-engagement order

Davies v DL Insurance Services Ltd UKEAT/0148/19/RN

D was made redundant by DL. He complained of unfair dismissal for redundancy and sought reinstatement or re-engagement, and compensation. The ET found that D had been unfairly dismissed for redundancy, and it made an award of compensation, but it did not make a re-engagement order on the basis that it had not been given enough information to identify a suitable alternative role for D. D appealed on the grounds that the ET had erred in giving inadequate reasons for its decision on re-engagement and failing to apply the correct legal test; in taking an inconsistent approach to the calculation of compensation; and in its approach to making the Polkey deduction.

Decision

1. The appeal was allowed.

2. The ET had failed to ask itself the correct question in relation to re-engagement, and had failed to apply the correct approach by considering that, to avoid making an order, it was enough for the employer to say that D was not the best candidate.

3. The ET did not calculate the compensation by reference to the loss sustained, but by reference instead to a lower figure arrived at by taking an inconsistent approach to loss of earnings and to earnings in mitigation, and it did not take into account all facts and matters in coming to its assessment. Accordingly, the appeal would be allowed and the matter remitted to the same ET.

2019 Cases

Capped payment

Ugradar v Lancashire Care NHS Foundation Trust UKEAT/0301/18/BA

U was dismissed for redundancy by L. She brought claims for contractual and statutory redundancy payments totalling £44,000. L argued that she had been unreasonably refused alternative employment. The ET found that the alternative employment had been unsuitable. Its jurisdiction over contractual claims was limited to £25,000 and it did not award a statutory redundancy payment on the basis that the NHS contractual redundancy scheme stated that it was an enhancement to a statutory payment and the statutory payment was offset against any contractual payment. U appealed to the EAT.

Decision

1. The appeal was allowed.

2. U met the conditions for a statutory redundancy payment but none had been made.

3. U was entitled to a statutory and a contractual payment.

Contract of employment

Employee shareholder status

Barrosso v New Look Retailers Ltd UKEAT/0079/19

In 2015 B was offered shares in a parent company in exchange for being an employee shareholder. Section 205A of the Employment Rights Act 1996 states that, in return for shares worth at least £2000, employees give up their rights to ordinary unfair dismissal and statutory redundancy payment. B entered into a separate agreement by which he would be entitled to the equivalent of an unfair dismissal award and a redundancy payment. In 2017 he signed a new employment contract which stated that it superseded all previous agreements. It preserved the effect of the separate agreement. In 2018 B was dismissed and he complained of unfair dismissal. The complaint was dismissed on the basis that he was an employee shareholder and was excluded from unfair dismissal protection. B appealed to the EAT.

Decision

1. The appeal was dismissed.

2. An employee shareholder does not revert to employee status by later concluding a service agreement with the employer.

3. The question of when employee shareholder comes to an end depends upon applicable facts and not statutory construction.

Establishment

Fleet of ships

Seahorse Maritime Ltd v Nautilus International (2019) Morning Star, February 15, Court of Appeal

S Ltd, a company based in the UK, supplied crew members to ships operated by other companies, including Sealion Shipping Ltd, which were mainly based outside the UK. S Ltd's employees were required to work on any of Sealion's ships. Most worked on one ship from four to six weeks and some moved between ships. In 2015 Sealion took some ships out of service, putting crew members at risk of redundancy. Nautilus, the trade union, claimed protective awards on the basis that S Ltd had failed to consult with it although it was proposing to dismiss 20 or more employees. The union had to show that the fleet of ships counted as an establishment. The ET accepted that the whole fleet was an establishment. This decision was upheld by the EAT and S Ltd appealed to the Court of Appeal.

Decision

1. The appeal was allowed.

2. As crew members were assigned to particular ship, each ship was an establishment and there was no obligation to consult.

3. There was not sufficient connection between the ships and the UK for the case to come within UK law.

Failure to offer a contractual trial period

George v London Borough of Brent UKEAT/0507/13/SM

G was employed as a library manager by B. She was made redundant and was offered an alternative role which was two pay grades lower than the previous role and required a change in location. B's redundancy policy included the right to a four-week trial period. This was refused. G refused the new position. She was dismissed for redundancy and complained of unfair dismissal. The ET dismissed the claim on the basis that G had not refused the new job offer because the trial period had been refused. G appealed to the EAT, which has now considered the claim three times.

Decision

1. The appeal was allowed and the matter remitted to a fresh tribunal.

2. Given that it was conceded that the failure to offer a trial period was unlawful, how could something unlawful be also fair and reasonable?

Legal Professional Privilege

Emails

Overheard conversation

Curless v Shell International Ltd [2019] EWCA Civ 1710, Court of Appeal

C was employed as a senior lawyer by Shell. He brought tribunal proceedings against the company in 2015, alleging unfavourable treatment and discrimination in relation to a protected medical condition. Shell started a redundancy review and C's employment was terminated at the end of January 2017. C started a second set of proceedings claiming that the redundancy dismissal was a sham and that he had been victimised. He relied on an internal email between Shell's lawyers and an overheard conversation in a pub in Fleet Street. Shell applied to have those parts of the claim struck out on the basis that they were privileged material. C argued that they disclosed an unlawful scheme to conceal victimisation and came within the "iniquity" exception to legal professional privilege. The ET found that Shell was entitled to claim privilege. This decision was overturned by the EAT. Shell appealed to the Court of Appeal.

Decision

1. The appeal was allowed.

2. The email did not disclose any unlawful scheme. This was not overturned by pub gossip.

Race discrimination

Compensation

Aggravated damages

Base Childrenswear Ltd v Otshudi UKEAT/0267/18/JOJ

O, an employee of C, was made redundant. She stated that the real reason for her selection for redundancy was her race. At a meeting she was intimidated by managers. She appealed against her dismissal and lodged a grievance. Both were ignored. C refused to engage in the ACAS early conciliation process. She complained of race discrimination. The ET upheld the claim and made the following awards:

- £16,000 for injury to feelings (middle Vento band).
- £5000 aggravated damages for failure to respond to the grievance and appeal, subsequent conduct of litigation and failure to apologise.
- £3000 for personal injury (depression).
- A 25% uplift for breach of the ACAS Code.

C appealed to the EAT.

