UK Employment Law Round-up

January 2017 | Volume 1 - Issue 12

Welcome to the January edition of our employment law round-up. In this edition we reflect on the key developments over the festive period, including an innovative way of trying to defeat the strikes which have affected many customers' journeys on Southern Rail. We look at a new vicarious liability case stemming from a Christmas party fallout. We recap on what you need to know for the forthcoming gender pay gap reporting. In addition, we summarise recent developments in areas including whistleblowing, re-engagement and prospective disability discrimination (stress).

Gender pay gap: what do you need to do now?

On 6 April 2017, the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (Regulations) will to come into force (subject to parliamentary approval). *The final version of the Regulations* has been published alongside an explanatory memorandum. The first gender pay gap reports will be due by 4 April 2018 (with publication for three years on both the company's website and a central government website).

What do you (as a qualifying private employer with more than 250 employees) need to do now?

- Ensure you are clear which entities are qualifying entities for the purposes of the Regulations, and how many reports will need to be produced. If each entity employs fewer than 250 employees as at 5 April 2017, no reports will need to be published.

In this issue...

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- Be ready to capture data on the snapshot date (now 5 April 2017 and not 30 April 2017).
- Check the guidance on how quartile pay bands are to be calculated. Remember that the four quartiles (lower, lower middle, upper middle and upper quartile pay bands) must each include an equal number of employees.
- Check that you know who must be included in the calculation. The most recent changes include clarification that employees on sick pay and maternity leave can be excluded from the hourly pay comparison. Partners and LLP members are now carved out. There is no longer a requirement that employees are ordinarily working in Great Britain (the wider definition of employment under section 83 of the Equality Act 2010 applies, being employment under a contract of employment, a contract of apprenticeship, or a contract personally to do work, crown employment, or employment as a relevant member of House of Commons or House of Lords staff). Ensure that you have identified any areas of uncertainty, for example, around casual workers and contractors.
- Check that you know which items need to go into the calculation (basic pay, paid leave, sick pay, area allowances, shift premiums and bonuses) and which are excluded (overtime pay, expenses, benefits in kind, value of salary sacrifice schemes).
- Know before finalising the data what it is expected to say. This will help your organisation plan. Where results indicate a significant gap, the organisation should consider if it wants to produce a narrative, or disclose more extensive data to offset this. If so, it will need time to agree appropriate content. Remember that employees may use any data disclosed for the purposes of an equal pay claim.
- Ensure that the data can be analysed and published on your website and the government website within 12 months (and remain publicly available for three years). Ensure that the overall figures are calculated giving the mean and median average hourly pay.

Bonus is a significant factor in this duty. The number of men and women receiving a bonus in the relevant 12-month period, as well as the gender bonus gap, is likely to be amongst the more controversial elements of the Regulations. While the latest information provides some extra explanation of what amounts to bonus pay, the position is far from clear. It remains likely that companies will interpret the requirements in different ways.

Where any interpretation or discretion is required in producing the annual statement, companies are advised to ensure that their approach remains consistent on a year-by-year basis (until further clarification). A significant change in the figures because of a different interpretation year on year is more likely to attract attention. Given that the enforcement of this duty is largely centred around public perception and self regulation, any negative jump should be avoided. It is expected that most entities will publish data showing a gap; what remains to be seen is how many of those organisations will make progress in closing that gap once other parties are aware of it.

The government's position remains that public authorities will be subject to separate but similar duties to report; further information will be published shortly. The snapshot date for public bodies is expected to be 31 March and not 5 April. Welsh and Scottish public authorities will be subject to separate duties under the devolved powers.

Innovative attempt to defeat Christmas strikes halted, for now

The battle rages on to try to halt the train strikes which have affected so many people over the Christmas period and into the new year. The dispute outlined below between ASLEF and Govia GTR Railway Ltd (GTR), concerning driver operated trains has the potential to expand to other train operators, causing disruption in other areas of the country. Train operators will be trying to think as creatively as possible, to gain an edge where they may not appease the trade unions through more routine industrial relations negotiations.

