This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.

January 2016

This is a summary of some of the most important cases reported in December 2015. It is not intended to be a full analysis of each and every case and some cases reported this month are not contained in this summary. We have made an editorial decision about which cases to include to ensure that the document remains manageable.

Instructions

- Clicking on the Case name will take you to the actual case report.
- Clicking on "read more" will take you to our PM summary and action points/commentary
This edition includes:

"NEED TO KNOW"

DISABILITY DISCRIMINATION

1. CoA ruling on duty to make reasonable adjustments to absence triggers
   Griffiths v The Department for Work and Pensions - Read more (p4)

2. Reasonable adjustments and competitive interviews
   Waddingham v NHS Business Services Authority - Read more (p5)

3. Negative verbal reference leads to disability discrimination
   Pnaiser v NHS England and Coventry City Council - Read more (p5)

DISCRIMINATION

4. CA rules that length-of-service pay criterion did not indirectly discriminate against Muslim chaplain
   Naeem v Secretary of State for Justice - Read more (p6)

5. Instruction not to speak Russian not discrimination
   Kelly v Covance Laboratories Ltd - Read more (p7)

"NICE TO KNOW"

TERMINATION OF EMPLOYMENT

6. Application to restrain hearing re termination of employment premature
   Al-Mishlab v Milton Keynes Hospital NHS Foundation Trust - Read more (p8)

SUMMARY DISMISSAL

7. Is an employer permitted to summarily dismiss an employee for releasing confidential information?
   Farnan v Sunderland Association Football Club - Read more (p9)

GIVING EFFECT TO EU LAW

8. Can a key provision in domestic legislation be deleted to give effect to EU legislation?
   The Advocate General for Scotland v Barton - Read more (p10)

*Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* - Read more (p11)

**COMPENSATION**

10. Does the Simons v Castle uplift apply in Employment Tribunals?

*Beckford v London Borough of Southwark* - Read more (p12)

**CONTRACTS**

11. New clarification for when terms will be implied into contracts

*Marks and Spencer plc (Appellant) v BNP Paribas Securities Services Trust Company (Jersey) Limited and another (Respondents)* - Read more (p13)

**TUPE**

12. Was the insourcing of rail freight management a relevant transfer under the Acquired Rights Directive?

*Administrador de Infraestructuras Ferroviarias (ADIF) v Aira Pascual and others* - Read more (p14)

**UNFAIR DISMISSAL**

13. EAT provides a summary of the main principles on mitigation of loss

*Cooper Contracting Ltd v Lindsey* - Read more (p15)

14. EAT critical of ET’s approach in finding that the Claimant had been automatically unfairly dismissed

*UNIVERSITY OF BOLTON v MRS J CORRIGAN* - Read more (p16)

**EXTENSION OF TIME**

15. Merit of claim relevant to time extension

*Rathakrishnan v Pizza Express (Restaurants) Ltd* - Read more (p16)
"NEED TO KNOW"

DISABILITY DISCRIMINATION

1. CoA ruling on duty to make reasonable adjustments to absence triggers

*Griffiths v The Department for Work and Pensions*

Summary

A Court of Appeal (CoA) decision on the duty to make reasonable adjustments confirms that employers may need to adjust their normal trigger points for absence management action. This overturns an earlier EAT ruling, which used a controversial approach to comparators in reasonable adjustments claims to decide that no duty to make adjustments had arisen.

Facts

Ms Griffiths (G), who was employed by the DWP, suffered from post viral fatigue and fibromyalgia which the DWP conceded amounted to a disability. After hitting trigger points for absence, she was given a formal written improvement warning. This was in accordance with the terms of the DWP’s Attendance Management Policy (“the policy”). G argued that the DWP should have made reasonable adjustments to its application of the policy.

The ET concluded that the duty to make reasonable adjustments under s.20 of the Equality Act had not arisen. The ET treated the relevant comparator as a non-disabled person with the same level of absence as G. As the absence management trigger applied in the same way to both, G had not been substantially disadvantaged. The EAT agreed.

Decision

The CoA has now overturned the decision of the EAT and found that the duty to make reasonable adjustments was triggered in G’s case. It was not valid to argue that the duty did not apply simply because the policy applied equally to everyone - the correct comparator was an employee who had no sickness absence. It was clear that the disabled employee suffered a disadvantage compared to that comparator, in being subjected to management intervention to address their absence. Therefore, the duty to make reasonable adjustments was triggered.

G had proposed two adjustments:

- that the DWP should not treat G’s lengthy absence (which was related to her disability) as counting towards the trigger points; and
- that the policy should in future be modified to allow her to have longer periods of absence before she faced the risk of sanctions (i.e. more absence than would be permitted for employees not subject to disability-related illnesses).