Decision

1. The injury to feelings award was appropriate.

2. The aggravated damages award was reduced by £1000 to avoid double counting with the 25% uplift.

Whistleblowing

Protected disclosure

Kilraine v Wandsworth London Borough Council [2018] ICR 1850, Court of Appeal

K, an employee of W, was suspended pending a disciplinary investigation into charges that she had made false allegations against colleagues. She was dismissed on grounds of redundancy. She complained of unfair dismissal and being subjected to a detriment because she had made qualifying protected disclosures. These were that the employer had failed in its legal obligations in respect of bullying and harassment and that her line manager had not supported her. The ET struck out these claims on the basis that they amounted only to allegations and were not qualifying disclosures. The EAT dismissed her appeal and she appealed further to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. Information could cover allegations.

3. To qualify as a protected disclosure, a statement had to have a sufficient factual content and specificity.

4. Whether a statement met that standard was a matter for evaluation by the tribunal. In the present case, the ET's decision had been correct.

2018 Cases

Age Discrimination

Proportionate means of achieving legitimate aim

BAE Systems (Operations) Ltd v McDowell UKEAT/0318/16/RN

BAE operated a redundancy scheme which included a cap so that payments were not available to employees aged over 65who had immediate entitlement to an occupational pension. The cap was applied to M who complained of direct age discrimination. BAE accepted that the cap was discriminatory on grounds of age but argue that it was a proportionate means of achieving the legitimate aims of its severance framework. The ET rejected this argument and did not accept that BAE had shown that this was a windfall case. Because there was no default retirement age, it could not be assumed that redundancy payments to employees in M's position would amount to a windfall. BAE appealed to the EAT.

Decision

1. The appeal was allowed in part.

2. The ET had been correct to conclude that this was not a windfall case.

3. The ET had failed to show a holistic approach to its assessment of the means adopted to achieve the various legitimate aims.

Disability discrimination

Legal advice privilege

X v Y Ltd (2018) UKEAT 0261-17-0908

X suffers from Type 2 diabetes and obstructive sleep apnoea. His employers had concerns about his performance. He complained of disability discrimination. He received, anonymously, an email from a lawyer to another lawyer which set out how to use a redundancy procedure to dismiss X, when in reality it was a cloak for dismissing him for performance and sickness issues. X wishes to use the email in his complaint. The ET refused to admit it on the basis that it was legally privileged. X appealed to the EAT.

Decision

1. The appeal was allowed. The email could be used in ET proceedings.

2. Advice sought or given for the purpose of iniquity could not be privileged.

3. The advice in the email was an attempted deception of X and of the ET.

4. The iniquity in the email was to disguise acts of victimisation or discrimination as a redundancy dismissal.

Consultation

Seahorse Maritime Ltd v Nautilus International [2017] ICR 1463, EAT

N, a company registered in Guernsey, supplied crews to a client company operating ships which provided specialised engineering work. Several ships were taken out of service and redundancy notices were issued. The claimant trade union complained to the ET, seeking a protective award in respect of employees domiciled in the United Kingdom. The employer argued that each ship was a separate establishment and the duty to consult did not arise. Further, most of the ships were located outside UK territorial waters and the ET did not have jurisdiction. The ET found that the whole fleet of ships was an "establishment" and the duty to consult arose. On the jurisdiction point, the ET found that UK domiciled employees were UK based with a stronger connection to the UK than elsewhere. The employer appealed to the ET.

Decision

1. The appeal was dismissed.

2. No finding of fact or evidence had been relied upon by the employer to show that it organised its business into individual ship-based units.

3. Employees living in the United Kingdom were international commuters who satisfied the test of a sufficiently strong connection with the UK to enable it to be presumed that, although they were working abroad, the ET had jurisdiction even if the UK was not their working base.

Contract of employment

Termination

Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust [2017] ICR 1370, Court of Appeal

C was told by N that her post was at risk of redundancy. She told N that she was taking annual leave and asked for an assurance that it would not make a decision as to her redundancy in her absence. On April 20, 2011, while C was on leave, N sent a letter by recorded delivery and ordinary mail, to her home address, and by email to her husband's email address, notifying her that it was terminating her employment by reason of redundancy and giving her 12 weeks-notice, terminating on July 15, 2011. C did not receive and read the

letter until April 27. She issued proceedings for a declaration that her notice period did not expire until after her 50th birthday on July 20 and that she was therefore entitled to an enhanced pension. The judge at first instance found in her favour on the basis that C's contract contained a term requiring written notice of termination personally to have been received and read by her before the notice period started to run. N appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. There was a general requirement that all notices of all kinds in contracts of employment had to be communicated to the employee before taking effect.

3. If necessary, the court would imply a term that if a notice was sent, to be effective it had to be received.

4. The 12-week notice period did not expire before C's 50th birthday.

Contract of employment

Variation

Deduction from wages

Abrahall and others v Nottingham City Council and another [2018] EWCA Civ 796

NCC and a company owned by it to which some of its employees had been transferred under TUPE, refused to award incremental pay increases to the employees. Several hundred employees brought proceedings for unlawful deduction of wages on the basis that they had a contractual entitlement to such increases. Six employees were chosen as lead cases.

Decision

1. All the claimants were entitled to arrears of pay equivalent to what they would have earned if pay progression had been operated in each of the years in which it was frozen.

2. In practice, employees would often agree to a variation of their contracts by conduct. This could be inferred where the variation was to the employee's benefit.

3. Where the variation is to the employee's disadvantage, in an appropriate case the employee should not be taken to have accepted the variation in order to avoid the risk of redundancy.

Failure to consult

Keeping Kids Company (In Compulsory Liquidation) v Smith and others (2018) Morning Star, April 20, EAT

KKC applied for a government grant in June 2015. The application included a proposal to make half its staff redundant in September 2015. The application was successful and KKC received £3 million. Following a police investigation into child sex allegations reported in the

media on July 30, KKC could not meet the requirement of obtaining matching funding from philanthropists and the government asked for the money to be returned. KKC went into liquidation and all its employees were made redundant. A number of employees claimed protective awards on the basis that the company had failed to consult. KKC argued that it had not known the names of employees being made redundant, and that adverse publicity related to the child abuse investigation amounted to "special circumstances". The ET found that there had been a proposal to dismiss by June 2015 and the company should have started the consultation process promptly after that date. The full 90 days protective awards were made. KKC appealed to the Eat.

Decision

1. The appeal was allowed in part.

2. Events which occur after a proposal to make more than 20 employees redundant cannot be used as a defence for failing to consult.

3. Such events might make a difference to the size of the award.

4. The events of July 30 had prevented further consultation. This was a mitigating circumstance and should have been taken into account. This point was remitted to the ET to decide the correct protective award.