In *Govia GTR Railway Ltd v. The Associated Society of Locomotive Engineers and Firemen* [2016] EWCA Civ 1309, the Court of Appeal considered an application

brought by GTR (which owns the franchise to run Southern Rail) for an interlocutory injunction to prevent ASLEF (the train drivers' union) from calling strike action in December 2016 and January 2017.

The strikes concerned a continuing dispute about GTR's use of driver-only operated trains and the introduction of new technology. GTR accepted that, in calling strike action, ASLEF was not in breach of UK law (considered independently of EU law). However, GTR argued that it had a separate claim under EU law, in particular under Article 49 (freedom of establishment) and Article 56 (freedom to provide and receive services) of the Treaty on the Functioning of the European Union (formally the EC treaty).

GTR argued that the active engagement of its French shareholders in decision-making was enough for Article 49 to be engaged (which was accepted by ASLEF). However, to argue that it had a claim under Article 56, GTR needed to rely on large number of passengers being prevented (by the strike) from providing, or receiving, services to or from other EU states. This argument was assisted by the fact that the rail link with Gatwick Airport was affected.

Having considered the relevant law, the Court of Appeal did not agree that either provision had been breached. When determining if there was any claim under Article 49, the Court was required to look at the object or purpose of the industrial action, not the damage caused by the impact (i.e. the strike). In this case, the object or purpose of the action was to have a guard on each train as well as the driver, to ensure the safe closing of doors. There was no discrimination on the grounds of nationality. The Court of Appeal did not interpret this as a deterrent to freedom of establishment. They considered the impact of the extreme action of ASLEF on the French investors' willingness to continue to engage in business in the UK. However, the Court felt the purpose of the legislation was not to protect companies from the strong or extreme actions of trade unions.

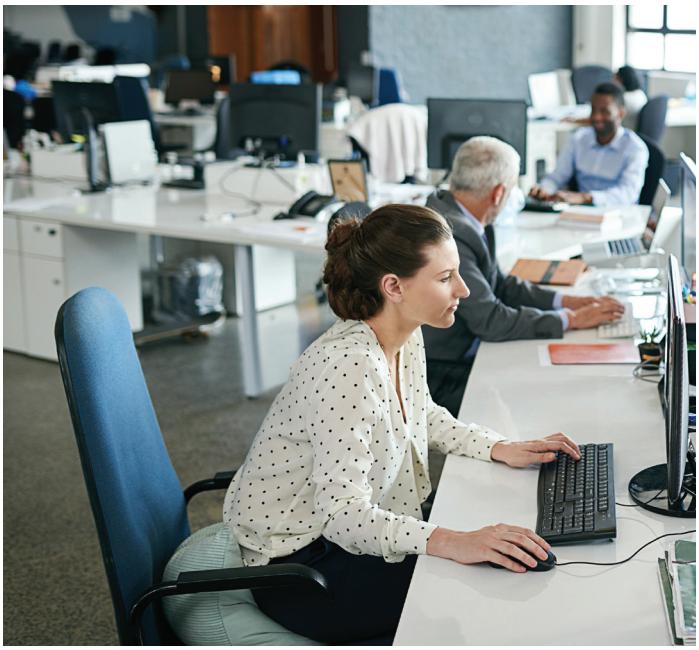
The Court only provided a provisional view about Article 56. However, given GTR's acceptance that it was the strike action, rather than its purpose, that potentially interfered with passenger rights, this aspect of the claim was never likely to succeed. Furthermore, the Court of Appeal was clear that it would not expect it to be so easy to evade the specific transport provisions which featured later in the Treaty.