Significantly, the CoA decided that the proposed adjustments were "not steps which the employer could reasonably be expected to take", making G's victory a rather hollow one. Although the CoA agreed that the ET was entitled to find that the proposed adjustments were unreasonable on the facts of G’s case (as they would not remove the disadvantage suffered by G), nothing in the CoA judgment precludes finding (on different facts) that such adjustments would be reasonable. For example, where a claimant had proposed specific extension of the consideration point (rather than a general one) or where the likely future absences would be short.

Action points/comments:

- We understand that a number of cases have been stayed pending the outcome of this decision, and these will now be relisted. We have also seen an increased number of such cases argued as indirect discrimination and discrimination arising from disability
(and this will continue, given the outcome for G was that the adjustments sought were not reasonable).

- Employers may choose to go further than the duty to make reasonable adjustments requires. However, this is an interesting example of the CoA analysing what it is reasonable for an employer to do. Back

2. Reasonable adjustments and competitive interviews

Waddingham v NHS Business Services Authority

Summary

The ET held that an NHS Trust (the Trust) breached its duty to make reasonable adjustments when it required the employee, Mr Waddingham (W) to undergo a competitive interview as part of a redeployment exercise whilst undergoing treatment for throat cancer.

Facts

W had been made redundant and was part of a redeployment exercise, which involved matching redundant staff to new roles and interviewing them. W applied for the role of Client Relationship Manager. At the time he was undergoing radiotherapy treatment, which meant he was unlikely to perform well at interview, notwithstanding reassurances given by W himself that he would be fine. The Trust did make some adjustments - flexibility around the date and time of the interview, and allowing breaks. W attended the interview. He scored badly and was unsuccessful in obtaining the job. W brought claims for failure to make reasonable adjustments and discrimination arising from disability.

Decision

The ET held that holding the interview was a mistake. The ET ruled a reasonable adjustment would have been to excuse W from the interview and make an assessment using other material available from his long service, including his previous appraisals. The ET also held that in not appointing him to the post the Trust treated W unfavourably because of something arising in consequence of his disability.

Action points/comments:

- Clarity on the extent of the duty to make reasonable adjustments in this context - which may extend to excusing the disabled employee from the competitive interview. However, this falls short of requiring employers to give the disabled employee the job where they are not the best candidate.
- Employers should be recommended that a ‘best practice’ approach to record keeping in the context of recruitment, including creating a paper trail reflecting why they have decided not to take a particular employee on and specifies as to why they are not the best candidate, or not meeting the essential requirements, will be valuable in such a case. Back

3. Negative verbal reference leads to disability discrimination

PNaiser v NHS England and Coventry City Council

Summary

The EAT held that a negative verbal reference by a previous employer to a prospective new employer amounted to disability discrimination.

Facts

The case involved a disabled employee, Ms PNaiser (P) who was employed by Coventry City Council (the Council). She had significant disability related absence.
P was made redundant and signed a settlement agreement which included an agreed reference based on an earlier appraisal which was positive. She applied for a new job with NHS England (NE) and was offered the position which she accepted. When NE asked for a reference, P's former manager, Ms Tennant (T) supplied it under cover of an email offering to discuss the matter further. T was taken up on that offer by Professor Rashid (R) of NE. During a telephone call between T and R, T informed R about the disability-related absences and even went as far as saying she would not recommend P for the new role - a clear departure from the terms of the settlement. R subsequently withdrew the job offer. P brought claims of unlawful disability discrimination against both NE and the Council.

The ET dismissed P's claims on the basis that P failed to establish a *prima facie* case that would shift the burden of proof to either NE or the Council. P appealed.

**Decision**

In allowing the appeal, the EAT substituted the ET's findings with findings of unlawful disability discrimination against both NE and the Council. The EAT held that the ET applied an "impermissibly high hurdle" by requiring P to demonstrate that the only inference (with regard to T's comments about P's unsuitability for the role) that could be drawn was a discriminatory one before the ET could conclude that the burden shifted to NE and the Council. The EAT further held:

> What the Tribunal should have asked itself instead is simply whether the fact that [T] gave a negative reference [...] and her knowledge of and concerns about the Claimant's history of significant absences were together sufficient to raise a *prima facie* case against the Council that absence was [...] a reason in [T's] mind for giving the negative reference, so that the burden shifted.

The EAT also held that the ET's findings were not only unsupported by the evidence before it, but also contrary to the evidence about the negative reference.

**Action points/comments:**

- A case that really highlights the dangers to employers and prospective employers when seeking and providing references. The Claimant in this case found out what had happened because she asked NE for reasons following the withdrawal of the offer. NE told her about the negative comments made over the phone. It is not clear from the evidence whether the manager who gave the negative reference had specifically asked for the matter to be kept private and confidential but would it have made any difference? We often see references given - usually in writing and marked "private and confidential" based on the assumption that somehow means the employee, the subject of the reference, will not see it. That is a common practice and a common mistake.
- Typically people do access things like references using a Subject Access Request under the Data Protection Act.
- Anything written in a reference may be seen by the subject of that reference and should only be included if it can be substantiated by objective evidence.