Unfair dismissal

Automatic unfair dismissal

Trade union activities

Morris v Metrolink RATP DEV Ltd [2018] EWCA Civ 1358, Court of Appeal

M was a union representative for the Workers of England trade union at Metrolink. Five members of the union were put at risk of redundancy. M was sent a photograph of a diary, taken without permission, belonging to a line manager. The diary contained adverse comments about the five. M lodged a grievance which contained the diary material. He was dismissed for storing and sharing private and confidential material. He complained of unfair dismissal and automatic unfair dismissal for taking part in trade union activities. The ET upheld the complaint. Metrolink appealed to the EAT which allowed the appeal. M appealed to the Court of Appeal.

Decision

1. The appeal was allowed.

2. M had not copied the material nor shared it further.

3. It could not be uncommon for a trade union representative to be the recipient of a leak.

4. M had made very limited use of the material and its use was within the scope of trade union activities.

Whistleblowing

Information, meaning

Kilraine v London Borough of Wandsworth (2018) Morning Star, September 14, Court of Appeal

K, an employee of W, made a number of alleged protected disclosures between 2005 and 2010. She was then suspended pending a disciplinary investigation into unfounded allegations against colleagues. In September 2011 she was dismissed for redundancy. She complained of automatic unfair dismissal for whistleblowing. The ET dismissed the complaint on the basis that K had not disclosed any information but had made a series of allegations. On appeal to the EAT, K's appeal was dismissed because her claims were far too vague. It criticised the ET for distinguishing between information and allegations. K appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. Information can include allegations but they have to be sufficiently evidenced in a factual context.

3. K's complaints lacked factual or any relevant context.

Written notice

Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust [2018] UKSC 22, Supreme Court

The Trust identified H's post as redundant. If her employment terminated by reason of redundancy on or after her 50th birthday on July 20, 2011, she could claim a non-actuarially reduced pension. H told the employer that she was taking two weeks annual leave from April 18. The Trust issued 12 weeks written notice of redundancy on April 20. It was delivered to her home on April 21 by recorded delivery. A relative collected the letter from the sorting office on April 26. On April 27 H read the letter. She claimed that the notice period ran from April 27 and expired on July 20. The Trust argued that there was a common law rule that notice was given when the letter was delivered to an address.

Decision

When an employee was dismissed on written notice posted to her home address, and there was no express provision in the contract of employment as to when the notice period would run, the court would imply a term that written notice only took effect when it came to the employee's attention and she had either read the notice or had a reasonable opportunity of so doing. The presumption of receipt at the address was rebuttable.

2017 Cases

Age discrimination

Indirect discrimination

Requirement for degree-level education

McFarland v Kincull Ltd (2016) Eq Opp Rev 273:23, Industrial Tribunal of Northern Ireland

M was employed by K from 2004 until 2014 when she was dismissed for redundancy aged 47. Her dismissal followed discussions as to possible redundancy. A new post was created and M was excluded from applying because it was a requirement that candidates were educated to degree level. M complained of indirect age discrimination on the basis that people of her age were particularly disadvantaged because they were less likely to be educated to degree level than younger people.

Decision

1. The complaint was upheld.

2. Statistics showed people aged 45 to 54 were less likely to be graduates and were therefore put at a particular disadvantage.

3. The criterion was not objectively justified because the employer could not show that it had carried out the required objective balance between discriminatory effect and the needs of the business.

4. The legitimate aim for the new role could have been achieved, without the necessity for a degree, by other means such as experience.

Consultation

Meaningful not sham

Thomas v BNP Paribas Real Estate Advisory and Property Management UK Ltd (2017) Morning Star, January 6, EAT

T was one of five people identified as being at risk of redundancy. He was placed in a pool of one. In January 2014 he was told that he was at risk of redundancy. He attended two consultation meetings at which he was told that there were no alternative posts available. A letter to T was addressed with the wrong name. He was made redundant. He appealed against the decision, arguing that the consultation process had been a sham with a predetermined outcome and that he had been selected because he was aged 60. The appeal was rejected and he complained of age discrimination and unfair dismissal. The ET rejected the complaints. It found that the consultation had been reasonable and there was no evidence to show that the company had a practice which involved dismissing people who were approaching age 60. T appealed to the EAT.

Decision

1. The appeal was allowed in part.

2. The tribunal had itself described the consultation as perfunctory and insensitive. Any dismissal was likely to have been unfair. The tribunal's decision that the consultation was reasonable could not stand.

3. In relation to the claim of age discrimination, the tribunal had applied the law correctly. It had considered and rejected the evidence put forward by T. The reason for the dismissal had been redundancy and not age.

Contracts of employment

Implication of term to complement express term

Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2

A, an employee of P, was given financial help to undertake further academic study. It was expressly provided that the employer would not seek repayment of the funding if A worked for it for a further five years. A took redundancy after a year and a half and the employer set off the amount of the funding from his redundancy payment. The courts of Trinidad and Tobago geld that it could do so. A appealed to the Privy Council.

Decision

1. There was an implied term that if the employer did anything of its own initiative to prevent the employee from working for that period (except dismissal for gross misconduct or acting under compulsion). This was necessary for business efficacy to prevent an employer negating the intent of the express term by cynically terminating the contract and requiring repayment.

2. A had not been pressured into taking voluntary redundancy. He would not have been made compulsorily redundant if he had not volunteered and he had good prospects of alternative work elsewhere. The employer could not be said to have prevented the employment from continuing and the employer had the right to repayment.

Disability discrimination

Associative discrimination

McCorry and others v McKeith [2017] IRLR 253, Northern Ireland Court of Appeal

M was employed as an advice assistant. She had a disabled daughter who was looked after by a family friend while she was at work. Her employer thought that M's place was at home. She was told, against her wishes, to be absent from work for some periods to care for her daughter. M was later dismissed for redundancy. She complained of associative direct disability discrimination. The industrial tribunal found that she had established a prima facie case that she had been discriminated against because she had been the primary career of her disabled daughter. The burden of proof therefore shifted to the employer which had not put forward any convincing or coherent explanation for its decision to make her redundant. The employer appealed to the Northern Ireland Court of Appeal.

Decision

1. The appeal was dismissed.

2. There was evidence of a difference in status, a difference in treatment and a reason for differential treatment. In the absence of an adequate explanation, a tribunal could conclude that the employer had committed an unlawful act of associative disability discrimination.

