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UK Employment Law Round-up

OCTOBER 2018 | ISSUE 29

In this issue we look at some of the key employment law developments over the past month. In particular, we examine a Court of Appeal decision on the scope of litigation privilege; we discuss an EAT decision on changing terms and conditions after a TUPE transfer; we reflect on a European Court decision on when an employer can require employees to be loyal to its religious ethos; and finally we consider a recent Supreme Court case on discrimination on the grounds of sexual orientation or political opinion.

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The Director of the SFO v. Eurasian Natural Resources Corporation Limited

In *The Director of the SFO v. Eurasian Natural Resources Corporation Limited (ENRC)*, the Court of Appeal overturned the High Court's decision and held that documents prepared by external lawyers and forensic accountants for an internal investigation are protected by litigation privilege.

Litigation privilege covers confidential communications between a client and a lawyer or third party made for the dominant purpose of conducting adversarial litigation which is pending, reasonably in contemplation or existing. It protects the client from having to disclose such communications to the opposing side in any proceedings.

Background

In December 2010, ENRC received a whistleblower's email that one of its overseas subsidiaries was involved in corruption and financial wrongdoing. It engaged external lawyers and forensic accountants to conduct an internal investigation into the claims.

The lawyers' notes (including 180 interviews with employees) and the accountants' review of ENRC's books and records are the documents over which ENRC claimed litigation privilege (the Documents).

The SFO got wind of the alleged corruption at ENRC and held meetings with the company to discuss compliance procedures and to consider self-reporting. In the following months, ENRC repeatedly promised commitment to a "full and frank" process but never made a substantial report of the results of the internal investigation.

In April 2013, the SFO announced a criminal investigation into ENRC; it served notice on the company under section 2 of the Criminal Justice Act 1987 requiring disclosure of all evidence relating to offences of bribery and corruption. ENRC claimed litigation privilege over the Documents and the current dispute ensued.

The Court of Appeal's judgment and its effect

The Court of Appeal held that the Documents were protected by litigation privilege because:

(1) Litigation was reasonably in prospect when the Documents were created.

The Court of Appeal looked at all the circumstances and correspondence to determine whether litigation was reasonably in prospect during the investigation. A lawyer's contemporaneous statement that litigation "could be said to be reasonably in prospect" will not be conclusive evidence on this point.

The court took into account several factors, including the fact that there was a whistleblower's email alleging corruption. Internal correspondence also showed that ENRC staff expected ENRC to be firmly on the SFO's radar; they predicted a dawn raid before summer was over and upgraded dawn raid procedures in response. The court held that the documents and evidence pointed clearly towards the contemplation of a prosecution.

It would therefore be prudent for companies to keep a full record of documents and correspondence detailing when the company first anticipated prosecution or litigation, and any measures taken to deal with it. A fuller account of the reasons for believing litigation to be in prospect will be more likely to persuade a court to accept that documents created in that period for the dominant purpose of the conduct of that litigation are privileged.

(2) The dominant purpose of the Documents was to obtain advice or information for legal proceedings reasonably in contemplation.

The SFO failed in its argument that the Documents were created only to avoid (rather than to resist or defend) contemplated proceedings and that they were not privileged as a result. Companies will welcome the fact that legal advice "given so as to head off, avoid or even settle reasonably contemplated proceedings" is as much protected by litigation privilege as advice given to defend a claim.

The SFO also sought to argue that ENRC only engaged lawyers and accountants to perform a "fact-finding" and "investigatory" role, rather than provide it with actual advice regarding contemplated litigation (as stated in its retainer). The Court of Appeal rejected this as it "sat

uncomfortably" with the background that a criminal prosecution was reasonably in ENRC's contemplation and that the purpose of its role was to assist ENRC in producing documents that would become useful in avoiding litigation later on. This generous interpretation of the role third parties play in an internal investigation makes it more attractive for companies to consult and involve third parties in an investigation involving corruption.

(3) Communications between employees and lawyers for the dominant purpose of conducting or avoiding litigation will fall within litigation privilege.

Companies will welcome the fact that communications between their employees and legal advisers for the purpose of an internal investigation in anticipation of proceedings will also be privileged. The court had special regard for large corporations because it would be more likely that the employees (rather than the company's board) would have information about the case. Companies should encourage employees to participate in internal investigations by providing lawyers and accountants with evidence and interviews; this will enable the company to investigate alleged unlawful practices more thoroughly.