**DISCRIMINATION**

4. CoA rules that length-of-service pay criterion did not indirectly discriminate against Muslim chaplain

*Naeem v Secretary of State for Justice*

**Summary**

Unsuccessful appeal against the EAT's finding that Muslim employees were not placed at a particular disadvantage by pay criteria linked to the length of service.
Facts

The EAT found that a Muslim prison chaplain, Mr Naeem (N) had not suffered indirect religious or race discrimination as a result of the prison's pay criteria placing emphasis on length of service. Prior to 2002 (N was employed in 2004), only Christian chaplains were employed by the prison meaning that Christian chaplains were more likely than Muslim chaplains to be towards the top of the pay scale. However, the EAT found that the pay criteria did not place Muslims at a "particular disadvantage" as compared with non-Muslim chaplains.

This decision was reached on the basis that N should not be compared with those Christian chaplains who had longer service than him as there was a "material difference" in their circumstances (and there must be no material difference in circumstances save as to the protected characteristic in question between a claimant and a comparator group). The correct comparison in this case was non-Muslim employees who began employment in 2004. On this basis, N had not been discriminated against. N brought an appeal to the CoA.

Decision

In dismissing N's appeal, the CoA held that the pay criteria linked to the length of service did not place Muslim employees at a particular disadvantage. The difference between the pay for Christian chaplains and Muslim chaplains was due to the fact that there were no Muslim chaplains prior to 2002, as there was no need for them at the time. This is an illustration of a relatively high hurdle for claimants in making out indirect discrimination as it goes beyond the 2 questions (1) do they have the PC? and (2) do they suffer disadvantage when compared to others?

The CoA disagreed with the EAT's focus on material difference, with regard to the correct comparison pool. Although the EAT reached the same outcome as the CoA, the CoA felt that the EAT's approach tended to bring "an elaborate jurisprudence about "pools" which attached to the predecessor provisions of the pre-2010 legislation in the context of arguments about statistical analysis." It found this to be an error, albeit not material to the outcome in this case.

Action points/comments:

- The EAT distinguished the case from that of Homer v Chief Constable of West Yorkshire Police in which the Supreme Court found that the Claimant had been indirectly discriminated against as a result of a time-related PCP.
- The EAT in this case had accepted N's argument that he did not need to demonstrate why the provision, criterion or practice (PCP) disadvantaged him. However, the CoA in the subsequent case Essop v Home Office confirmed that for indirect discrimination claims it is also necessary to show why the PCP disadvantages the group sharing the protected characteristic. Permission to appeal to the Supreme Court in Essop has been granted, although a hearing is yet to be scheduled.
- Permission to appeal has been sought in this case as well.

5. Instruction not to speak Russian not discrimination

Kelly v Covance Laboratories Ltd

Summary

The Claimant, Mrs Kelly (K), had been instructed by her line manager, Mr Simpson (S), not to speak Russian in the workplace. The EAT were required to determine whether the ET had erred in dismissing K's claims of direct race (national origins) discrimination and/or harassment related to her race (national origins).
Facts

K, of Russian national origin, was employed by Covance Laboratories Ltd (CL) as a contract analyst. CL is a large multinational company operating testing laboratories involving the use of animals for testing products. As a result of its activities, the company has been targeted by animal rights activists, including violent assaults on some of its employees. S had become concerned that K was an animal rights activist and had obtained employment with CL to gather information to use in campaigns. This was a known risk to CL and something that they had fallen victim to previously. S was concerned by the fact that K would often use her mobile phone at work, disappear into the bathroom with her phone for long periods of time and speak in Russian on her phone. As a result, S instructed K not to speak Russian in the workplace. K argued that two of her Ukrainian colleagues spoke in Russian at work too, in response to which S passed on similar instructions to their managers. K subsequently brought claims of race and sex discrimination, harassment and victimisation.

The ET dismissed K’s claims. It took the view that K had not established facts that could support her claims. More specifically, the ET rejected K’s complaint with regard to S’s instruction not to speak Russian in the workplace because any other employee who spoke in a language other than English would have received the same instruction. The ET also held that S’s instructions were not on the basis of K’s national origin but were based on his suspicions about K. K appealed.

Decision

The EAT dismissed the appeal. It agreed with the ET’s findings and was satisfied that the ET had not erred in law in reaching its findings.

