SERJEANTS' INN

"6 from 2016"

EMPLOYMENT LAW ROUND-UP 2016

A selection of cases

Sebastian Naughton

Cecily White

Serjeants' Inn Chambers, 85 Fleet Street, London EC4Y 1AE DX: 421 London Chancery Lane
Tel: +44 (0) 20 7427 5000 Fax: +44 (0) 20 7353 0425 Email: clerks@serjeantsinn.com www.serjeantsinn.com

6 FROM 2016: EMPLOYMENT LAW ROUND-UP

(1) EMAILS NOT PRIVATE IN DISCIPLINARY PROCEEDINGS

Garamukanwa v Solent NHS Trust

[2016] I.R.L.R. 476 (Appeal No. UKEAT/0245/15/DA)

The facts

The appellant had been employed as a clinical manager. He formed a personal relationship with a nurse (M) on his ward.

When the relationship ended the appellant suspected M was in a relationship with another nurse on the same ward. An anonymous letter was sent to the employer raising concerns about the appropriateness of M's new relationship, and anonymous, malicious emails were sent from various email addresses to members of the employer's management.

M also became concerned that the appellant was stalking her and complained to the police. The employer was made aware of the situation and carried out an investigation. It was provided with copies of photographs found by the police on the appellant's phone which contained details of the email addresses from which the emails had been sent.

A disciplinary hearing took place, and principally in reliance upon the photographs on the appellant's phone it was concluded that the appellant had been responsible for sending the emails and that that amounted to gross misconduct warranting summary dismissal.

Before the tribunal, the appellant argued that Article 8 had been breached in using evidence in relation to his private life to dismiss him. The tribunal did not agree that Article 8 had been engaged, concluding that the decision to dismiss had been within the range of reasonable responses for a reasonable employer and was fair.

At the EAT, the appellant again submitted that the employer had acted in breach of his art.8 rights by examining and relying upon matters that related purely or essentially to his private life. He argued that the employer should have drawn a distinction between the evidence provided by the police, which was public material (e.g. the email sent to staff and managers) and private material (such as emails he had sent to M and the photographs on his iPhone).

The judgment

The EAT held that the tribunal had been entitled to hold that Article 8 was not engaged because the appellant had no reasonable expectation of privacy in respect of the private material.

The disciplinary investigation had been into matters that had been brought into the workplace by the appellant, notwithstanding that they had begun as a personal relationship. At para. 27:

> "… the case that the Tribunal was addressing and in which any Article 8 rights had to be addressed was a disciplinary investigation into matters that, whilst they related to a personal relationship with a workplace colleague, were brought into the workplace by the Claimant himself and were introduced into the workplace as giving rise to work related issues. The emails of particular concern were published to colleagues at work email addresses. The publication of those emails had an adverse consequence on other employees for whom the Respondent had a duty of care, and raised issues of concern so far as the Respondent's own working relationship with the Claimant or individual responsible was concerned. These are all features that entitled the Tribunal to conclude that Article 8 was simply not engaged and was therefore not relevant because the Claimant had no reasonable expectation of privacy in respect of the private material."

The EAT agreed that it was not required to separate out the material into "public" and "private" matters as the appellant had argued. The police had not drawn this distinction and had given the employer permission to use all the evidence gathered for the criminal investigation. The EAT also considered it relevant that the appellant had not drawn any distinction between the types of materials, or objected to the evidence being used, during the investigation, disciplinary or appeal procedures.

Take-away points

"*Whether or not there is an expectation of privacy in an individual case must … depend upon the facts and circumstances of that case. These are fact sensitive questions*" (para. 23)

The case indicates that Article 8 is unlikely to be engaged where private correspondence has been brought into the employment sphere as a consequence of an individual's misconduct.

(2) PRIVILEGE IN UNFAIR DISMISSAL SETTLEMENT DISCUSSIONS

Faithorn Farrell Timms LLP v Bailey

(Appeal No. UKEAT/0025/16)

The facts

The Claimant was a part-time office secretary at a firm of surveyors who resigned, claiming constructive dismissal.

The reason for her resignation was that (she said) it had been made clear to her that part-time working was no longer an option, so she initiated discussions about a settlement agreement.