Disability discrimination

Effective cause of unfavourable treatment

Charlesworth v Dransfield Engineering Services Ltd (2017) Morning Star, July 28, EAT

C was employed by D as a branch manager. In November 2014 it was decided that his job could be deleted and that this would save D £40,000. C was diagnosed with renal cancer and was off work sick from October to December 2014. In 2015 C was given four weeks' notice and dismissed for redundancy. C complained of direct disability discrimination and discrimination because of something arising in consequence of his disability. The ET rejected the claims. It found that D would not have treated someone without a disability from the way in which C was treated. D needed to make savings and the redundancy had nothing to do with his disability. C had not been dismissed because of his absence. C appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The ET's decision that the Claimant's absence resulting from his disability was not an operative cause of his dismissal for redundancy was reached without error of law or perversity.

Disability discrimination

Evidence

Balson v Foray Motor Group Ltd UKEAT/0288/16/RN

B was disabled because of depression. He was made redundant following his scoring the least number of points in a redundancy exercise. He complained of disability discrimination in that he had suffered unfavourable treatment in his scoring and dismissal and that his ability to score well was adversely affected by his depression. The ET dismissed the claim. He appealed to the EAT, arguing that the tribunal had erred in preferring the evidence of the employer's witness and B's manager.

Decision

1. The appeal was dismissed.

2. The reasoning of the ET had been sound and did not disclose any error of law.

Employment contracts

Variation

TUPE

Xerox Business Services Philippines Inc Ltd v Zeb UKEAT/0121/16/DM

Z was employed by X. His contract stated that his place of work was Leeds or Wakefield. X decided to transfer some work to the Philippines. Workers were given the choice of rejecting the transfer and being made redundant with a generous redundancy package or to transfer and be made redundant with statutory redundancy pay. X would not be required to carry out the transferring work in the UK. Z asked to be transferred to the Philippines on his existing terms. X rejected the request. It stated that the effect of TUPE was that Z would transfer on his existing terms. He was not employed to work in the Philippines, so his role was redundant because there was no requirement for his work in Wakefield. X dismissed Z and paid his statutory redundancy pay. Z complained of unfair dismissal. His complaint was upheld. The ET found that there was a vacancy in the Philippines. If Z had accepted local terms and conditions, X would have facilitated a move to the Philippines. There had been no redundancy. X appealed to the EAT.

Decision

1. The appeal was allowed.

2. There had been no variation of the contract.

3. Following the transfer, X was required to employ Z at Wakefield. It was not obliged to employ him in the Philippines at the same salary.

4. TUPE did not entitle Z to vary his contract unilaterally so as to change his place of work.

Protective awards

Human rights

Vining v London Borough of Wandsworth (2017) Morning Star, September 15, Court of Appeal

The claimants were employed as parks constables by LBW. They were dismissed for redundancy following a reorganisation of the parks police service and complained of unfair dismissal. Unison brought proceedings seeking protective awards for LBW's failure to consult about proposed redundancies. LBW argued that the claimants were employed in the police service and were not employees protected from unfair dismissal and were excluded from the obligation to consult. The ET found that they were not employed in the police service. The EAT reversed this decision in the light of the decision in *London Borough of Redbridge v Dhinsa* that parks police were employed under police service contracts. The claimants appealed to the Court of Appeal.

Decision

1. The appeal was allowed.

2. The right to be consulted was one of the essential elements protected by Article 11 (freedom of association) of the European Convention on Human Rights.

3. A union must be allowed to pursue a claim for a protective award about whether there has been a failure to consult, even if its members do not have collective consultation rights.

4. The case would be remitted to the ET to decide whether or not there had been a failure to consult.

Note: Police forces have remedies to replace employment rights from which they are excluded. Parks police have no such remedies. This could not be justified.

Sex discrimination

Indirect discrimination

Requirement for full-time work

Timoshenko v Spy Alarms Ltd (2016) Eq Opp Rev 273:22, Ashford ET

T was employed by SA as an accounts assistant. SA moved its offices to Orpington from Sevenoaks. This meant that her children would have to spend a nine to ten-hour day at their primary school in Sevenoaks. She requested a change in working hours to part-time, which was granted. SA decided that it needed a full-time accounts manager. T was invited to interview for the new post but she declined because of the child care issue. She was dismissed on grounds of redundancy. She complained of indirect sex discrimination based on the requirement that she work full-time.

Decision

1. The complaint was dismissed.

2. The tribunal could not simply make an assumption that a provision requiring full-time work would disadvantage women who would be suitable candidates for such a role.

3. T's assertion that there was such a disadvantage to women was no more than an assertion based on her own circumstances.

2016 Cases

Age discrimination

Enhanced redundancy scheme cap

McDowell v BAE Systems (Operations) Ltd (2016) Eq Opp Rev 270:37, Bristol ET

M was employed by BAE as a design lead. In January 2015 he was made redundant at the age of 65. The employer's enhanced redundancy scheme was capped at age 65. M received only his statutory redundancy pay and no enhancement. He complained of direct age

discrimination. The employer argued that it had legitimate aims in imposing the capping, in that finite funds available for redundancy payments were allocated across the workforce in a fair and equitable manner.

Decision

1. The claim succeeded.

2. The cap itself was not a legitimate aim because it was in itself simply linked to age.

3. Too much of the employer's argument was based on generalisations. It had not presented any figures to explain what finite funds were available to it.

Age discrimination

No true redundancy

Demosthenous v Sosa Factory Ltd (2016) Eq Opp Rev 272:24, Watford ET

D was dismissed for redundancy at the age of 67. She complained of age discrimination.

Decision

1. In the absence of any evidence of redundancy, the burden of proof on the claim passed to the employer.

2. The claim succeeded.

3. No proper procedure had been followed by the employer.

4. In relation to comparators, two employees aged 58 and 60 were proper comparators despite the narrow difference in age, because D's age group was those entitled to draw state pension whereas the comparators were not.

Injury to feelings award: one off act: serious matter with substantial effects: £5000 plus £552 interest plus reimbursement of tribunal fees.

Age discrimination

Refusal of voluntary redundancy

Donkor v Royal Bank of Scotland (2016) Eq Opp Rev 266:24, EAT

D began working for RBS in 1978. In 2012, following a preliminary desktop selection exercise, his role was identified as at risk of redundancy. RBS determined that anyone whose role was so identified at this preliminary stage would be offered the option to volunteer for redundancy. If aged over 50, that would include an option to take early retirement (which substantially increased the value of any severance payment due). Unlike his two comparators (who were both aged under 50), D (who was then aged 52) was not offered the option to volunteer for redundancy. Determining his claim for direct age discrimination, the ET held that there were material differences between his circumstances and those of his comparators

in respect of the benefits to which they would be entitled if they applied for voluntary redundancy. It further concluded that, in any event, D was not less favourably treated because his comparators were similarly not given the option to apply for voluntary early retirement because they were not entitled to apply for it. They were therefore all treated the same. Finally, it concluded that, even if the failure to offer voluntary redundancy did amount to less favourable treatment, it was not on the basis of age but rather the substantial cost to RBS. Any such sizeable severance payment would have been treated in the same way and was not necessarily linked to age. D appealed, broadly on the grounds that the denial of the benefit due to the cost of early retirement necessarily discriminated against those aged over 50, that the denial amounted to a detriment and that the reasons for the denial were irrelevant.