Action points/comments:

- There have been a number of successful race discrimination cases relating to language requirements in the workplace.
- ACAS guidance gives the example of instructing employees to speak English (as opposed to a mutual native language) without a good business reason as potentially discriminatory. Employers will be expected to justify such an instruction.
- The employer’s ‘alternative non-discriminatory’ explanation defeated the Claimant’s assertion that the instruction was ‘intrinsically linked’ to race/national origin.
- The reasonableness of the employer’s suspicions and the context of their security concerns and industry protocols were key issues. Presumably these were evidenced successfully.
- The EAT also took account of the fact that the employer would have given the same instruction to actual and hypothetical comparators (i.e. others speaking a language other than English in circumstances where it gave cause for concern).

"NICE TO KNOW"

TERMINATION OF EMPLOYMENT

6. Application to restrain hearing re termination of employment premature

Al-Mishlab v Milton Keynes Hospital NHS Foundation Trust

At a glance

The Applicant, Mr Al-Mishlab (A) was employed by Milton Keynes Hospital NHS Foundation Trust (the Trust), as a consultant colorectal and general surgeon. A was suspended following an investigation into his surgery performance. A unsuccessfully challenged the legality of his suspension. In accordance with A’s employment contract and the Trust’s procedures, the Trust
convened a panel of independent assessors to determine whether A’s employment should be terminated. In considering the issue the panel claimed to have followed the Department of Health's 'Maintaining High Professional Standards in the Modern NHS' (MHPS), although it was disputed that the Trust had failed to apply the MHPS with regard to the issue of relationship breakdown between A and his team. A applied to the High Court to restrain the hearing on an urgent basis.

A argued that the Trust's decision to hold the hearing was breach of his employment contract. Amongst other things, he argued that the Trust had failed to carry out an adequate investigation; the case manager responsible for making a decision on behalf of the Trust did not intend to attend the hearing; the Trust intended to rely on conclusions contained within a High Court judgment (in which A had been unsuccessful) to argue that A should be dismissed on the grounds that there had been a fundamental breakdown in working relationships between A and his team.

A's application was refused. The High Court held that A's application was pre-emptive litigation and premature. A could raise the arguments he had made and any concerns he had at the hearing itself. If he was not happy with the outcome of the hearing he could appeal the decision. The judge was satisfied that the procedure was flexible and adequate to deal with A's arguments and that it would be a specialist body hearing and deciding the case, which was independent and capable of hearing the case. Any errors in the decision would be appealed. Such factors led to the conclusion that the panel was better placed than the High Court to hear the case.

Comment:

- An example of failed attempts by an employee to derail an internal disciplinary process. The findings of the High Court may be useful to an employer in responding to an employee’s objections to the progression of an internal process – perhaps particular resonance in the university sector? Back

**SUMMARY DISMISSAL**

7. Is an employer permitted to summarily dismiss an employee for releasing confidential information?

_Farnan v Sunderland Association Football Club_

**At a glance**

Mr Farnan (F) was employed by Sunderland Association Football Club (SAFC) as an International and National Marketing Director. He was suspended for gross misconduct and subsequently dismissed without notice. SAFC alleged that F had breached the confidentiality he owed to SAFC by:

- sending emails to his own or his wife's personal email account attaching SAFC documents relating to sponsorship bids;
- emailing a former director with confidential information with regards to a sponsorship deal;
- emailing third parties with confidential documents and
- discussing the termination of a sponsorship contract with a journalist.

SAFC also alleged that F had made derogatory comments in emails and that F had sent a lewd Christmas e-card from his work email address. F brought claims for wrongful dismissal and payment of unpaid bonus due under his employment contract.

In dismissing F's claim for wrongful dismissal, the High Court (HC) held that F had committed serious and repeated breaches of his Service Agreement by releasing confidential information. The HC listed the breaches as consisting of "banking" confidential information (for use in a personal capacity) sent to his own or his wife's personal address; communicating with third
parties by disclosing confidential documents; and communicating with a journalist, without prior authorisation, about the termination of a sponsorship contract. The HC dismissed SAFC’s allegations with regard to the email to a former director, the derogatory comments in emails and the lewd Christmas e-card. The HC held that on the basis of the serious breach of confidentiality, SAFC was entitled to summarily dismiss F without notice and terminate his contract for gross misconduct. The HC also dismissed F’s claim for payment of unpaid bonus on the basis that he was not entitled to this.

Comment:

- F also made claims in the ET which were stayed pending the outcome of the HC case. Consequently, the fairness of the process followed by SAFC and the ‘reasonableness’ of the decision to dismiss under ERA 1996 were not in issue here. Note the comments of the HC (below) which could impact on those other claims. Respondents should not take the outcome of the HC case as an endorsement of the procedure.
- The HC was critical of SAFC for “trumping” up a case against F by making allegations, which were found to be trivial or on examination not established breaches at all. The HC also criticised SAFC for not accommodating F’s period of illness and holding a disciplinary hearing at a time he could attend, allowing him to sufficient time to prepare.

