

## UK: EMPLOYMENT UPDATE

Welcome to this month's briefing in which we explore two cases where an employee has been manipulated and/or influenced to take a particular decision. In such circumstances, who is the decision maker for the purposes of identifying an employer's reasons for the action complained of? Can the unlawful motives of a manipulating colleague be attributed to the decision maker? Will exerting influence over the decision maker mean that there are in fact two (or more) decision makers? We also report on a decision that expands on the principle that a transferee acquires a transferor's liability in tort for personal injury.

### **Whistleblowing: when assessing the reason for a dismissal, only the motivation of the dismissing manager is attributable to the employer**

An employee will be regarded as automatically unfairly dismissed if the reason for the dismissal is that the employee 'blew the whistle' (made a protected disclosure) regardless of the employee's length of service. If the individual who took the decision to dismiss did not know of the employee's protected disclosure, but was manipulated by an employee who did, does that render the dismissal automatically unfair?

J reported concerns to her manager about irregularities in the way in which client discount arrangements were being made. He put J under pressure to withdraw the allegations and implied that her job could be at risk if she did not do so. He then embarked on a course of bullying and harassment which included a performance management programme. J eventually went off sick and after a period of absence V was asked to take a decision about J's future employment. V had no previous involvement with J. She asked J's manager for information and he provided her with partial and misleading information that was intended to cause V to conclude that J should be dismissed for poor performance. The Employment Tribunal concluded that the manager was motivated by J's protected disclosures when he manipulated the information. It concluded that it was not surprising, but in fact inevitable, that V, the decision maker, would choose to dismiss on poor performance grounds; she genuinely believed J was a poor performer on the basis of the partial and misleading information supplied.

The Court of Appeal, overturning the Employment Appeal Tribunal (EAT), held that when determining the reason for an employee's dismissal the

#### Key issues

- Whistleblowing: when assessing the reason for a dismissal, only the motivation of the dismissing manager is attributable to the employer
- Discrimination: exerting influence over a decision maker can render the decision a joint one.
- TUPE: transferee liable for personal injury caused by the transferor's breach of the duty of care.

employment tribunal should only consider the mental processes of the person(s) authorised to take the dismissal decision and who did so. Although the decision maker, V, had been manipulated her reason for dismissal was a fair one, capability. The motivation of the manager could not be attributed to her (and therefore to the employer) to render the dismissal unfair by virtue of being motivated by the employee's protected disclosure.

The Court acknowledged that at first sight it seems wrong that the employer should not be liable in circumstances such as these. However, as a matter of law, the statutory right not to be unfairly dismissed depends on there being unfairness on the part of the 'employer'; unfair or even unlawful conduct on the part of individual colleagues or managers is immaterial unless it is properly attributable to the employer.

The Court pointed out that in a case of this nature the employee might have an alternative remedy to an unfair dismissal claim. The employee might be able to recover compensation for the losses arising from the dismissal caused by the conduct of the 'manipulator'; if the conduct is detrimental treatment motivated by the employee having "blown the whistle". An employer can be 'vicariously' liable for the detrimental treatment that an employee's colleague (employee or worker) subjects him to on the grounds that he has made a protected disclosure. An employer can avoid such liability if it can demonstrate that it took all reasonable steps to prevent the other worker from acting in the way complained of. Whether or not the employer succeeds with such a defence, the worker can also be personally liable.

In most cases it is the decision maker whose motive must be scrutinised, however, the Court suggested that there could cases where the motive of other individuals involved in the decision making process could also be attributed to the employer. For example where an employer has a disciplinary procedure that places responsibility on an investigating manager to investigate the allegations and produce a report which will form the factual basis for the disciplinary decision of a second manager. In such circumstances the investigating manager's unlawful motive may be attributable to the employer. The Court also commented obiter that in some circumstances if a senior member of management was responsible for manipulating evidence in order to secure the dismissal of an employee because they had blown the whistle, the manipulator's motivation could be deemed that of the 'employer'.

*[Royal Mail Ltd v Jhuti]*

### **Discrimination: exerting influence over a disciplinary decision maker can render the decision a joint one**

The EAT considered issues similar to those explored by the Court of Appeal in the case outlined above in the context of a discrimination claim under the Equality Act 2010.