Not deterred by the Court of Appeal's adverse finding, GTR has announced its appeal to the Supreme Court. It said, "GTR is therefore prepared to continue its legal claim to the Supreme Court, as it believes that it has an arguable case that the industrial action is unlawful under EU law". While the grounds of appeal are not yet known, it appears likely there will be some legal argument about the application of the existing EU authorities (the object or purpose test), as that test was relevant to the claims under both Articles. The Court of Appeal had been wary of making a finding that foreign companies setting up, or expanding into the UK were interfered with on a basis which was “too uncertain, indirect or insignificant to have the requisite deterrent or dissuasive impact”. There is potential for some challenge to this finding, perhaps based on what was, or was not considered. Equally the challenge may be that the bar was set too high and the judge was overly influenced by the fact that the Unions were “strong or even bloody-minded trade unions”. Points about infringement of the rights of GTR's passengers are also likely to be revisited in the appeal in some way. The Court of Appeal was generally dismissive of GTR's authorities in respect of its points on Article 56, so there may be some interpretation points made on appeal.

There is little case law in relation to the transport provisions in Article 58, which may assist GTR to some degree in making points about its interpretation on appeal.

It remains to be seen if other employers with a cross-border shareholding will also seek to bring claims under EU legislation and, if so, whether further clarity will be provided on the proportion of the shareholding required to establish that cross-border element.

RMT has put other train operators on notice that they are not safe from the union's disruptive tactics unless it receives "cast iron assurances" about the role of guards. This is unlikely to be the last that we will see of the rail dispute



The Christmas party, and the fallout that followed

Many will recall the vicarious liability case heard earlier in 2016, involving a petrol station attendant (*Mohamud v. WM Morrison Supermarkets plc.* [2016] UKSC 11) where it was found on appeal that there was a sufficiently close connection between a vicious assault and the employee's job of attending to customers.

In the recent case of *Bellman v. Northampton Recruitment Ltd* [2016] EWHC 3104 (QB), the High Court has found that a company was not vicariously liable for an assault by its Managing Director on his sales manager (who was also a childhood friend) when drinking together immediately after the company's Christmas party.

When determining vicarious liability, the Court considers whether the torts committed by an employee were "so closely connected with employment that it would be fair and just to hold the employers vicariously liable". In this case, 24 guests (employees and their partners) attended a Christmas party at a golf club. After that, about half of the guests attended "impromptu" after-party drinks at a hotel where some employees were staying. During a contentious discussion about work-related matters, the Managing Director punched the sales director twice. The extent of the injuries suffered by the sales manager mean that he may never work again.

Significantly in the Bellman claim, the Court found it relevant that the drinks were not planned but, as the company was paying for taxis home, it instead paid for the taxis to the hotel where the after-party drinks were held. It was understood that the company would pay for at least some drinks. The Court focused on the roles and responsibilities entrusted to the Managing Director, including that, as "controlling mind" of a small company, he was authorised to act on the company's behalf with a wide remit and that things were done "his way". However, the Court did not feel that the wide range of his duties he held meant that he was automatically "on duty" (or for that matter "off duty") at any one time. All the circumstances needed to be considered to determine this.

When considering if there was a sufficiently close connection between the position in which the Managing Director was employed and the wrongful conduct, such that the company should be liable, it decided:

- there was a clear separation between the Christmas party and the "impromptu" drinks, which were not a seamless extension of the party; and
- the fact that the dispute concerned a work-related matter was only relevant to a limited degree.

In the absence of any incident or confrontation at the Christmas party, the Court was not minded to place material emphasis on the provision of alcohol by the company, which it felt but for the decisions of those who chose to participate could have been enjoyed in moderation. There were insufficient grounds to conclude that acts were so closely connected with employment that it would be fair and just to hold the respondent company liable.

The decision may yet be appealed, particularly given the significance of the level of potential loss. In any event, employers should exercise caution in assuming that this broader application of the close connection test means that they will not be liable for any incidents which occur after the official end of a Christmas party.

Not practicable to re-engage?