GIVING EFFECT TO EU LAW

8. Can a key provision in domestic legislation be deleted to give effect to EU legislation?

*The Advocate General for Scotland v Barton*

**At a glance**

Mr Barton (B) was employed as a clerk to the Commissioners of Income Tax on a part-time basis. He retired on 31 March 2009. Under the Taxes Management Act 1970 (the TMA) the Secretary of State for Scotland and the Lord Chancellor had a discretionary power to award a pension to a “full-time clerk”. B was not granted a pension. B argued he had received less favourable treatment than Mr Howey (H) (another clerk who had also worked part-time and retired in 2001), contrary to his part-time workers’ rights. He relied on the provisions of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR) and article 141 of the Treaty of Rome and the Equal Pay Directive 75/117. In relying on the PTWR B was required to show that his treatment was less favourable than that afforded to an actual comparator.

The ET dismissed B’s claim on the grounds that B had failed to identify a valid full-time comparator.

B successfully appealed to the EAT. The EAT held that under the PTWR denying access to a pension to a part-time worker but granting the possibility of a pension to a full-time worker was discriminatory and therefore the TMA had to be read down to omit the words “full-time”. It also held that H was a valid comparator. As such, B had been unlawfully treated less favourably than a full-time comparator.

The Advocate General for Scotland appealed to the Court of Session (CoS), arguing that the ET was correct. In allowing the appeal and dismissing B’s claim, the CoS held that the EAT’s rewriting of the TMA would “be so fundamental and would distort a piece of primary domestic legislation that it would not be an appropriate application of the Marleasing principle […] there are limits to what can be done by the court to amend the expressed will of Parliament as set out in its legislation and care has to be taken to ensure that the court does not legislate under the guise of reading down.”

Comment:
The CoS's decision conflicts with the EAT's decision in *Bear Scotland v Fulton* (holiday pay). In *Bear* the EAT held that Tribunals can read words into legislation where necessary to implement EU law. It further held that the Working Time Regulations 1998 (WTR) were not compliant with the Working Time Directive and had to be interpreted so that the WTR did comply. The latest approach of the CoS in the *Barton* case supports British Gas's argument, in *British Gas v Lock*, that the EAT's approach in *Bear* amounted to "judicial vandalism".


*Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*

At a glance

Mr Rasmussen (R) was dismissed from his employment with Ajos and the employment relationship terminated at the end of June 2009. R had been with the company since 1 June 1984. As such, he was entitled to a severance allowance equal to three months’ salary, pursuant to Danish law on salaried employees. However, because R had reached the age of 60 when he left his employment and was entitled to an old-age pension payable by Ajos under a scheme which he joined before the age of 50, Danish law on salaried employees barred his entitlement to the severance allowance, even though he was still seeking work. The Danish Formands Association brought an action on behalf of R against Ajos claiming the payment of a severance allowance equal to three months’ salary.

The Danish Maritime and Commercial Court upheld the claim for payment of severance allowance, on the basis that, pursuant to the judgment in *Ingeniørforeningen i Danmark acting on behalf of Ole Andersen v Region Syddanmark* (*Andersen*), the Danish law on salaried employees was contrary to the Equal Treatment Framework Directive (the Directive) and that the previous national interpretation of the relevant national law was inconsistent with the general principle, enshrined in EU law, prohibiting discrimination on grounds of age. Ajos appealed the decision before the Danish Supreme Court, arguing that any interpretation of the Danish law on salaried employees that was consistent with the judgment in *Andersen* would be contrary to the law. It also argued that the application of a rule as clear and unambiguous as the Danish law on salaried employees could not be precluded on the basis of the general principle of EU law prohibiting discrimination on the grounds of age without jeopardising the principles of legal certainty and the protection of legitimate expectations.

The Supreme Court referred the matter to the ECJ for preliminary ruling. The Supreme Court asked whether the general principle prohibiting discrimination on the grounds of age has the same content and scope as the Directive or whether the Directive affords broader protection against discrimination on grounds of age than the general principle. It also asked whether the general principle can be directly applied in relationships between private persons and how the direct application of that principle is to be weighed against the principles of legal certainty and protection of legitimate interests. The Supreme Court also asked whether EU law permits national courts to conclude that the principles of legal certainty and protection of legitimate interests takes precedence over the general principle prohibiting discrimination on the grounds of age.