Decision

1.The EAT allowed the appeal.

2. The only permissible conclusion was that a *prima facie* case of direct age discrimination had been made out. The ET had erred in its approach to the question of comparison, wrongly relying on the differences attributable to the ages of D and his comparators. The material difference identified was in reality simply one of age, and since this was precisely D's complaint, it could not be relied upon as a material difference. The ET had further erred both in its alternative finding that there was no less favourable treatment and, in considering the reason for any less favourable treatment, in failing to adopt the correct – *but for* – test, where the reason for the treatment itself imported the relevant characteristic, age. The finding of no *prima facie* direct age discrimination was set aside and the case remitted to the same ET to consider justification.

3. The additional expense was simply a consequence of the fact that D was over 50 and was therefore inseparable from his age.

Disability discrimination

Associative discrimination

McKeith v Committee of Ardoyne Association (2016) Eq Opp Rev 268:26, Belfast IT

M was employed by AA for 14 hours a week over four days. She is a primary carer for her disabled daughter. She was absent from work on a number of occasions because of her daughter's illness. In March 2015 she was dismissed for redundancy. She complained of associative disability discrimination.

Decision

1. The complaint was upheld.

2. Evidence showed that funds were available and there was no true redundancy.

3. The employer had excluded M from work for extended periods because her manager stated that her place was with her disabled daughter and not at work.

4. The aim of the legislation is to encourage and enable people with disabilities or primary carers of disabled people to work and not too treat them as charity cases.

Constructive dismissal

Implied term of reasonableness

Craig v Bob Lingfield &Son Ltd UKEAT /0220/15

C's contract of employment provided for short-term working and layoff for an indefinite period. Following four weeks layoff without pay, he resigned and complained of unfair constructive dismissal on the basis that the layoff had gone on for an unreasonable period. The tribunal dismissed the claim on the basis that the period had not been unreasonable. C appealed to the EAT.

Decision

1. The appeal was dismissed.

2. Where a contract of employment states that there are circumstances in which no money will be paid, or no work done, or both, then a failure by an employer to pay will not be a breach of contract.

3. The Employment Rights Act 1996, section 148, provides for a period of layoff or short-time working during which there is no entitlement to claim a redundancy payment. After the prescribed period, an employee can serve a notice claiming a payment. For this additional reason there was no room for the implied term in the employment contract argued by C.

Sex discrimination

Unconscious or subconscious

Geller and Geller v Yeshurun Hebrew Congregation (2016) Morning Star, August 19, EAT

Mr G was employed by YHC in 2011. A year later his wife started working for YHC on an ad hoc basis. YHC later suggested that the couple should be paid a joint salary. This was accepted.

In 2013 it was decided that Mr G would be made redundant. Before he was informed of this, he told his employer that his wife was pregnant. Mrs G stated that she should also be considered for redundancy. Both were made redundant at the end of 2013. They lodged a number of claims in the employment tribunal including sex discrimination in that YHC had failed to treat Mrs G as an employee and had failed to pay her properly. The claims were dismissed on the basis that YHC had not treated Mrs G less favourably because of her sex but because it genuinely believed that she worked for them on an ad hoc basis. Mrs G appealed to the EAT.

Decision

1. The matter was referred back to the tribunal for reconsideration.

2. The tribunal had overlooked the important point that discrimination can be conscious or subconscious.

3. The tribunal had failed to go through the two-stage burden of proof test in section 136 of the *Equality Act 2010.* Its treatment of the test had been rudimentary. There were primary facts from which discrimination could be inferred. At that stage the burden of proof would have shifted and it would have been for the employer to demonstrate a non-discriminatory reason for treatment.

Unfair dismissal

Excluded classes

Wandsworth London Borough Council v Vining and others [2016] ICR 427, EAT

V and others were employed by W as parks constables. They were dismissed for redundancy. They complained of unfair dismissal. The ET found that they were not employed in police service and were therefore not excluded from complaining of unfair dismissal. WLBC appealed to the EAT.

Decision

1. The appeal was allowed, following a Court of Appeal decision that parks police were employed in police service.

2. A dismissal by itself, even with its consequence of severing relationships with co-workers, did not engage *Article 8, ECHR* (the right to privacy)

Unfair dismissal

Termination by mutual consent

Khan v HGS Global Ltd and another UKEAT/0176/15/DM

K and others were consulted in relation to a prospective TUPE transfer. Employee representatives raised concerns about increased travelling time. The transferor employer gave three options: transfer under TUPE, applying for available posts with the transferor, or redundancy.

K opted for redundancy. On the day of the TUPE transfer his employment terminated. He was paid a severance package, a redundancy payment and pay in lieu of notice. He complained of unfair dismissal. The ET dismissed the claim. There had been no dismissal. K's employment had terminated by mutual consent, K appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The ET had been entitled to conclude, on the facts, that this had been a mutually agreed, consensual termination of employment even though the eventual method was formal dismissal.

Whistleblowing

Protected disclosures

Kilraine v London Borough of Wandsworth UKEAT/0260/15/JOJ

K made 4 disclosures which she claimed were protected disclosures. Following the fourth disclosure, she was suspended pending disciplinary investigation. The basis for this was that she had raised unfounded allegations against colleagues. K was later dismissed for redundancy. She complained of unfair dismissal on the grounds of making protected disclosures. The ET dismissed the complaint. It found that only one of the disclosures was protected and that the real reason for the dismissal was redundancy. K appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The disclosures were not protected because they did not contain information.

2015 Cases

Agency workers

Right to obtain employment

Coles v Ministry of Defence UKEAT/0403/14

Statute reference: Agency Workers Regulations 2010, reg.13

C was an agency worker with the MOD. His post was made vacant and was offered to potentially redundant permanent employees. C was given information as to the relevant post. He argued that he should be given preference for the post or at least given an interview.

Decision

The regulation gave only a right to be informed and not a right to be given preference.

