

# Employment Law Update

by Lynsey Howes

Issue 140 – August 2018

In this month's newsletter we look at TUPE, contracts of employment, victimisation and the limitations of legal professional privilege. A diverse list of topics.

## Time Limits

Time limits for submitting unfair dismissal claims are strictly enforced. The usual time limit is 3 months, though with ACAS early conciliation this can be extended due to the stop the clock provisions. However, once the deadline for submitting the claim is established having taken account of any ACAS early conciliation extension, the time limit is one that is closely observed.

The EAT was asked in the claim of *Miah v Axis Security Services Limited* whether rule 4(2) of the Employment Tribunal Rules of Procedure 2013 gave a one day extension if the deadline for submitting a claim fell on a Saturday, Sunday, Christmas Day, Good Friday or other bank holiday?

The EAT found that it did not, the rule referred only to a practice directions or an order of the Employment Tribunal and not to the time limit for submitting a claim. It is always worth checking the deadline has been adhered to when responding to a claim. If the claim is late, in most cases the Employment Tribunal will not have jurisdiction to hear the claim.

## Legal Professional Privilege

It is not often that we see cases about legal professional privilege, which is seen as sacrosanct. In other words, what is said or written between the solicitor and the client in giving legal advice is private and disclosure cannot be forced.

However the case of *X v Y Limited* has given guidance on when legal professional privilege will be lost and a solicitor forced to disclose their advice for the purposes of the Court or Tribunal.

The EAT has stated that where an adviser whether solicitor, barrister or legal executive is guilty of iniquity, legal professional privilege will be lost. The EAT described this iniquity as "... conduct which ... amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was fraud or which the law treats as entirely contrary to public policy..."

In the case the advisory email which was found to have been sharp practice as described above, suggested hiding an act of victimisation in a wider redundancy process. The EAT allowed the Claimant's appeal that the evidence be used, as it demonstrated an attempt at deception of the Claimant and the Employment Tribunal.

This case illustrates the principle that a solicitor's first duty is to the Court.

## Victimisation

In the case of *Saad v Southampton University Hospitals NHS Trust* the EAT was asked to consider whether the Claimant had to be dishonest for an allegation or evidence not to be protected by victimisation legislation.

The EAT found that the Claimant did have to be dishonest in his allegation or evidence to be refused the protection of both victimisation and whistleblowing.

In this case the employee believed that his allegations were true, it was not given in bad faith, even though the facts were later found to be untrue. On that basis he was not dishonest and his claims could proceed.

## Employment Contracts

Two interesting points arise out of the case of *Brown & Another v Neon Management Limited & Another*.

The first concerns serving a long period of notice, in this case six and twelve months respectively for each of the two Claimants. Both had resigned due to a repudiatory breach of contract. Both chose to serve their notice. In doing so the EAT found that such long service affirmed the contracts, meaning in a constructive dismissal claim, the original breaches of contract by the employer could not be relied upon.

This could have been the end of the matter, however, during that notice period the employer then committed further fundamental breaches of the employee's contracts, including making unwarranted findings against them and reporting them to the regulator without good reason. These acts by the employer during the notice period resulted in a loss of trust and confidence giving the employees the opportunity to again claim constructive dismissal.

It is worth noting that trust and confidence is a term implied into every contract of employment, regardless of whether it is expressly stated. A breach of this implied term is often used as a reason justifying resignation and a future claim of constructive dismissal. It is something to consider.

## TUPE

A Spanish case heard by the CJEU was asked to decide whether a 5 months cessation in the activities of the undertaking (in this case a school) precluded a TUPE transfer.

A contractor was appointed to take over the running of the school. A dispute arose and on 27 March 2013, the contractor dismissed all of the staff. On 1 April 2013 all activity at the school ceased. This was two months before the end of the school year.

In August 2013 and following tendering a new contractor was appointed. In September the school reopened for the new year and new staff were appointed. None of the staff appointed were previously employed at the school.

The CJEU found that although the school had been closed for 5 months, 3 of those were during the school holidays. The CJEU concluded that this temporary cessation in activity did not therefore preclude a TUPE transfer from taking place. It was referred back to the national court to decide whether in fact a TUPE transfer had taken place, but was clear the time elapsed did not preclude the possibility.

This illustrates the onerous and far reaching grasp of TUPE. It is always best to take advice about this complex area.

## And finally.....

This concludes the August newsletter, as always we very much hope you have found it to be informative. Should it raise any questions please do not hesitate to call.

Bye for now.

Lynsey and the team.

Lynsey Howes

Direct: (01482) 639674

Email: [lhowes@hamers.com](mailto:lhowes@hamers.com)

5 Earls Court, Priory Park East,  
Kingston upon Hull, HU4 7DY

Switch: (01482) 326666

[www.hamers.com](http://www.hamers.com)

**Hamers**  
SOLICITORS

No responsibility for loss caused to any person by acting or refraining from acting as a result of this information can be accepted by Hamers Solicitors LLP. If you have any doubt about any of the matters raised above, please seek further advice.

Hamers Solicitors LLP is a limited liability partnership registered in England & Wales (Registered No. OC352081) and regulated by the Solicitors Regulation Authority.