Subsequently, it could properly be said that the parties were in dispute. The Claimant's solicitors wrote a "without prejudice" ("WP") letter setting out the Claimant's position, at the end of which was an offer of settlement.

The Respondent's reply (incidentally not marked without prejudice), set out the Respondent's position with passing reference to the settlement proposal.

Correspondence went back and forth with passing reference to the settlement proposal. The Claimant then raised an internal grievance, which openly relied upon the contents of her original letter proposing settlement.

She subsequently brought proceedings for (constructive) unfair dismissal and sex discrimination, and when she did she referred in her claim to the initial discussions before her offer letter, and the subsequent without prejudice correspondence.

The Respondent denied the claims but did not object in their response to the open references to WP matters, and also made reference to WP matters (without specific detail). Subsequently, however, they sought to rely upon litigation privilege and so at a Preliminary Hearing admissibility issues were argued.

The ET concluded that the WP correspondence and negotiations were not wholly inadmissible under s111A or common law WP privilege, since this was not a "pure" unfair dismissal claim, but included a discrimination complaint.

The judgment

Section 111A(1) provides that "*evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint of (s111 claims for unfair dismissal – i.e. not automatically unfair dismissals)*".

It was argued before HHJ Eady sitting in the EAT that where an employer had waived privilege, it could not subsequently rely upon it. The EAT held that:

a) common law principles are not applicable to s111A ERA;
b) not even the fact of the negotiations (as opposed to the content of offers) is admissible;
c) unlike common law privilege, the s111A privilege cannot be waived, even if the parties consent;
d) that said, the s111A admissibility rule only applies to unfair dismissal complaints, and not to any other kind of claim.

Take-away points

- WP communications in unfair dismissal cases are in a specific category:

- You can't even refer to the fact that negotiations have taken place;

- You can't waive s111A privilege (so take care not to refer to it in your response);

- There is an exception when there is evidence of improper conduct (s111A(4)), which reflects the common law (see eg: *BNP Paribas v Mezzotero*);

- The common law WP principles (including waiver) apply to other types of claim, e.g. discrimination;

- If you are dealing with a claim of unfair dismissal and (e.g.) discrimination, it is possible that the parties will be able to make reference to WP discussions in relation to the

discrimination claim, but not in relation to the unfair dismissal complaint. How can that work?

(3) EMPLOYER VICARIOUSLY LIABLE FOR RACIALLY AGGRAVATED ASSAULT

Mohamud v Wm Morrison Supermarkets plc

[2016] UKSC 11

The facts

The customer (M) had attended a petrol station kiosk run by the supermarket and had approached one of the staff members (K) with an enquiry. K, whose job was to serve customers and see that the petrol pumps and kiosk were kept in good running order, responded with foul-mouthed abuse and ordered the customer to leave. He then followed him onto the forecourt where he told him to keep away and subjected him to a violent and unprovoked assault.

The customer brought proceedings against the supermarket, claiming that it was vicariously liable for the assault. The trial judge held that it was not liable because there was no sufficiently close connection between the assault and what K was employed to do.

The Court of Appeal upheld his decision, finding that while K's employment involved interaction with customers, that was insufficient to fix the supermarket with vicarious liability for his violence: his duties did not involve him being placed in situations where there was a clear possibility of confrontation.

The customer submitted that there should be a new test of vicarious liability in which the courts applied a "representative capacity" rather than a "close connection" test. He argued that the question should be whether a reasonable observer would consider the employee to be acting in the capacity of a representative of the employer at the time of committing the tort.

The judgment

The court confirmed the "close connection" test adumbrated in *Lister v Hesley Hall* [2001] UKHL 22 and *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48.

To determine what amounted to a sufficiently close connection to make it just for an employer to be held vicariously liable, two matters had to be considered:

a) what functions had been entrusted by the employer to the employee (which had to be addressed broadly); and
b) whether there was sufficient connection between the employee's wrongful conduct and the position in which he was employed to make it right for the employer to be fixed with vicarious liability.