Consultation

University and College Union v University of Stirling (2015) Times, May 19, Supreme Court

In 2010 a Scottish employment tribunal decided that dismissal following the non-renewal of a limited term contract was not excluded from the definition of "dismissal as redundant" for the purposes of an employer's duty to consult. This decision was reversed by the EAT. The Scots Inner House upheld the decision of the EAT. The claimants appealed to the Supreme Court.

Decision

1. The appeal was allowed.

2. An employee was dismissed as redundant for the purposes of an employer's duty to consult on proposed collective redundancies if the reason for the dismissal was not something to do

with him personally but was a reason relating to the employer, for example the need to effect business change.

3. The expiry and non-renewal of a limited-term contract amounts to a dismissal. The question is whether the dismissal related to the individual or to the needs of the business.

Disability discrimination

Discounting disability-related absence

Russell v College of North West London [2014] Eq Opp Rev 252:28, EAT

R suffered from Meniere's disease (a disorder of the inner ear) and was accepted to be a disabled person. She was selected for redundancy when the Bradford Score (a scoring mechanism) showed that she had the highest sickness absence in her pool. She complained of unfair dismissal, disability discrimination, victimisation and harassment. The ET dismissed all the complaints except for unfair dismissal. The tribunal found that she had been unfairly selected because the scoring mechanism was fatally flawed. It applied an 80% Polkey deduction. R appealed to the EAT.

Decision

1. The selection criteria were applied equally to disabled and non-disabled employees. R had been selected for redundancy not because of her disability but because of her level of absence.

2. Even if all disability-related absences had been ignored, R would still have been dismissed because the level of her non-disability related absence was also higher than that of the next most absent employee.

Protective award

E Ivor Hughes Educational Foundation v Morris and others [2015] IRLR 696, EAT

Statute reference: Trade Union and Labour Relations (Consolidation) Act 1992, ss. 188, 189

M and others were employed as teachers at a private school. At a meeting in February 2013 the employer decided that the school would close at the end of the summer term if pupil numbers did not increase. In April 2013 all the teachers were dismissed for redundancy with effect from July 2013. There was no consultation. The ET found that the duty to consult had arisen in February 2013 and awarded the maximum 90 days protective award. The employer appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The duty to consult had arisen in February 2013 and there were no special circumstances which made it impracticable to consult.

Sex discrimination

Stereotypical assumptions about part-time workers

Dykes v Premier Risk Service LLP (2014) Eq Opp Rev 253:30, Leeds ET

D was employed as a part-time health and safety expert. Her employing company carried out a restructuring exercise which involved the abolition of D's job. She was given the opportunity to apply for a full-time post but she was unable to apply because of childcare responsibilities. She was made redundant and complained of unfair dismissal and direct and indirect sex discrimination.

Decision

1. There was no direct discrimination. D was made redundant because she did not apply for the full-time post and not because she was a woman.

2. There was a PCP of requiring employees to work full-time. This put women at a disadvantage.

3. The employer's reasons for deleting the part-time post were based on stereotypical and prejudiced assumptions about part-time workers.

4. In the absence of evidence of a need for a restructuring which resulted in the part-time post being deleted, the claim of indirect sex discrimination was upheld.

Unfair dismissal

Redundancy while on maternity leave

Sefton Borough Council v Wainwright [2015] IRLR 90, EAT

Statute reference: Maternity and Parental Leave etc Regulations 1999, regs. 10, 20; Equality Act 2010, s.18

SBC carried out a restructuring process. This resulted in two posts being made into one, which meant that either W or her colleague would be appointed to the new post. W was on maternity leave in July 2012 when interviews for the post were carried out. W was unsuccessful. She was made redundant in April 2013. She complained of direct sex discrimination and automatic unfair dismissal. The ET found that regulation 10 of the *1999 Regulations* applied. This gave W the right to special treatment in that, where there is a suitable available vacancy, it must be offered to a claimant on maternity leave. A failure to do so renders a subsequent dismissal automatically unfair. W had also suffered direct sex discrimination. SBC appealed to the EAT.

Decision

1. The dismissal had been automatically unfair.

2. The direct discrimination claim would be remitted. The fact that regulation 10 of the 1999 Regulations applied did not necessarily mean that there had been direct sex discrimination.

3. SBC had paid £400 to lodge the appeal and £1200 for the hearing. W was ordered to pay the £400 and half the hearing fee – a total of £1000.

2014 Cases

Age discrimination

Redundancy

Palmer v Royal Bank of Scotland plc UKEAT/0083/14/MC

RBS operated a VER (Voluntary Early Retirement) policy. This allowed employees over the age of 50 to take VER. RBS then decided to change the policy so that only employees over the age of 55 could choose VER. RBS announced that it would be making redundancies and deferred the change in the VER policy. Employees who were at risk of redundancy, including P, had already decided between VER, voluntary redundancy or redeployment. RBS allowed employees between the age of 50 and 55 to change their decision and opt for VER instead. P had opted for voluntary redundancy at the age of49 and did not qualify for VER. She argued that she should be allowed to change her mind and choose redeployment instead, in the hope that the redeployment process would take long enough for her to reach the age of 50 so that she could then opt for VER. RBS did not allow her to do this. She complained of age discrimination. The complaint was dismissed by the employment tribunal. She appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The tribunal had been entitled to conclude that less favourable treatment had not been established. P's comparators could lawfully have chosen VER but P, at her projected date of leaving employment, could not.

3. The tribunal had correctly identified a legitimate aim on the part of RBS, and had decided that the means of achieving it were appropriate. It had not sufficiently balanced the importance of achieving the aim against the discriminatory group, of which the claimant was part, of being denied the chance to revisit their options after the delay in making the adjustment to the policy on VER.

Contracts of employment

Employee, meaning

Secretary of State for Business Innovation and Skills v Knight [2014] IRLR 605, EAT

K was employed by RSS. Her contract provided for an annual salary of £20,000. She was actually paid varying amounts. In 2011, RSS became insolvent. K applied to the Secretary of

State for a redundancy payment. The main issue before the ET was whether K was an employee of RSS at the relevant time. K argued that she had forfeited her salary to help colleagues and to pay suppliers. The ET found that she was an employee of RSS. On appeal, the Secretary of State submitted that in forfeiting her right to a full salary, she had agreed to change her status from that of employee.

Decision

1. The appeal was dismissed.

2. The fact that an employee decides not to require her company to pay her salary does not necessarily lead to the conclusion that she must be taken to have entered into an agreed variation of the contract or a discharge of that contract.