In the case of *United Lincolnshire Hospitals NHS Foundation Trust v. Farren* UKEAT/0198/16, the Employment Appeal Tribunal (EAT) considered re-engagement of a band 5 staff nurse. The Claimant was dismissed for allegedly administering drugs to four patients without prescriptions and failing to adequately record their treatment. The decision was held to be unfair because of a predetermined presumption of guilt.

The Trust argued that the Claimant could not be re-engaged because it could no longer trust her. This was based on her response in the disciplinary case and evidence before the Tribunal, which the Trust considered had been dishonest.

The Tribunal was clear that a conduct dismissal alone will not mean that re-employment would be unjust. Rather it was important to assess the degree of the employee's contribution to the dismissal. If the contribution level was high, this might be inconsistent with the Trust re-engaging the Claimant. The Tribunal considered the Trust's Policy for Medicines Management. It also considered the Claimant's long service and character references and the fact that she had taken voluntary training in medicines management.

The Tribunal considered that the Claimant could not be re-engaged in her old role, given the emphasis placed on respect for the policy, but she could be re-employed in a band 5 post at the hospital outside A & E.

The Trust successfully appealed, and the EAT remitted the case back to the same Tribunal.

The EAT said that when the Tribunal is contemplating an order of re-engagement and an employer is relying on a breakdown in trust and confidence, the Tribunal will need to be satisfied that:

- the employer genuinely believed that trust and confidence had broken down; and
- that belief was not irrational.

The issue of the breakdown of mutual trust and confidence needs to be tested (i.e. the Tribunal must not just form its own view) before the Tribunal can decide if it is practicable to re-engage.

Orders for re-engagement remain rare. However, where a Tribunal can be said to have substituted its view in a re-engagement, this will result in a ground for appeal.

Difficulties at work resulting in disability?

When does stress at work amount to a disability? In the recent cases of *Herry v. Dudley Metropolitan Council UKEAT/0100/16 and Herry v. Dudley Metropolitan Council and Governing Body of Hillcrest School* UKEAT/0101/16, the EAT provided some clarification.

The Claimant was a teacher and part-time youth worker. Over a four-year period, he raised 90 allegations in claims in the employment Tribunal against both Respondents. The Tribunal hearing lasted 39 days. All the claims were dismissed.

Following an application for a costs award against him the Claimant brought further claims against Dudley Metropolitan Council alleging disability and race discrimination. He said that his disabilities were dyslexia, stress and depression. The Claimant had been diagnosed with dyslexia in 1996 (while at university). The Council did not concede that the Claimant was disabled (although accepted he was dyslexic). While employed as a teacher, the Claimant did not make anyone aware of his dyslexia, or ask for any adjustments. The Claimant had various absences from work. However, in the period to April 2013, the Claimant's medical certificates referred mainly to a physical injury. It was only after that time that they began to refer to "stress at work", "work related stress", "stress", or "stress and anxiety". There was no reference to depression on any medical-certificates.

The Claimant had advised the Tribunal that he had dyslexia and asked for adjustments to be made, which the Tribunal allowed. However, the Tribunal ultimately found that the Claimant was not disabled at the relevant time. It noted that he was "intelligent and able to analyse, with the benefit of a short period of time, documents and instructions and to fully comprehend them". He had not shown that his dyslexia had a substantial adverse affect on his ability to perform day-to-day activities. The Tribunal considered that his stress was "very largely a result of his unhappiness about what he perceives to have been unfair treatment of him and to that extent is clearly a reaction to life events". The Claimant appealed to the EAT.

The EAT found the Tribunal had been correct to conclude that the Claimant was not disabled at the material time. The EAT did not agree that just because the Tribunal had agreed to make some adjustments for the Claimant in the Tribunal hearing, it was then bound to agree that he was disabled. The EAT did not agree that the Tribunal had incorrectly defined substantial adverse effect. The Tribunal's observation that the Claimant's stress was a reaction to life events was a reference to previous case law where Lord Justice Underhill had made a distinction

between a mental impairment (which could be a disability) and a reaction to life events (which could not).

