BREAKFAST BITES

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Case list

- ***Sinclair v Trackwork***
- ***Kong v Gulf international (GB)Ltd***
- ***Martin v London Borough of Southwark***
- ***Fallahi v TWI Ltd***
- ***Royal Mail Group Ltd v Efobi (SC)***
- ***Seccombe v Reed***

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“It’s not what you do but the way that you do it”: application in Auto UFD.

The true cause of a dismissal can be very tricky to identify:

- Fact of disclosure v mode of disclosure in *Bolton School v Evans* [2007] ICR 641 CA.
- *Martin v Devonshires Solicitors* [2011] ICR 352, the EAT held that an employer will not be liable if it can show that the reason for its act or omission was not the protected act as such, but rather one or more features and/or consequences of it which were properly and genuinely separable from it.
- BUT *Woodhouse v West North West Homes Leeds Ltd* [2013] IRLR 773 concerns over ‘evasion’ exceptional circumstances approach.

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Sinclair v Trackwork [2021] IRLR 557

- Trackwork Ltd did not inform their other workers of C's burdensome health and safety work obligations in implementing strict new regulations. Colleagues complained of significant levels of friction accusing him of being *"overcautious and somewhat zealous"* He was dismissed for the demoralising impact that his actions had caused to them.
- Claim under s100 ERA
- Choudhary J in the EAT

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Causa causans?

- Matters identified as being the reason for dismissal were the direct result of C carrying out his duties as designated H and S employee.
- Diligent execution of the duties caused relationships to sour. NB they were not soured for some other reason.
- The over zealous execution of the role not properly separable from the role itself.
- No evidence of extraneous malicious behaviour by C.
- Dismissal Auto Unfair.

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Kong v Gulf international (GB)Ltd EAT UKEAT /055/21/JOJ

- C was employed by R as Head of Financial Audit. A draft audit report prepared by her raised concerns about the lawfulness of an agreement drafted by Head of Legal.
- HOL had been responsible for the agreement, disagreed with the claimant's view. She went to C's office and a discussion took place, following which there were exchanges of emails.
- The HOL considered that C had impugned her integrity, and raised the matter with the Head of HR and others. She indicated that she was very upset, and could not see how she could continue working with the claimant. She declined mediation.
- The Head of HR and CEO became inclined to the view that the claimant should be dismissed. The Group Chief Auditor agreed to that course and the claimant was then dismissed

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Kong conclusions.

- The Tribunal properly found that they were not motivated by the protected disclosures, but by the view that they took of C's conduct towards the Head of Legal, when she and C met, and in particular in a subsequent email. They considered that to be an unacceptable personal attack on the Head of Legal's abilities, and reflective (in their view) of a wider problem with the claimant's interpersonal skills.
- s103A claim was correctly rejected.

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Lessons to be learned?

- ‘But for test’ wholly irrelevant.
- ‘Principal reason’ for dismissal under s100(1)/103A the same.
- Great care to be taken when assessing the ‘reason why’ to see if it the ‘real’ reason.
- Focus on the key issue, how viable is it to separate “message” from “mode”?
- Sinclair proof that true “separation” may be difficult to establish. Tread carefully.

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Martin v London Borough of Southwark

- Issue: Qualifying protected disclosures
- S.43B(1) ERA 1996
- PD Detriment claim

- EAT, HHJ Tayler (10 June 2021)
- The claimant was concerned that teachers, including himself, were working in excess of “statutory directed time”.

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Martin v London Borough of Southwark (2)

- Starting point: s.43B(1)
- ET error: loose analysis
- 5-step analysis (requirement)
- "It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. **First**, there must be a disclosure of information. **Secondly**, the worker must believe that the disclosure is made in the public interest. **Thirdly**, if the worker does hold such a belief, it must be reasonably held. **Fourthly**, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). **Fifthly**, if the worker does hold such a belief, it must be reasonably held." (HHJ Auerbach in ***Williams v Michelle Brown AM***)

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Martin v London Borough of Southwark (3)

- "**Unless all five conditions are satisfied there will be not be a qualifying disclosure**. In a given case any one or more of them may be in dispute, **but in every case, it is a good idea for the Tribunal to work through all five**. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn out its reasoning and conclusions in relation to those which are in dispute." (***Williams*** ibid)
- Concise findings (10 pages …)

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Martin v London Borough of Southwark (4)

- Importance of structured approach
- Don’t be tripped up by “Information”:
- sufficient factual content and specificity to be capable of tending to show one of the matters listed in s43B(1).