What about self-reporting?

If a company participates in a self-reporting process, this may remove its entitlement to litigation privilege, depending on the extent to which it has promised to disclose documents. In the current case, even though ENRC had appeared to take part in the self-reporting process and agreed to be "full and frank", the court emphasised that it had never actually agreed to disclose the materials created in the course of its investigation. Therefore, litigation privilege was not lost over the Documents.

Companies should therefore be careful not to make any express commitment to disclose particular documents to the opposition because litigation privilege is likely to be lost as a result. However, it appears that a more general commitment to co-operate will not be seen as a waiver of litigation privilege. If the SFO then serves a section 2 notice requiring the disclosure of documents relating to alleged offences, litigation privilege will apply, provided that the company has not promised specifically to disclose any particular documents.

Why this is good for companies

Companies will be able to obtain fully informed legal advice for the purpose of avoiding any potential litigation and that advice and the documents created in order to obtain it are privileged. The court recognised that "it is obviously in the public interest that companies should be prepared to investigate allegations from whistle-blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation".

It is welcome that the sanctity of litigation privilege was preserved in this case. Interestingly, the Court of Appeal took into account that the self-reporting guidelines which the SFO asked ENRC to consider clearly envisaged that they would need to receive professional advice from third parties during this process of investigation. It would be strange for the guidelines to expect companies to approach professionals for advice without reassurance that the advice would not later be revealed in court.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Does an employee waive an employer's repudiatory breach by resigning on notice and continuing to work? – http://www.ukemploymenthub.com/does-an-employee-waive-an-employers-repudiatory-breach-by-resigning-on-notice-and-continuing-to-work
- Parental Bereavement (Leave and Pay) Act 2018 receives royal stamp of approval – http://www.ukemploymenthub.com/parental-bereavement-leave-and-pay-act-2018-receives-royal-stamp-of-approval
- Employment Tribunal quarterly statistics published – http://www.ukemploymenthub.com/employment-tribunal-et-quarterly-statistics-published
- New legislation seeks to ensure restaurant owners give their employees all tips from customers – http://www.ukemploymenthub.com/new-legislation-seeks-to-ensure-restaurant-owners-give-their-employees-all-tips-from-customers

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Employer's post-transfer removal of outdated allowance not void under TUPE

Changing terms and conditions following a TUPE transfer is a minefield for employers, with the penalty of changes being void if the reason for the change is found to be the transfer itself. Helpfully, however, the recent EAT case of Tabberer and Others v. Mears Ltd and Others has provided a clear example of where a change is permitted under the law.

Background

To understand the decision, we have to turn the clock back to 1958, when a travel time allowance (called ETTA) was introduced for electricians who worked for Birmingham City Council. The background to the allowance was to compensate electricians because their working arrangements meant that they could not earn a productivity bonus. The electricians were working across 30 to 40 depots, resulting in more travel time between sites and lost working time on site.

By 2006, the working arrangements had changed. There was only one depot left and the electricians were now working in vans, receiving their job instructions on mobile devices. The productivity bonus had been phased out and was no longer available. But ETTA was continuing to be paid, despite the employer believing this was no longer justified.

On 1 April 2008, there was a TUPE transfer to Mears Limited. The electricians were told they would cease to receive ETTA. They were told they were not entitled to it because it was out of line with their current (bad pun intended) working practices. This sparked (all right, no more) a Tribunal claim for unlawful deduction of wages (Salt v. Mears Ltd). On 1 June 2012, the EAT agreed with the Tribunal that there was a contractual entitlement to ETTA.

However, during the unlawful deductions proceedings both the Tribunal and the EAT had referred to the ETTA payments as "outdated" and "prehistoric". Using the same language, Mears wrote to the employees on 30 July 2012 giving them notice that their contract would be changed

such that they would no longer be entitled to receive ETTA. Mears also stated that the allowance was unfair on the remainder of the workforce, whose working hours operated in the same way as the electricians, but who could not claim the allowance.

The electricians brought fresh claims, alleging that this change was void under TUPE. Their argument was rejected at first instance by the Tribunal and the electricians appealed to the EAT. They argued that the change was linked to the TUPE transfer on the basis that there was a factual link with the date of transfer and ETTA payments not being made. They highlighted the fact that there was a campaign from the point of transfer to remove the allowance. They also argued that Mears' reasoning in respect of unfairness to the remainder of the workforce indicated an intent to harmonise.