Advocate General Bot (the AG) opined that it may be inferred from the judgment in *Andersen* that the Danish law on salaried employees, as interpreted by Danish courts, is incompatible with the Directive. He also stated that while *Andersen* was between an employee and a public-sector employer, the judgment can also be applied between a private individual and private employer. The AG also noted that in its observations lodged in *Andersen* the Danish Government had taken the view that it was not impossible to interpret Danish law on salaried employees in a way that was consistent with the Directive. In *Andersen* the ECJ acknowledged that the very wording of Danish law on salaried employees was not inconsistent with the Directive. The provision, read literally, could be justified by the objective of protecting employment. It was the extension of the rule in the case-law to employees who were entitled to receive an old-age pension,
without ascertaining whether they did, that the ECJ found to be contrary to the Directive. In light of this, the AG took the view that the national legislation could be interpreted so as to conform with the Directive and that doing so would not be contrary to the law, because the national court would not be compelled to re-write the relevant provision in the Danish law on salaried employees. The court would merely be required to change its case-law so as to give full effect to the Andersen judgment. With regard to the general principle prohibiting discrimination on the grounds of age, the AG took the view that because it is possible to interpret national legislation to conform with the Directive, the general principle was not relevant. It would only be relevant where national legislation is irreconcilable with an EU directive.

**Comment:**
- AG opinion relating to the interpretation of national legislation to conform with the Directive prohibiting discrimination on the grounds of age.
- Distinguishes between the need to re-write national legislative provisions as oppose to change case law.
- General interest only, but may be relevant in the context of apparent conflict in approach to 'interpretation' of national legislation in *Andersen* (above) and *Bear Scotland*.

**COMPENSATION**

10. Does the Simons v Castle uplift apply in Employment Tribunals?

*Beckford v London Borough of Southwark*

**At a glance**

Mr Beckford (B), a dyslexic social worker, was employed by London Borough of Southwark (LBS) in the Early Engagement Team. He had worked in this position for sometime until a change of structure resulted in his transfer to a new team in the Young Offenders Service. He struggled in his new role. LBS found him not capable of performing his duties and dismissed B. B brought a number of claims, including unfair dismissal, disability discrimination arising from failure to make reasonable adjustments, victimisation and harassment.

The ET held that B had been unfairly dismissed and made a finding of disability discrimination arising from failure to make reasonable adjustments and victimisation. His claim for harassment failed. B was awarded £4,000 for injury to feelings, which was increased by £400 under *Simmons v Castle*. B sought a reconsideration of the remedies on a number of grounds. The ET considered those and confirmed its original findings. B appealed arguing that the ET had erred in failing to have regard to his disability in considering re-engagement. LBS found him not capable of performing his duties and dismissed B. B brought a number of claims, including unfair dismissal, disability discrimination arising from failure to make reasonable adjustments, victimisation and harassment.

The ET held that B had been unfairly dismissed and made a finding of disability discrimination arising from failure to make reasonable adjustments and victimisation. His claim for harassment failed. B was awarded £4,000 for injury to feelings, which was increased by £400 under *Simmons v Castle*. B sought a reconsideration of the remedies on a number of grounds. The ET considered those and confirmed its original findings. B appealed arguing that the ET had erred in failing to have regard to his disability in considering re-engagement. LBS found him not capable of performing his duties and dismissed B. B brought a number of claims, including unfair dismissal, disability discrimination arising from failure to make reasonable adjustments, victimisation and harassment.

In dismissing B's appeal and LBS's cross-appeal, the EAT held that the ET did not err in law in failing to have regard to his disability in considering re-engagement. The EAT was satisfied that the ET had dealt with the matter sufficiently and in any event the point had not been argued as such. With regard to LBS's cross-appeal, the EAT held that the *Simmons* uplift did apply in Employment Tribunals. The EAT also expressed doubt as to the correctness of the decision in *De Souza v Vinci Construction UK Limited*, a case which LBS sought to rely on. In *De Souza* the EAT had held that the *Simmons* uplift did not apply in Employment Tribunals.

**Comment:**
- The EAT in this case considered *De Souza*, *Sash Window Workshop v King* and *The Cadogan Hotel Partners Ltd v Ozog* (the latter two cases take the view that the *Simmons* uplift does apply in Employment Tribunals.) Both *De Souza* and *Sash Window* are being heard by the Court of Appeal this year. It is hoped that the Court of Appeal will provide clarity.  

*Back*
CONTRACTS

11. New clarification for when terms will be implied into contracts

*Marks and Spencer plc (Appellant) v BNP Paribas Securities Services Trust Company (Jersey) Limited and another (Respondents)*

**At a glance**

The Supreme Court has provided guidance on the tests by which terms may be implied into commercial contracts, and has criticised the thinking in the earlier leading decision on the matter. The judgment provides a useful review and clarification of the relevant issues.