The cases in which the necessary connection had been found to exist were those in which the employee had used or misused his position in a way which injured the third party. There was nothing wrong with the close connection test as such and the law would not be improved *"by a change of vocabulary*" (Lord Toulson JSC at paras 42- 46). The proposed "representative capacity" test was "*hopelessly vague*" (per Lord Dyson MR at para. 53).

On the facts of the case, it had been K's job to attend to customers and respond to their inquiries. His conduct in answering the claimant's request in a foul-mouthed way and ordering him to leave was inexcusable but was within the field of activities assigned to him.

What happened thereafter was an unbroken sequence of events. It was not right to regard K as having metaphorically taken off his uniform when he followed the customer onto the forecourt. Since the supermarket had entrusted him with the position of serving customers it was just that it should be held responsible for his abuse of that position (see para. 47).

Lord Toulson added (para. 48): "*Mr Khan's motive is irrelevant. It looks obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there*."

Take-away points

The existing law on vicariously liability has been affirmed.

This case demonstrates that the application of the "close connection" test is broad and can extend to conduct which is criminal in nature.

(4) DECISION-MAKER ON A DISIPLINARY PANEL MAKING DECISIONS ON TAINTED EVIDENCE

Royal Mail Group Ltd v Jhuti

[2016] IRLR 854

The facts

The Claimant, working as a Media Specialist for the Respondent, raised a complaint with her manager relating to business practices she perceived to be cheating the employer and the public. The tribunal found that this email amounted to a protected disclosure for the purposes of s47B ERA.

M then met with the Claimant and (the Tribunal found) leaned on her to withdraw her allegations, which she did by a further contrite email.

M then subjected the Claimant to a series of detriments, including a performance plan and setting unachievable targets before emailing HR before the end of the Claimant's probationary period to say "if things don't change, we will need to look at exiting this individual". The Claimant complained about her treatment to HR by email (also found to be a qualifying disclosure).

A different manager, V, was tasked with a review of the Claimant's position, but was excluded from the grievances which amounted to qualifying disclosures, although she was aware in general terms of the nature of the Claimant's allegations. V spoke to M, who provided a misleading account of the Claimant's grievances.

V concluded that the Claimant had not met the standards required during her probationary period and terminated her employment. There was an internal appeal which upheld this decision. The Claimant claimed automatic unfair dismissal (s103A ERA).

The Tribunal relied upon the Court of Appeal's decision in *CLFIS (UK) v Reynolds* [2015] ICR 1010 in finding that because V was not aware of the full details of the protected disclosures and had not investigated these, she was not motivated by those, and the reason for the dismissal could not be said to be the protected disclosures.

The judgment

The employer argued that the ET had got it wrong. Mitting J agreed (§34):

> "…I am satisfied that, as a matter of law, a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to the employer of both of them."

This does not sit comfortably with *Reynolds*, a discrimination claim in which the Court of Appeal held that a decision made in ignorance of tainted evidence absolved the decision-maker (and employer) of discriminatory intent.

Take-away points:

- At first blush, *Jhuti* seems contrary to *Reynolds*;

- The explanation for the different outcomes is the different language for discrimination claims and claims of whistleblowing / victimisation:

    - Where a discriminatory act is the provision of the tainted information to a decision-maker, in a discrimination case it is that act, rather than the consequences of it, which gives rise to a claim (*Reynolds*, §46). This might (or might not) have caused the subsequent dismissal, but that is a question of causation;

    - In contrast, in a s103A claim, the question is whether the reason (or principal reason) for the dismissal was that the employee had made a protected disclosure. That can mean looking at the employer in the broader sense, rather than simply at the individual making the decision.

(5) ACAS CODE ONLY IN DISCIPLINARY CASES

Holmes v Qinetiq Ltd

[2016] I.R.L.R. 664 (Appeal No. UKEAT/0206/15/BA)

The facts

The appellant (H) appealed against an ET's award of compensation for unfair dismissal and unlawful discrimination. He had worked for the respondent employer as a security guard from 1 July 1996 until he was dismissed on grounds of ill health, on the basis that he was no longer capable of doing the job, with effect from 17 April 2014.

The respondent conceded that the dismissal was unfair because it had failed to obtain an up-to-date occupational health report about H's ability to provide reliable attendance at work after undergoing an operation in April 2014 that effectively resolved the pain he had been experiencing prior to that operation.