Direct discrimination

Non-disabled person compared

JP Morgan Europe Ltd v Chweidan [2011] IRLR 673, CA

C was employed by JPM as an executive director. In 2007 he suffered a serious back injury. He returned to work for restricted hours. C complained that his 2007 bonus had been reduced because of his disability. He was dismissed for redundancy and complained that his selection for redundancy had been because of his disability. The employment tribunal found that he had been unfairly dismissed and subjected to direct disability discrimination. JPM appealed to the EAT and then to the Court of Appeal.

Decision

The tribunal's decision in relation to direct discrimination could not stand. A non-disabled person would similarly have been dismissed.

Knowledge of disability

IPC Media Ltd v Millar [2013] IRLR 707, EAT

Statute reference: Equality Act 2010, s.136

M was employed by IPC as a journalist. She suffered from osteoarthritis. She was made redundant following a company restructuring. She was not given the opportunity to apply for two vacancies for which the ET considered she was potentially appointable. She complained of disability discrimination. The ET ruled that the failure to give her the opportunity to apply for the vacancies was because of her absences caused by her disability and was discrimination arising in consequence of disability. IPC appealed.

Decision

1. The appeal would be allowed.

2. There was no evidence that the relevant decision maker was aware of M's absence history.

3. There was no evidential basis for the burden of proof to have shifted.

Professional negligence

Loss of a chance

Chweidan v Mishcon de Reya Solicitors [2014] IRLR 871, High Court

C, a former JP Morgan employee, alleged age and disability discrimination following a skiing accident in 2007. He claimed that, despite improved performance following the accident (and subsequent serious spinal injury), his bonus was cut and he was eventually made redundant, while more junior (and younger) employees were given more favourable treatment.

C succeeded in the ET and was awarded £550,000. JP Morgan appealed, and their appeal was upheld. C's solicitors lodged a cross-appeal, but this was not lodged in time, and an extension of time was refused.

As a result of losing the appeal, C was awarded £68,000 for unfair dismissal, and was responsible for a costs bill far in excess of that sum. He claimed against his former solicitors a lost opportunity to cross-appeal.

The solicitors admitted the breach, but argued that the prospects of success in C's appeal were so low that he had suffered no loss.

Decision

1.The correct approach to take in a situation where the Claimant had to overcome multiple separate hurdles was a mathematical one, that is to assess the probability of success for each hurdle, and multiply these together to give an overall probability.

2. The claimant must prove a more than negligible prospect of success.

3. The court must then make a realistic assessment of the claimant's prospects should the litigation have been concluded at trial.

4. The court should then assess the likely level of damages the claimant would probably have received, then apply an appropriate fraction to reflect the various uncertainties of litigation.

5. In some cases a broad approach is appropriate for this exercise, in others the court should examine the potential prospects in greater detail.

6. The court must take into account that the oral and documentary evidence before it will be more limited than if the underlying action had proceeded to trial. It must also account for the possibility that settlement could have been achieved. It is wrong in any event for the court to conduct a trial within a trial.

7. If there are "separate hurdles", the percentage prospects of each of these should be multiplied together to give an overall lower percentage prospect.

8. In this case, C's total prospects were evaluated at 18%. This was calculated on the basis that he had a 50% chance of winning the age discrimination cross-appeal, and a 33% chance on the underlying claim following the appeal. This gives a 16% chance, which was nominally

increased on the basis that, if C won his cross-appeal, JP Morgan's attitude to the case may have changed in C's favour (presumably making settlement more likely).

9. C was awarded 18% of his £357,574.86 total claim against his solicitors. He received £64,363.47 in damages.

Reasonable adjustments

Compensation award

Kelly v Land Rover (2012) Birmingham ET

K was employed by LR as a manager. He had been an employee for 24 years. He suffered from physical disabilities and neurofibromatosis. During a period of sickness absence LR considered redundancies. K was not informed of this. He was dismissed for redundancy.

Decision

1. The failure to allow K to engage with the redundancy process amounted to a failure to make reasonable adjustments.

2. LR could have extended the assessment period to allow for K's absence.

Quantum: LR argued that K had failed to fully mitigate his loss. The tribunal agreed, stating that he had not availed himself of all the potential opportunities open to him.

Actual loss of earnings: £65,000

Loss of benefits: company car, healthcare: £20,000

Pension loss: simplified approach: £47,000

Injury to feelings: although there were only two instances of disability discrimination, the effect on K was traumatic in that his career was terminated.

Redeployment

Redcar and Cleveland Primary Care Trust v Lonsdale [2013] Morning Star, October 4, EAT

L was employed by C in a band six position. Her eyesight deteriorated and she was registered blind. She was assessed by occupational health and redeployed into a band four post. C underwent a restructuring exercise. L was told that her band four post was at risk of redundancy. She asked if she could apply for a band six post. This was refused and a disabled colleague was appointed to the band six post. L complained of disability discrimination, including a failure to make a reasonable adjustment because C had not allowed her to apply for the band six role. The ET found that C had failed to make a reasonable adjustment. C appealed to the EAT.

Decision

1. The appeal would be dismissed.

2. L had suffered a substantial disadvantage when she was redeployed from a band six to a band four post as a direct result of her visual impairment. That was the reason she was precluded from applying for the band six role.

3. By failing to allow L to apply for the higher-grade post, the employer had not taken into account that disabled employees can sometimes be treated more favourably than those who are not disabled.

Redundancy selection

Autism

Doolan v Interserve Facilities Management Ltd (2013) Eq Opp Rev243:22, London South ET

D, an autistic man, was employed by IFM. He was warned of possible redundancy but he did not understand the seriousness of this because of his disability. The selection pool for redundancy included a rage of employees. D scored lowest and was subsequently made redundant. He complained of unfair dismissal and disability discrimination.

Decision

1. The disability discrimination claim succeeded. The redundancy selection criteria applied by IFM had put D at a substantial disadvantage.

2. Adjustments should have been made to remove that disadvantage.

Standard of performance

Connolly v London Probation Trust (2013) Eq Opp Rev 239:29, London Central ET

C was employed by LPT for 26 years. In 2003 she was diagnosed with cerebella ataxia. This condition affected her mobility and eyesight and she became a wheelchair user. LPT made a number of adjustments to enable her to carry out her role.

In August 2011 LPT began redundancy consultation. "Standard of work performance" was one of the criteria used in redundancy selection. C's standard of work received a score of zero on the basis that she had not met requirements. C complained of disability discrimination, claiming that there had been a failure to make reasonable adjustments in assessing her standard of performance.