The EAT had to decide what the reason was for the variation to the relevant employment contract. This is a question of fact and not of law. If it was found that the transfer had been the sole or principal reason for the variation, it would have been void.

EAT decision

It was held that:

- The outcome of the *Salt* litigation was not the reason for the decision to vary the contract, although it had set the context.
- The Tribunal had made a permissible finding of fact that the reason or principal reason for the decision was to ensure that the contractual entitlement to ETTA was brought to an end because Mears believed that the entitlement was outdated. Mears could not countenance having to maintain a contractual entitlement when the historic rationale for this had long since disappeared.
- The Tribunal was entitled to take into account the fact that the previous employer felt that ETTA was unjustified. Therefore the belief that the payment was outdated and unjustified did not arise purely on the occasion of the transfer. It was a pre-existing state of affairs.
- Although Mears only came into the picture on the transfer, it would have questioned the payment of ETTA even if there had been no transfer. This would be no different to a new manager coming into the workplace and taking action upon learning of such an entitlement. It just so happened that Mears learned of the payment at around the time of the TUPE transfer.
- The need for fairness across the workforce as a whole did not necessarily indicate a desire to harmonise.

Comment

The lesson to be learned is that it is important not to confuse the context with the reason when assessing what caused a change in employment terms following a TUPE transfer. In this case, the reason for the variation existed regardless of the transfer.

This does not give employers carte blanche to make changes to terms and conditions following a transfer. Advice should always be sought, particularly since changing terms and conditions of employment without agreement can have other legal consequences, including constructive dismissal.

Dismissed for remarrying: Religious discrimination at work

In the recent case of IR v. JQ, the Court of Justice of the European Union (CJEU) has held that the dismissal of a Catholic employee because he did not act in accordance with the religious ethos of his employer could constitute unlawful discrimination.

The CJEU was asked by the Federal German Court to consider whether an employer whose ethos is based on religion or belief can impose an obligation on its employees to behave with loyalty towards that religious ethos. The CJEU ruled that an employer can only do

so where the religion or belief is a genuine, legitimate and justified occupational requirement, in accordance with Article 4(2) of the EU Equal Treatment Framework Directive (No.2000/78) (the EU Equal Treatment Directive).

Background

JQ, a Roman Catholic, was employed as the Head of Internal Medicine in a Catholic hospital run by IR, a charitable company subject to the supervision of the Archbishop of Cologne. JQ had previously married in a Roman Catholic ceremony but later divorced his first wife. He subsequently remarried in a civil ceremony without his first marriage being annulled.

When IR became aware that JQ had remarried, he was dismissed on the ground that he had breached a contractual duty to be loyal to the ethos of the Catholic Church, which considers religious marriage to be sacred and indissoluble by divorce. IR claimed that it was entitled to require JQ, as a Catholic doctor in a managerial position, to follow the Catholic Church's teaching on marriage.

JQ argued that his dismissal amounted to unlawful discrimination, because an employee of Protestant faith or no faith would not have been dismissed for remarrying. JQ, as a Catholic, was being required to provide greater loyalty to IR's Catholic ethos than non-Catholic employees.

CJEU ruling

The German Federal Labour Court sought clarification from the CJEU on the correct interpretation of the EU Equal Treatment Directive.

The CJEU held that, where an employee receives less favourable treatment because of his or her religion, there must be a genuine, legitimate and justified occupational requirement for such treatment in the light of the ethos in question, and that the treatment must be proportionate. The CJEU referred the matter back to the German Federal Labour Court to satisfy itself on these issues.

However, the CJEU observed that adherence to the Roman Catholic doctrine of marriage did not appear to be necessary for the promotion of IR's ethos, bearing in mind the importance of the occupational activities performed by JQ in the hospital, namely providing medical advice and care and managing the Internal Medicine Department. Therefore, in the CJEU's view, such adherence did not appear to be a genuine requirement of JQ's occupation. The CJEU found support for its view in the fact that similar positions within the hospital were held by employees who were not Roman Catholic.

Comment

This case serves as a useful reminder to employers with a religious ethos that they must avoid applying a blanket occupational requirement of adherence to that ethos on all employees. Rather, employers should be able to justify and evidence the necessity of any such occupational requirement imposed on any particular employees.