The EAT said that where there is a work-based dispute and the employee will not compromise, or return to work, this will often be recorded by medical practitioners as stress, even where that individual suffers no, or little, obvious impact on their normal day-to-day activities. It clarified that in these circumstances, a Tribunal is not bound to find there is a mental impairment for the purposes of assessing if a person is disabled under the Equality Act. Any medical evidence put before a Tribunal in such a case must be carefully scrutinised, but the decision on whether there is a mental impairment is ultimately one for the Tribunal.

Uber, CitySprint, Deliveroo... time for change?

The negative press around gig economy working has been prevalent over the past few months. Below, we take a look at the most significant developments in case law, including some innovative attempts by one trade union to achieve prompt and cost-effective resolution for its prospective members.

In *Aslam and others v. Uber BV and others* ET/2202550/15 the Tribunal (at a preliminary hearing stage) found that Uber's drivers were workers for the purposes of bringing claims for unlawful deductions (failure to pay National Minimum Wage) and failure to give paid leave in accordance with rights granted under the Working Time Regulations. The organisation, which enables consumers to order taxis via a smartphone app, built its employment model around individuals being self-employed and, as such, not accruing key employment law rights.

There were some factors that were consistent with self-employed status. Drivers supplied their own vehicles and were responsible for upkeep, running costs and private licences. They were not required to make any commitment to work, but were considered on duty when they logged onto the app. If a job was available, they had 10 seconds to accept the job, before it moved on to locating another driver.

However, there were also some factors pointing to worker status, with a level of integration and control by Uber. If drivers continually missed jobs they would receive warnings which could ultimately result in their access to the app being suspended or blocked. They did not have complete access to customer details. Uber could withdraw use of the app for drivers rated poorly. Drivers were not aware of the final destinations until collecting

a passenger and all directions were supplied by the smartphone app. Uber took some risk, for example, with regard to fraud by passengers.

In this case the Tribunal was seemingly influenced by the scale of Uber's operation, saying that it was an unbelievable notion that London could be covered by a mosaic of 30,000 small businesses linked by common practices. They said that it was unreal to deny that the individuals were suppliers of transfer services. It was not believable that Uber was working for the drivers. In so far as there was a contract between drivers and passengers, there was no ability for any real bargaining. As a result, the individuals were workers as long as the app was turned on, they were ready and willing to accept fares and in a territory where they were authorised to drive. Whilst the assessment for the claim under the Working Time Regulations was different, the outcome was the same.

Hot on the heels of the above claim was a claim by a CitySprint cycle courier (Dewhurst v. CitySprint UK Ltd ET/2202512/16) for holiday pay under the Employment Rights Act. In that case, individuals were required to enter into a "tender to supply services" and then electronically supply terms including terms which stated that:

- there was no obligation on CitySprint to provide work;
- substitution was permitted (although it did not occur in practice);
- no pay would be received when the individuals did not work;
- individuals were not entitled to holiday pay, maternity pay, or sick pay; and

- self-billing and invoicing system would be required for payment (although in practice CitySprint calculated what was due and paid the couriers after deductions).

In a similar way to the app used in the Uber case, couriers were directed via a centralised service. However, unlike in the Uber claim, drivers wore a uniform. CitySprint told them to smile, as part of a professional service.

Relying on the previous claim of *Autoclenz v. Belcher and others* [2011] IRLR 820, the Tribunal found that the words "confirmation of tender" were not enough. They did not reflect the true relationship between the parties. The Tribunal found that in practice, the Claimant had little autonomy to determine the manner in which services were performed and that she had been integrated into CitySprint's organisation. Accordingly, she was a worker at the times she was logged onto the tracking system.