Decision

There had been a provision, criterion or practice of reliance on the scoring of standard of performance. C had suffered a substantial disadvantage of being scored zero, which might not have been the case if she had been given the required training. The appraisal put her at a disadvantage compared to someone who did not have the same mobility issues. It would have been a reasonable adjustment to have ensured that training was provided to C.

Remedies: recommendation that LBT's policies did not discriminate and that reasonable adjustments were made where a work performance assessment was to be made.

Injury to feelings: £6000: the cusp between lower and middle Vento bands.

TUPE

Refusal to relocate

RR Donnelly Global Document Solutions Group Ltd v Besagni and others [2014] ICR 1008, EAT

Statute reference: Transfer of Undertakings (Protection of Employment) Regulations 2006, reg.7

B and others were employed by a local authority in its parking enforcement department. Contracts were transferred to R which confirmed that B and others would be required to relocate. B and others refused to relocate and were dismissed for redundancy. They complained of automatic unfair dismissal in that they had been dismissed for a reason connected with their redundancy. The ET upheld their claims, stating that the phrase "entailing changes in the workforce" did not apply to a change of location. R appealed to the EAT.

Decision

1. The appeal was dismissed.

2. The fact that many transfers of undertakings involved a change in the workplace negated rather than supported an interpretation which involved a change of location. Otherwise, employees dismissed for refusing to relocate would be deprived of a finding of automatic unfair dismissal and that would go against the grain of the Regulations.

2013 Cases

Robert's Comments:

Legal Myths… Busted! #10

Many different contracts of employment exist, and one of the most myth-laden is that of the fixed term contract. So, for the avoidance of doubt:

- A contract is still fixed-term, even where it contains a notice clause
- Employees have the right to be treated as favourably as permanent employees, due to protection contained under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.
- Employees cannot opt out of statutory redundancy payment/unfair dismissal.
- Upon non-renewal, employees are dismissed, therefore the reason for non-renewal must be fair.
- After a succession of fixed term contracts over 4 years, an employee can request a declaration from the tribunal that he is a permanent employee.

- Collective redundancy consultation requirements are not excluded merely by the fixed-term contract status.

Compensation

Chance of proper dismissal

Hazel v New Eltham Conservative Club [2013] All ER (D) 318

The claimants were husband and wife who were made redundant. They complained of unfair dismissal. The complaint was upheld on the ground that there was no redundancy situation. The husband would have retired in 4 years' time. Compensation was awarded until his retirement date on the basis that he would have worked until retirement. No consideration was given to reflect the chance that the claimants could have been properly dismissed at some time before retirement. The employer appealed.

Decision

1. The appeal was allowed.

2. There was sufficient evidence for the employment tribunal to have considered the chance that the claimants might have been properly dismissed at some time before retirement.

3. The task of the tribunal was to assess the loss flowing from the dismissal, using its common sense.

Proposing to dismiss

Consultation

Kelly v The Hesley Group Ltd [2013] IRLR 514, EAT

Statute reference: Trade Union and Labour Relations (Consolidation) Act 1992, s.188

H Ltd employed 300 people at a school. The company decided that, because of financial pressures, it needed to change the employees' contracts by reducing their hours and freezing their salaries. The company proposed the changes in August 2010. It sought agreement to the changes. By November 2010 it was realised that job losses were possible if the contracts were not agreed. In December 2010 the company decided to terminate the original contracts and offer re-employment on revised terms. 32 employees did not accept the new terms. The company advised them that it was entering into collective consultation in relation to the 32 and consulted with a joint consultative committee. This committee did not have a negotiating function. Its constitution provided for the nomination and election of members, but the employer co-opted people onto it.

The claimants brought proceedings on the basis that they were entitled to a protective award for failures in the consultation process. They argued that the word "proposing" in section 188 of the 1992 Act should have been interpreted as "contemplating" and that consultation should have begun at an earlier stage, in November 2010. The ET rejected the claims on the ground

that there was no duty to consult before the employer had formulated its proposals, applying the decision in MSF v Refuge Assurance plc. The claimants appealed to the EAT.

Decision

1. The appeal was allowed.

2. It was clearly established that there was no duty to consult before an employer had formulated its proposals.

3. The tribunal had failed to determine whether the committee representatives were appropriate.

4. Consultation with a view to reaching agreement was not to be equated merely to the passive receipt of information about an employer's plans. The fact that the committee was not a negotiating body was problematic.

5. It is not enough to provide an opportunity for consultation on particular topics. The requirement to consult with a view to reaching agreement does not mean that the employer is disentitled from having a firm position. It does mean that he must be prepared to listen and to move from it of good reason is shown.

6. To the extent that compliance with the legislation is technical, this may be reflected in compensation but not in liability.

Re-engagement

Facts available at date order made

Rembiszewski v Atkins Ltd (2013) Morning Star, January 25, EAT

R complained of unfair dismissal on the basis that a redundancy scoring exercise had been unfairly applied to him because he had made a protected disclosure. His complaint was upheld and he applied for re-engagement at a remedies hearing in October 2010. The tribunal received further evidence from R and his employer and ruled in January 2011that re-engagement would not be practicable because the employer did not have any suitable work for him. R appealed to the EAT. The employer submitted a cross-appeal arguing that re-engagement would not work because of a loss of trust and confidence.

Decision

1. The appeal was allowed.

2. The practicability of reinstatement or re-engagement is to be determined at the date it is to take effect. The tribunal had only referred to evidence given at the hearing in October 2010 and it seemed that it had not taken into account written evidence and submissions sent after that date.

Sex discrimination

Haynes v Neon Digital (Document Solutions) Ltd and Others (2012) EqOppR224:30,Bury St Edmunds ET

H was dismissed from her employment with N shortly after S, the managing director of N, was informed that she was pregnant. She was told that the reason for her dismissal was redundancy. She complained of unfair dismissal and sex discrimination.

Decision

1. S was not a credible witness. His general attitude to female employees was sexist and he commented on the size of H's breasts. S told her to "grow a pair of balls". It was not a coincidence that H was put on notice of redundancy and dismissed shortly after S learned of her pregnancy.
2. S's comments and conduct amounted to direct sex discrimination and harassment. They created an environment which was intimidating, hostile, degrading, humiliating and offensive.
3. H was awarded £11,000 for injury to feelings, based on the middle Vento band because there was a continuing course of conduct.
4. S's solicitors had sent a letter to H demanding £26,000 compensation to recover recruitment costs to replace another employee who had left the company. The tribunal stated that this was an act of intimidation and awarded £3000 aggravated damages.