!"#

!"#

$ % %
&&
' % (
%

) (
&

%% *
+

(
,-
& % & .
, & & . + (
!"#

/)

01 $ 02
+1 +

) + &

)

! "#$!
, 3 4!"5!4"64+ . !
%& ' (! &) * & # !
+ , "-*# * . /& !
/ ! ! !) !
$ * 0 !& ! ! $
1 ! (2 " ' 3 2# ! 3 0 (&
/ &/ ! ! . 4 & '

$ % % && ' % (
%

, 3 4!"5!4"64+ .
"#$ %& ! ! 5
'

& 5 &
/' '
' 5
(5 & ! 6%& ' (! & 7
(.82 3 "0# 99:5
! ! & ! &
%& ' (! & ! !& '

$ ' 5 ; / 5 ! ! /& & $
' %& ! 8& * &
< (= !& &! ! ((!
& $ & '
# & ' . ' =
= > ' < (5 (
' & ! ! ! (= !
' ' ! 5 /&
!

$! (! !
(& ! '5 6 & !
& & ! ! ! (& 7

! " "

Seminars and workshops

3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or would like further information then please do not hesitate to contact our marketing manager, Carolyn Harris.

Conferences

We are often invited to speak at conferences in the UK and abroad. If you have a query concerning a conference then please get in touch with our marketing manager, Carolyn Harris.

Clerks

We have an experienced and approachable clerking team who will be happy to assist with recommendations, fees, our service protocol or general enquiries. Please contact the clerks on 0207 415 7800. Alternatively please contact the Senior Clerk, James Donovan.

Feedback

As always at 3 Hare Court we welcome your feedback. In particular, any feedback or suggestions on this and forthcoming updates will be gratefully received.

Please contact our marketing manager, Carolyn Harris with any queries.

His third was to the HR department. It raised a query about whether his team would be paid if they were unable to attend appointments due to the weather. This email stated that the employee had a duty to care for the health and safety of his team, and that in his experience driving through snow was both dangerous and unproductive.

The employee was then dismissed with insufficient qualifying service to claim unfair dismissal. He instead claimed automatic unfair dismissal under section 103A ERA 1996 and that he had been subjected to a detriment under section 47A ERA, both on the grounds of making a protected disclosure. A preliminary issue was whether the employee's e-mails could amount to a qualifying disclosure.

The ET held that, when taken as a whole, the employee's emails could amount to a qualifying disclosure, and the EAT upheld this on appeal. The EAT agreed that the employee was not simply raising queries but also disclosing information, namely the dangerousness of the road conditions for his team in driving in those conditions. The ET had been correct in considering the email correspondence as a whole, even though the third email had been sent to a different individual.

Importantly, the employee had worded the third email such as to leave the HR department in no doubt that there had been earlier communications about the danger of driving conditions. This was crucial because it allowed the whole string communication to be viewed as a bundle or whole. The EAT also concluded that the employee reasonably believed that the information he was disclosing tended to show that the health and safety of his team was being endangered. Accordingly, the communications when taken as a whole were capable of amounting to a qualifying disclosure.

The decision illustrates the potential width of the protection given to employees under the whistle-blowing legislation. In this case, the employee was still protected even though his emails were sent to 2 different managers.

NB. The relevant legislation has changed since this case. It is now necessary for the employee to show a reasonable belief that the disclosure is in the public interest. However, that issue did not arise in this appeal.

Shifting burdens in direct discrimination cases

In *South Wales Police Authority v Johnson* [2014] EWCA Civ 73 the Court of Appeal had to consider the often difficult question of when the burden of proof shifts in a claim based on direct discrimination.

The employee in this case was employed by South Wales Police as its head of the diversity unit. He brought a claim of direct race discrimination (he was black). He

alleged that both another member of staff and the Chief Superintendent had engaged in a campaign against him. He complained of some 62 acts (although some of these were relied upon as background).

The ET dismissed the great majority of the individual complaints. But it held that there had been a campaign. It upheld his complaints regarding 2 acts. First, he had not been asked to a meeting to discuss a racial incident. The other member of staff was responsible for not inviting him. This was motivated by her dislike of him on the grounds of his race. Second, he had not been invited to another meeting. Both the other member of staff and the Chief Superintendent were responsible for that.

The ET's found that the member of staff's hostility to the employee was on grounds of race based on a remark that a witness said she had made. According to the witness, she had said that whenever she had been in a relationship with a black man she had been treated very badly. The ET relied on this remark with regard to both incidents. The ET reasoned that this constituted a *prima facie* case of race discrimination, which was therefore for the employer to disprove. It also found that complaints based on the incidents were out of time, but held that it was appropriate to extend time. The employer challenged the findings of race discrimination on the grounds of perversity.

The Court of Appeal allowed the appeal. The ET's findings depended entirely on the single observation by the member of staff, as recounted by the witness. The acts complained of were not themselves racial in character. While the remark could show that the member of staff had an adverse stereotype of how black men behaved in intimate relationships, the issue was whether that gave rise to a *prima facie* case that that was at least in part the explanation of her “animus” against the employee.

The Court of Appeal found it did not. The evidence was simply too flimsy. The remark had no direct reference to the employee. The ET referred to no other evidence linking her attitude to the employee to his race. While there was a “possibility” that there could have been a link, this was not enough - “Inferences about the subconscious motivations of putative discriminators could only be based on solid evidence” (paras 29-30).

The Court of Appeal further found that there was no evidence about the Chief Superintendent's motivations at all. There was therefore no sufficient basis for concluding that either he of the member of staff had been motivated by the employee's race. The claim for race discrimination would be dismissed in its entirety. The appeal against the EAT's decision to remit the claims for consideration of the limitation issue would also be allowed.

The case illustrates that, while the law on when the burden shifts in a discrimination claim is easy to state in the abstract, it is often hard to define a *prima facie* case in practice. It may be that the Court of Appeal's indication that evidence needed to shift the burden must be “solid” will encourage a more restrictive approach to this issue by the ETs in the future.

update, please email our marketing manager, Carolyn Harris or click on the 'Unsubscribe' link below.

Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regs 2014

These are the product of a Government consultation in 2013 on proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), aimed at simplifying the legislation. They include the following changes.

- The service provision change regulations are amended to clarify that the activities must be “fundamentally or essentially the same” after the purported transfer as before.
- Employee liability information has to be provided at least 28 (rather than 14) days before the transfer. This applies to TUPE transfers occurring on or after 1 May 2014.
- Transferees may vary a contract either where the sole or principal reason is an ETO reason and the employee agrees to the variation; or where there is a contractual term in place which permits the variation.
- Businesses with fewer than 10 employees can inform and consult with their employees directly, where there is no trade union (with effect for transfers from 31 July 2014).

Get in touch

We hope you have enjoyed this issue of the Employment Law Update. If you are dealing with a similar case or wish to discuss any area of employment law, please **get in touch** to arrange a short informal discussion.

The next edition of the Employment Law Update is due in March. Until then!

3 Hare Court
Temple
London EC4Y 7BJ
Tel: 020 7415 7800
Fax: 020 7415 7811

Email: clerks@3harecourt.com
DX: 212