Marks & Spencer (the Tenant) were granted a sub-underlease by BNP Paribas (the Landlord), the rent for which comprised a basic yearly rent and service charges/car park licence fee. The Tenant invoked the lease's break clause, and sought to recover elements of the rent and charges paid in advance. The Landlord refused to re-imburse the advance payments. The Tenant brought a claim contending that there should be implied into the lease a term that if they exercised the right to end the lease under the break clause, they would be entitled to a refund from the Landlord of the proportion of the rent paid in respect of the period between when they vacated the property and when they had paid the rent until. The Tenant's argument was based on the established test of "reflecting the parties' intentions" The Supreme Court rejected the Tenant's case.

The Supreme Court (rejecting the 'intention of the parties test' as set out in Belize) held that a term will only be implied if it satisfies the test of business necessity or it is so obvious that "it goes without saying". Only one need be met.

They offered no reformulation of the test on the basis that it was clearly set out in pre-Belize case law. However, some additional 'gloss' was added (see below under Comment).

The Supreme Court also commented that implying terms involves a consideration of the surrounding circumstances known to both parties at the time of the contract. This covers a very wide range of information and factors, including non-complex legal principles, relevant case law and evidence of market practice.

**Comment:**

- **BP Refinery** - any proposed implied term must meet the following conditions, which may overlap:
  1. It must be reasonable and equitable. (The Supreme Court held that this could be disregarded as implicit in other elements)
  2. It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it
  3. It must be obvious that "it goes without saying"
  4. It must be capable of clear expression
  5. It must not contradict any express term of the contract

- **Philips Electronique** – comments from the CoA on implied terms should be noted:
  - Because the implication of terms is potentially so intrusive (as the parties have made no express provision), the law imposes strict constraints on the exercise of such power.
  - It is much more difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully drafted contract but have omitted to make an express provision. It may be doubtful whether the omission was the result of the parties' oversight or their deliberate decision.
It is tempting, but wrong, for a court, with the benefit of hindsight, to imply a term which reflects the merits of the situation as they then appear.

It is not enough to show that had the parties had foreseen the eventuality which in fact occurred they would have wished to make the provision for it, unless it can also be shown either that there was only one contractual solution or that one of the several possible solutions would without doubt have been preferred.

Marks and Spencer - the Supreme Court added:

- The implication of a term is not critically dependent on proof of an actual intention of the parties when negotiating the contract. What is relevant is the answer of the notional reasonable people in the position of the parties at the time at which they were contracting and not the hypothetical answer of the actual parties.
- A term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term.
- The test for business efficacy is not one of "absolute necessity". A more helpful way of explaining it would be: If, without the term, the contract would lack commercial or practical coherence, a term can be implied to plug the gap.

TUPE

12. Was the insourcing of rail freight management a relevant transfer under the Acquired Rights Directive?

Administrator de Infraestructuras Ferroviarias (ADIF) v Aira Pascual and others

At a glance

ADIF is a public undertaking responsible for the service of handling freight containers at a Spanish terminal. ADIF outsourced that service to Algeoposa (Al). Al provided that service using ADIF’s equipment and facilities. ADIF seconded some of its employees to Al for training purposes. ADIF subsequently informed Al that it would be insourcing the rail freight management and using its own staff. ADIF refused to take on Al's employees. As a result, Al carried out a collective dismissal for economic reasons of several workers. One of Al's employees, Mr Aira Pascual (AP) brought proceedings before the Spanish Labour Tribunal, arguing that ADIF was required to takeover his employment. The Tribunal ruled in AP's favour. ADIF appealed to the Spanish High Court of Justice. The High Court referred to the ECJ for preliminary ruling on whether the facts of the case are caught by the Acquired Rights Directive (the Directive).

The ECJ held that the Directive applied to a situation where the management of rail freight (which had originally been out-sourced to Al, which used ADIF's equipment and facilities) was taken back in-house, even though there was no transfer of employees or ownership of assets. The ECJ also noted that whether or not ownership of tangible assets is transferred is irrelevant for the purposes of the application of the Directive.

Comment:

- This factual scenario would be dealt with in the UK under the SPC provisions in any event. However, as the UK SPC cases continue to narrow the circumstances where TUPE protection applies, ECJ cases on the definition of a 'relevant transfer' may become increasingly pertinent to the question of the application of the TUPE 2006 Regulations in such cases.

UNFAIR DISMISSAL
13. EAT provides a summary of the main principles on mitigation of loss

*Cooper Contracting Ltd v Lindsey*

**At a glance**

Mr Lindsey (L) provided services as a carpenter that his employer, Cooper Contracting Ltd (CCL), terminated after 21 months service. No reason was given for the termination and CCL argued that because L was self-employed no reason was required. L argued that he was an employee. Following the dismissal L went back to working as a self-employed carpenter. L claimed to prefer working for himself. He subsequently brought a claim for unfair dismissal. CCL argued that L could have earned more money in employment (rather than self-employment) and that he had therefore failed to mitigate his loss. The ET held that L had been an employee and made an award for loss of earnings and loss of statutory rights. However, it limited L’s future loss on the basis of what as just and equitable, assessed broadly at a period of three months. CCL appealed the remedy judgment.