"Gay marriage" cake: refusal to supply was not discriminatory

In Lee v. Ashers Baking Company Limited and Others, the Supreme Court considered whether a bakery's refusal to supply a cake with a slogan supporting gay marriage was discriminatory on the grounds of sexual orientation or political opinion. It held that there had been no unlawful discrimination, overturning the decisions of the courts below.

Background

The background to this case has received a lot of publicity. Mr Lee, a gay man, volunteers for a charity called QueerSpace, which supports the LGBT community in Belfast. It supports the campaign in Northern Ireland to allow same-sex couples to marry, although it is not itself a campaigning organisation.

Mr Lee was invited to attend a private event organised by QueerSpace to mark the end of Northern Ireland's anti-homophobia week and reinforce the political momentum towards same-sex marriage. He wanted to take a cake to the party.

He had bought cakes before from a shop run by Ashers Baking Company Limited. Ashers is a business owned and managed by the McArthur family, who are Christians. The company's name has a biblical origin and they try to run the business in accordance with their beliefs, although they do not advertise that fact.

Mr Lee placed an order with Ashers for a cake to be decorated with a picture of the muppets Bert and Ernie, the QueerSpace logo and the slogan "Support Gay Marriage". Whilst the order was initially accepted, and the cake paid for, the McArthurs reflected on the order and concluded that they could not in conscience make a cake with that slogan. They therefore called Mr Lee to explain that they could not fulfil the order as theirs was a Christian business and they could not supply a cake with the requested slogan. They apologised to Mr Lee and arranged a refund.

Mr Lee brought claims of discrimination on the grounds of sexual orientation and political opinion in the Northern Ireland county court against Ashers and its owners, the McArthurs. His claims were upheld by the district judge and the Northern Ireland Court of Appeal dismissed Ashers' appeal, albeit on different grounds.

Supreme Court decision

Ashers then appealed to the Supreme Court, which gave judgment on 10 October 2018. The Supreme Court upheld Ashers' appeal, finding that the McArthurs (and hence the business) had not discriminated against Mr Lee on the ground of his sexual orientation. The court also allowed the appeal against the finding of discrimination on the grounds of political opinion.

Mr Lee's sexual orientation claim was based on alleged "associative" discrimination, namely that the reason for cancelling the order was that he was likely to associate with the gay community. However, Lady Hale (who gave the leading judgment) found there was no evidence that Ashers had discriminated on that or any other ground in the past. They employed and served gay people and did not discriminate against them because of their sexual orientation. Contrary to the findings of the district judge, Lady Hale believed that Mr Lee's sexual orientation could be dissociated from his support for gay marriage. People of all sexual orientations can and do support gay marriage.

The crucial point for the Supreme Court was the fact that the bakery had not cancelled the order because of Mr Lee's sexual orientation but because of their religious objection to the message to be printed on the cake in favour of gay marriage.

When it came to the claim of discrimination on the grounds of political opinion, Lady Hale found that there was a much closer association between Mr Lee's sexual orientation and the message he wished to promote and a greater argument that the two were "indissociable". However, Lady Hale relied on the McArthurs' rights under the European Convention on Human Rights and the Supreme Court's conclusion in previous cases that no one should be forced to have or express a political opinion in which they do not believe. As a result, the McArthurs (and by extension Ashers) could not be forced to produce a cake bearing a message with which they profoundly disagreed.

Lessons for employers

Whilst the case concerns the supply of goods and services, there are lessons to be learned for employers. The Supreme Court judgment expressly emphasised that the situation was not comparable to someone being refused a job because of their political opinion or religious belief. It is a clear reminder of the tensions that exist where different beliefs or opinions conflict. It is wise to tread with caution in these situations and take advice before acting.

It should also be noted that, unlike the rest of the UK, only the law in Northern Ireland prohibits discrimination on the grounds of political opinion, as distinct from religion or religious or philosophical belief.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- People Management – Susan Doris-Obando comments on the tribunal's ability to order reinstatement and the penalties for not complying with such an order.
- People Management – Susan Doris-Obando comments on the danger surrounding dismissals around the time of a TUPE transfer.

If you have an idea of a topic you'd like us to cover in a future round-up or seminar, please provide your comments here.

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