While these are first instance decisions, they display an interesting appetite to protect against the mis-use of a self-employed status to prevent individuals who are truly workers from gaining certain employment law rights. While, in the case of Deliveroo, one trade union (Independent Workers Union of Great Britain), following a historic precedent, was innovative in asking the Central Arbitration Committee to make a decision on worker status in an application for recognition (which if decided in the union's favour would result in a non-binding but persuasive decision which could be used for negotiation, or in any employment Tribunal claim), there does not appear to be too much of an appetite among the trade unions for any mass action. This may be influenced by the fact that there may be more valuable claims to pursue on a collective basis; in the case of CitySprint the claim was only worth two days of holiday pay.

Wholesale reform is unlikely to result from the above cases, or from those of a similar nature which are pending. It is much more likely to inform legislative change. The following dates are indicative that key bodies have this issue firmly in their sights, even if no firm proposals have been issued yet:

- 26 October 2016 BEIS Committee launched inquiry into future world of work, including looking at gig economy. The deadline for written submissions was 19 December 2016;
- 30 November 2016 BEIS launched Independent Review of Employment Practices in the Modern Economy. The outcome will inform government's strategy (expected to last six months);
- 1 December 2016 Work and Pensions Committee inquiry to consider whether the UK welfare system adequately supports the growing number of self-employed and gig economy workers. The deadline for written submissions was 16 January 2017; and
- 2 December 2016 Office of Tax Simplification (OTS) published a focus on exploring tax issues and implications of the gig economy.

One approach that affected companies may take is to pacify staff with some small concessions and resist any more substantial changes (unless and until legally required) and sensibly use the time to plan how best to re-work their employment model. If they are unable to do this, the obvious impact is that these organisations will have to pass their cost increases on to their customers, making them much less competitive in the market.

Intertwining allegations and information, the case of the misused password

In the case of *Eiger Securities LLP v. Korshunova* UKEAT/0149/16 the EAT considered what amounted to a protected disclosure when bringing a whistleblowing claim.

The Claimant was a sales executive, at Eiger Securities LLP, a broking business, from 1 April 2013. She was dismissed for gross misconduct on 25 July 2014.

Aggrieved at the Managing Director using her sign-on details on Bloomberg Chat without identifying himself, the Claimant said the following to the Managing Director:

"It is wrong for you to log in under my name when I am not in the office and trade under my name without making it clear that it is not me who is making the trade and identifying that it is you. Yes, and my clients do not like that you talk to them pretending it is me when I am away for lunch."

Following this, the Claimant was warned by text message that changing her password without notifying the Managing Director would be gross misconduct. The Managing Director had already instructed the company's IT team to give him access to the Claimant's computer.

In July 2014, the Claimant had client accounts transferred away from her. Disciplinary action was instigated following two trading errors, and she was ultimately dismissed in her absence at a disciplinary hearing. The finding was that she was guilty of insubordination (failure to follow reasonable instructions). The Claimant was alleged to have misused Eiger's systems by switching her computer off and changing passwords without notifying customers, as well as having caused the company loss because of misquoting. The Claimant's internal appeal was rejected.

The Claimant convinced the Tribunal that she had made a qualifying disclosure for whistleblowing purposes, and this had resulted in her being subjected to a detriment.

However, Eiger was successful in its argument on appeal that, whilst the Claimant had disclosed information, there was a failure to identify the legal obligation that had been breached. The Tribunal had therefore failed in its approach to the question of whether she had been subject to a detriment.

The EAT said that, while the Tribunal found the Claimant reasonably believed that her colleagues were breaking some industry guidance or rules involving legal obligations, it had not identified what legal obligation was potentially breached. It also had not considered whether industry guidance or rules (which the Claimant said must have been breached) gave rise to any legal obligation. It said that while the Claimant was not required to provide detailed and precise identification of the legal obligation she felt had been breached, the Tribunal should have gone further. It felt that this was fundamental to the Tribunal being able to decide the reasonableness of the Claimant's belief that the legal obligation had not been complied with.

It was also not enough that Eiger had in its mind the disclosure when dismissing. The Tribunal was required to ask whether it was the reason or principal reason for dismissal.