In dismissing the appeal, Mr Justice Langstaff summarised the main principles from case law on the mitigation of loss:

1. The burden of proof is on the wrongdoer. The Claimant is not required to prove that he has mitigated loss.

2. It is not some broad assessment on which the burden of proof is neutral. If the evidence as to mitigation is not put before the ET by the wrongdoer, the ET has no obligation to find it.

3. What has to be proved is that the Claimant acted unreasonably. The Claimant does not have to show that what he did was reasonable.

4. There is a difference between acting reasonably and not acting unreasonably.

5. What is reasonable or unreasonable if a matter of fact.

6. The Claimant's views and wishes are one of the circumstances the ET should take into account when determining whether he has acted reasonably. However, it is the ET's assessment of reasonableness and not the Claimant's that counts.

7. The ET is not to apply too demanding a standard to the Claimant, who after all is a victim of a wrong. The Claimant is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer.

8. The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

9. In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

**Comment:**

- A good reminder of where the burden of proof lies on mitigation of loss arguments and of the evidential burden in relation to such arguments.
- Respondents wishing to rely on such arguments need to be made aware of the burden and the role they can play in gathering evidence to support unreasonable actions on the part of the Claimant. Back

14. EAT critical of ET’s approach in finding that the Claimant had been automatically unfairly dismissed
UNIVERSITY OF BOLTON v MRS J CORRIGAN

At a glance

Mrs Corrigan (C) was employed by the University of Bolton (UoB) as a Library Support Team Leader and during her employment was elected Branch Secretary of UNISON. C's post in Library Services along with six others was deleted and two new team leader posts were created. C had a good chance of being appointed to one of the posts. However, both of those new posts were then deleted. One post was then re-instated but not the post to which C had a good chance of being appointed to. C was dismissed as redundant. C claimed that she had suffered a detriment (the withdrawal of the team leader post that she had a good opportunity of being appointed to) to penalise her for her trade union activities. The ET held that C had suffered a detriment. The ET also held that C's dismissal was automatically unfair, as the primary reason for her dismissal was C's trade union activities. UoB appealed.

The EAT dismissed the ground that C had suffered no detriment. However, the EAT found that the ET had erred in its approach in finding that C's dismissal was automatically unfair. The ET had erred in their reasoning. The EAT held that just because UoB's reason for the dismissal was not made out it did not necessarily follow that C was dismissed for the reason that she argued. The EAT remitted the unfair dismissal claim for rehearing before a fresh ET.

Comment:

- An example of the EAT enforcing the proper construction of the test for a finding of automatically unfair dismissal. Respondents will welcome the outcome of this appeal but should always be cautioned that in the absence of a positive case being made (and evidenced) for a 'fair reason' to dismiss, there is little prospect of successfully defending a normal unfair dismissal case. In addition the Respondent leaves themselves wide open to having to defend claims of automatic unfairness as in this case.

EXTENSION OF TIME

15. Merit of claim relevant to time extension

Rathakrishnan v Pizza Express (Restaurants) Ltd

At a glance

Mr Rathakrishnan (R) was employed by Pizza Express (Restaurants) Ltd (PE) as a pizza chef. He was dismissed for breaches of PE's food safety procedures. R brought claims for unfair dismissal, detrimental treatment relating to a protected disclosure, breach of contract, holiday pay shortfall and failure to make reasonable adjustments. The unfair dismissal and whistleblowing claims were dismissed and the money claims upheld. However, the reasonable adjustments claim was lodged 17 days outside the primary three month limitation period. The ET rejected R's explanation that the reason why the claim was lodged late was because R feared reproach whilst still working for PE. The ET could find no evidence to support R's explanation and found that on the contrary, R had raised a number of lengthy grievances with PE during his employment and as such he was not the type of person to keep quiet. The ET also found that R had consulted his solicitors after the dismissal and had ample opportunity to seek information about time limits. The ET refused to extend time. R appealed.

In allowing the appeal the EAT held that the question of balance of prejudice and potential merit of the reasonable adjustment claim was a relevant consideration for the ET and it was wrong not to weigh those factors in the balance. The EAT also cast doubt on the case of Habinteg UKEAT/0274/14/BA in which Mr Justice Langstaff took the view that a failure to provide an adequate excuse for the delay in bringing the relevant claim will inevitably result in an extension of time being refused. The EAT remitted the case back to the ET for reconsideration.
Comment:

- A reminder to those arguing against extending time limits of the key issues that will determine the application.

FEEDBACK

Please provide any feedback on this update by emailing sue.gilchrist@pinsentmasons.com, or manpreet.hayre@pinsentmasons.com. This will help us to shape future editions of this Monthly case law update.

*This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.*