Case law has established that where a decision is taken by an individual, he will only be liable for discriminatory conduct if he acted with a discriminatory motive. What if a decision is based on tainted information supplied by another employee who did have a discriminatory motive for influencing the decision? The decision maker in this scenario will not be personally liable for discrimination but the 'supplier' of tainted information will be; the discriminatory act is the supply of the information, not the decision taken.

In many cases it is usually quite clear who the decision maker was in any particular situation; but not always. The EAT has accepted that the above principle is open to abuse if an employer operates a system of deliberately opaque decision making intended to mask the involvement of senior employees who dictate the decision to be taken to a junior employee whose decision they can then hide behind.

C complained that he had been subjected to a criminal investigation in circumstances where a female comparator had not. The Employment Tribunal held that the decision maker, D, had been influenced by two superior officers, with a discriminatory motive. On appeal, the EAT rejected the argument that D was an innocent agent acting without discriminatory motive and therefore neither he nor the employer guilty of sex discrimination. It upheld the Tribunal's conclusion that the decision to investigate was a joint one of the junior and two senior officers and that all three has acted with a discriminatory motivation.

The EAT agreed that employers should not be allowed to hide behind opaque decision making processes; in its view the way to avoid unfairness is for the Employment Tribunal to permit employees to amend their claims to 'target' alternative decision makers.

These cases illustrate that where decision makers are being manipulated by others who have unlawful reasons for doing so (either discrimination because of a protected characteristic or because the employee has made a protected disclosure) an employer is unlikely to be able to escape liability altogether: either the manipulator and the decision maker will be classed as co-decision makers, or, the act of manipulation itself will amount to discrimination or detrimental treatment (in the whistleblowing scenario).

*[Commissioner of Police of the Metropolis v Denby]*

## **TUPE; transferee liable for personal injury caused by the transferor's breach of the duty of care**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') provide that any act or omission before the transfer is completed, of or in relation to the transferor in relation to transferring employees is deemed to be an act or omission of the transferee.

Around seventeen years ago the Court of Appeal (in *Bernadone v Pall Mall Services Group*); held that the effect of TUPE was that a transferor's liability in tort for personal injury can transfer to the transferee employer. It was also held that the transferee was entitled to the benefit of any indemnity that the transferor was entitled to under its employer's liability insurance.

In the *Bernadone* case, the transferring employee sustained the accident before his employment contract TUPE transferred. The High Court has considered this principle where the negligence occurred before the transfer but the accident itself did not occur until after the employee had transferred.

Defective light wiring was installed in a shop by D2. Subsequently, when maintenance was carried out on the lighting by Co A it failed to notice and rectify the defective wiring. Co A was C's (the claimant's) employer. Subsequently, C's employment transferred under TUPE from Co A to D1. Two years later C when working on the defective light was electrocuted and seriously injured.

The Court had to consider who was liable for the subsequent negligent maintenance Co A or D1? C sued D1, his current employer. It argued that the transfer of liability under the Bernadone principle only applied to an accident that had actually occurred prior to the date of the transfer; therefore liability remained with the old employer, Co A.

The High Court rejected this on the grounds that the purpose of TUPE is to protect the transferring employees; not to protect the transferee employer from unknown liabilities that might occur. On the contrary, its view was that where a breach of the employer's duty occurs pre transfer but the injury occurs afterwards this falls squarely within the provisions of TUPE; the rights and liabilities arising under or in connection with the employment contract transfer with the employee; i.e. tortious and contractual claims.

D2 was held liable for the initial negligent installation and D1 for the subsequent negligent inspection/maintenance by Co A with a liability compensation split of 75% : 25%.

The facts of this case were clearly not run of the mill; however the decision provides an important clarification on what liabilities a transferee can potentially inherit with the incoming TUPE workforce. A potentially more common scenario could be where a transferring employee develops a psychiatric illness post transfer as a consequence of being subjected to excessive stress at work pre transfer. Where the circumstances permit, indemnity protection will help mitigate the risks that may arise.

*[Baker v British Gas Services (Commercial) Ltd]*

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