The issues raised on appeal included whether the tribunal was correct to refuse to award any compensation pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992 s.207A(2).

The judgment

On the tribunal's findings of fact, no disciplinary procedure was invoked

That meant that the respondent was not required to follow the ACAS Code of Practice on disciplinary procedures, and that the uplift under s.207(A)(2) was not available.

Per Mrs Justice Simler DBE (President) at para. 15:

> "… properly construed the Code of Practice does not apply to internal procedures operated by an employer concerning an employee's alleged incapability to do the job arising from ill health or sickness absence and nothing more. It is limited to internal procedures relating to disciplinary situations that include misconduct or poor performance but may extend beyond that, and are likely to be concerned with the correction or punishment of culpable behaviour of some form or another."

Take-away points

The case confirms that the ACAS Code of Practice on disciplinary procedures need not be

followed in cases not involving conduct or discipline issues, such as ill health cases.

(6) STAND BY YOUR MAN?

Pendleton v (1) Derbyshire CC (2) The Governing Body of Glebe Junior School

(Appeal No. UKEAT/0238/15/LA)

The facts

In this unusual case, the Claimant (a teacher) was a committed Anglican Christian married to a head teacher of another school. He was convicted of criminal offences related to voyeurism and the downloading of indecent images of children, and sentenced to 10 months' imprisonment.

The Claimant was dismissed after she elected to remain with her husband after conviction because he had repented. As an Anglican Christian, she believed her marriage vows sacrosanct.

Her employers took the view that this decision was incompatible with her duty to safeguard pupils, and they were uneasy about parental concerns (which were not investigated). It was not suggested that the Claimant had any knowledge or involvement in his offences.

The Claimant's unfair dismissal claim was upheld, the employer failing to establish 'conduct' or 'SOSR' for the dismissal.

The Claimant also brought claims for indirect religion or belief discrimination under s19 ERA.

The relevant provision (s19) provides that:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of (1), a PCP is discriminatory in relation to a relevant protected characteristic if:
    a. A applies, or would apply, it to persons with whom B does not share the characteristic,
    b. It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared to persons with whom B does not share it,

c. It puts, or would put, B at that disadvantage, and
d. A cannot show it to be a proportionate means of achieving a legitimate aim…

Here, the PCP was the policy of dismissing those who chose not to end a relationship with a person convicted of the criminal offences that her husband had committed. The Tribunal accepted that this was a PCP, despite *Nottingham City Transport Ltd v Harvey* (2012), in which it was held that a one-off flawed disciplinary process could not be a PCP.

The Claimant said the PCP put her at a disadvantage compared to those who were not Anglican Christian, and lost on this point, the Tribunal finding that the Claimant would have been dismissed irrespective of her religion. The Tribunal observed that anyone who was in a long-term loving relationship having to make the same choice was just as likely to be dismissed, and thus there was no group disadvantage here.

The employer provided no evidence on justification.

The Claimant appealed to the EAT, and the employer cross-appealed on whether the decision could amount to a PCP.

<u>The judgment</u>

HHJ Eady upheld the appeal and dismissed the cross-appeal.

On the evidence, although this was a one-off decision, it could amount to a "practice" because of the closed-minded approach of the employer, who would have treated anyone in this way.

It was held that there had been a group disadvantage, albeit a slight one. The question was whether being forced to choose between a partner and a career might have given rise to the particular disadvantage for those with the Claimant's religious belief in the sanctity of marriage vows. Both those in long-term relationships outside marriage, and those who were married would face an additional disadvantage if forced to make the choice. Those also with a religious belief would face an additional dilemma.

<u>Take away points</u>

- Where, in an unusual situation, an employer makes a one-off decision, this can amount to a PCP;

- A group disadvantage can be very slight, and proved by inference. This emphasises the importance in such cases of the defence of justification;

- Make sure you have some evidence on justification if you run this defence. None was adduced by the Respondent, and this might have led to a different outcome (for example, the practical difficulties given the association, parental pressure which was alluded to but with no evidence provided).

Sebastian Naughton

Cecily White

28 November 2016