The EAT agreed with Eiger that the Tribunal had made a further error in blurring the disclosure with the Claimant's subsequent conduct. The Tribunal had not found that the subsequent conduct was a repetition of the disclosure.

The claim was remitted for consideration by a fresh Tribunal.

The decision that the Tribunal had not gone far enough to identify the legal obligation appears to place a greater obligation on Claimants than was previously understood.

Interestingly, the public interest element of the requirement to achieve whistleblowing protection was not a focus of this claim. Whilst not a claim about the Claimant's own terms and conditions, this complaint was largely personal to the Claimant's situation. It appears to us that any arguments about public interest must have centred around the fact that the chat room was externally facing.

Reasonable instruction to move working location?

In the case of *Kellogg Brown & Root (UK) Ltd v. (1) Fitton UKEAT/0205/16 and (2) Ewer UKEAT/0206/16* the EAT upheld an appeal against a Tribunal's finding that two employees had been dismissed for redundancy when the company purported to use a mobility clause to move their working location, when their office closed.

When the company took the decision to close one of its two offices, it relied upon a clause in the Claimants' contracts (as below) to move employees to the other office.

"The location of your employment is ... but the company may require you to work at a different location including any new office location of the company either in the UK or overseas either on a temporary or permanent basis. You agree to comply with this requirement unless exceptional circumstances prevail."

The employees were notified in April that they were required to move in June.

On taking advice, Mr Fitton told the company that he considered that he was redundant and entitled to a redundancy payment. He told the company that the mobility clause was unenforceable, he was not routinely required to travel and it was not a true condition of his employment. The company said that the mobility clause was to ensure retention of the workforce and continuity of delivery for clients. They considered that the availability of work at the other office location meant that no redundancy payment was available and that a refusal was a breach of contract. The company had taken a view only to offer redundancy payments in exceptional circumstances, including where employees had caring responsibilities for children or elderly relatives.

These exceptional circumstances were not considered to apply to Mr Ewer, who approached the company in a distressed state objecting to the additional travel and asserting that the mobility clause was not valid. He considered that after 25 years' service and approaching retirement he should not be increasing his daily commute by 29 miles each way, to a total of 47 miles each way. Mr. Ewer also asserted that this was a redundancy situation. Mr Ewer was summarily dismissed after he failed to attend his new place of work. His internal appeal was dismissed.

The Tribunal found that the mobility clause was broad and lacked certainty. It found that the instruction to work at the other office was unreasonable, given the greatly increased commuting time. Steps which the company had taken to alleviate the longer commute were not

considered significant to Mr Fitton and Mr Ewer, although they might have been for some employees. All the factors, including Mr Ewer's proximity to retirement and his lifelong connection to his prior working town needed to be taken into account when assessing the question of the increased travelling time.

However, on appeal the EAT disagreed. It found that the Tribunal had been incorrect to identify a redundancy situation. It should have asked itself what the company genuinely had in mind when dismissing the employees. Due to the fact that the company believed that the clause was enforceable, what it genuinely had in mind was the employee's failure to comply with its instruction. The EAT also felt that the Tribunal had lost sight of the mitigating steps the company had taken when reaching its decision.

Regardless of its finding that the Tribunal had erred in identifying the reason for the dismissals, the EAT upheld the Tribunal's finding that the dismissals had been unfair. The Tribunal had found that, in the circumstances, the employer had not been entitled to rely on the mobility clause, its instruction to move to the other office had not been reasonable and the employees had reasonable grounds to refuse.

Employers can expect that where employees are requested to move any significant distance under a mobility clause, their mobility clause wording will be scrutinised. Often it will be a question of what the employer can offer to mitigate the disadvantage to the employee. However, this case demonstrates the significant blurring between a redundancy situation and a misconduct situation where the employee cannot be appeased. It is a generous opportunity for employers to try to show that they genuinely believed in the legal enforceability of their mobility clause provisions.

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