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Fallahi v TWI Ltd

- EAT, Bourne J – 17th August 2021
- Case: Unfair dismissal, capability
- Issue: going behind a written warning?

- Facts: performance issues, capability hearing
- Final written warning

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Fallahi v TWI Ltd (2)

- ET: dismissing claim
- Could not go behind FWW unless “manifestly inappropriate”
- (***Davies v Sandwell MBC*** and ***Wincanton Group v Stone****)*
- But capability?

- Dismissal letter:

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Fallahi v TWI Ltd (3)

- *Bandara v BBC* (2016, EAT):

i. A final warning may be found manifestly inappropriate "if there was something about its imposition that once pointed out shows that it plainly ought not to have been imposed". [30]

ii. The latter test was satisfied in the case of a warning for gross misconduct where the conduct "plainly did not amount to gross misconduct either on a reading of the Respondent's own disciplinary procedure or by generally accepted standards". [32]

iii. A final warning will never be manifestly inappropriate if it was within the range of reasonable responses, although the two tests are not the same. [33]

iv. If a final warning was manifestly inappropriate, and if the employer attached significant weight to it when deciding to dismiss (as opposed to treating it as mere background or as indicative of the standard to be expected while in reality dismissing for the post-warning misconduct), it would be difficult to see how the employer's decision could have been reasonable

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Fallahi v TWI Ltd (4)

- EAT conclusions:
- ET: the reasonableness (in all the circumstances) of the dismissal, not the reasonableness (or appropriateness) of the final warning. The latter was a relevant factor, but was only one factor.
- Capability (or conduct) and final stage?
- Discretionary language wins the day
- Manifestly inappropriate test – capability

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Royal Mail Group Ltd v Efobi [2021] UKSC

- Supreme Court confirmation of reverse burden of proof in discrimination cases.
- Issue: claimant to prove a *prima facie* case
- Direct discrimination:
  - C must prove prima facie case LFT
  - And, reason for treatment was protected characteristic
- R produced no/limited evidence of application processes
- Inferences and does the burden shift?

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Royal Mail Group Ltd v Efobi (2)

- EAT: (Elisabeth Laing J) allowed the appeal
- that the employment tribunal had wrongly interpreted s 136(2) EqA as imposing an initial burden of proof on the claimant.
- CA: ***Ayodele v Citylink Ltd***
- S.54A(2) RRA 1976 (2-stage test)
- the distinction between “facts” and “explanation”.

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Royal Mail Group Ltd v Efobi (3)

- SC: “The central point … is that s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not there are facts...”
- “replacing “[w]here … the complainant proves facts” by “[i]f there are facts” created the possibility for a different misunderstanding that there is no longer any burden of proof on a claimant.”

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Royal Mail Group Ltd v Efobi (4)

- Analogy with unfair dismissal: neutral burden?
- Adverse inferences - no show?
- Not relevant to first stage of test (explanation)
- ***Madarassy*** applied.
- Tribunals are the fact-finders (and inference-makers)
- Onus on Claimant to seek disclosure.

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Seccombe v Reed

- EAT, HHJ Tayler, 3rd August 2021
- Issues: disability and knowledge of
- 2 bouts of mental illness pre-dismissal
- ET: not established long term

- Knowledge: on health questionnaire he had not disclosed any mental health impairment
- ET: no knowledge

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Seccombe v Reed (2)

- EAT: perversity appeal
- Summary of tests of disability and knowledge
- C: time off for “psychological/emotional recovery” (Jan 18);
- Cf. “severe anxiety and depression” as pleaded
- Long-term: about the effect
- Relevant time = acts complained of

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Seccombe v Reed (3)

- Relevant time = acts complained of
- ***All Answers v W*** [2021] IRLR 612
  - **“The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months."**

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Thank you

We are happy to pick up any questions arising.

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