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In this edition of On Notice, we report on the EAT decision on the relationship between grievance and disciplinary procedures (*Samuel Smith v Marshall*), the recent EAT judgment on the reverse burden of proof in victimisation claims (*Pothecary Witham Weld v Bullimore*), the High Court decision providing guidance on how to exercise the right to make a payment in lieu of notice (*Geys v Société Générale*) and the decision of the EAT on the recoverability of damages for injury to health and feelings (*Taylor v XLN*). Further topics are discussed in the "in brief" section.

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### The right to discipline irrespective of a pending grievance appeal

In *Samuel Smith Old Brewery v Marshall*, a welcome decision for employers, the EAT has relaxed the time consuming rules restricting disciplinary and grievance processes from running concurrently.

Mr and Mrs Marshall were the managers of one of the pubs run by the well-known Samuel Smith brewery. Due to financial pressures, the brewery directed that the staffing hours at the Marshalls' pub be reduced from 84 to 45 hours. Mr and Mrs Marshall raised a grievance and refused to implement the new staffing hours. The grievance was not upheld and the Marshalls appealed, still refusing to implement the new staffing hours. Before the appeal was heard, the brewery commenced disciplinary proceedings which ultimately led to the dismissal of the Marshalls for gross misconduct. They subsequently filed a claim for unfair dismissal.

Both the employment tribunal and the EAT held that executing a dismissal by way of a disciplinary process before grievance proceedings had been completed was within the range of reasonable responses open to an employer. Only in the rarest of cases would it be outside that range. The brewery's decision to reduce staffing hours was reasonable and the refusal to implement the decision was not justified. The Marshalls could have raised the reasonableness of their actions as a defence to the disciplinary proceedings and, in any event, the brewery had agreed to reverse its decision if the grievance appeal was successful.

The outcome of this case will be welcomed by employers for its strong defence of the right to dismiss and its pragmatic approach to the interrelation between grievance and disciplinary procedures. However, caution is still necessary if the disciplinary proceedings are carried out before the grievance process is concluded, in the event there is a risk of unfairness or prejudice to the employee that cannot be overcome.

### Reversing the burden of proof in victimisation claims

The decision of the EAT in *Pothecary Witham Weld v Bullimore* reverses the burden of proof in victimisation claims under the Sex Discrimination Act, thus placing the burden on the employer in the first instance.

Miss Bullimore's former employers were a firm of solicitors, Potheary Witham Weld (PWW). In an earlier action she had unsuccessfully claimed against them for sex discrimination. In this action Miss Bullimore claimed that she had been victimised by PWW, who had sent an unfavourable reference to her new employers as a punishment for her bringing the initial claim.

It is well-settled that the burden of proof in sex discrimination cases is on the employer. However, this is the first time that the burden has been shifted to the employer in a victimisation claim. Thus, in the Employment Tribunal PWW were required to prove that they were not influenced in any significant way by the previous proceedings when writing the reference.

The EAT agreed that the burden of proof is on the employer in victimisation cases brought under the Sex Discrimination Act. This is in contrast to victimisation claims brought pursuant to the Race Relations Act in which the employee bears the burden of proof. This inconsistency was explained by the different language used in the two statutes.

Employers are used to bearing the burden of proof in discrimination claims. They should now be aware that the same approach is required in sex-related victimisation claims but not in race-related victimisation claims.

### **The need to give clear notice of an intention to pay in lieu of notice**

The High Court's decision in *Geys v Société Générale* emphasises the importance for employers to be clear and unequivocal when indicating the end of an employment relationship, or else face a potentially costly claim for wages linked to an ongoing employment relationship which is not in the mind of the employer at the time.

Mr Geys was dismissed by the Bank and under the terms of his employment contract was entitled to a 3 months' notice period or a payment in lieu of his notice. Shortly after his dismissal, whilst Mr Geys was working out his notice period, the Bank paid a sum of money into Mr Geys' account but crucially gave no written indication that this comprised a payment in lieu of notice or that his contract of employment was terminating on that date. He subsequently received written notice of the Bank's intention to exercise its right to make a payment in lieu of notice. An issue arose as to when his contract in fact terminated and whether

he was entitled to an additional sum as salary given this ambiguity.

The High Court confirmed that in the absence of a clear and express term in the contract, it would be very surprising if a contract could be terminated without unequivocal notice being given to the employee that the contract was in fact being terminated. The payment of the sum in lieu of notice was not sufficient to imply such a termination. Whilst Mr Geys could have surmised why the payment had been made, this was insufficient to alter the legal position. The Bank had to clearly communicate its intention to rely upon its right to make a payment in lieu of notice.

This serves as a reminder to employers to draft dismissal letters clearly and unequivocally in terms of terminating the employment relationship. Employers intending to rely upon a right to make a payment in lieu are well advised to put this in writing in the dismissal letter. For a "belt and braces" approach contracts of employment might also be drafted to expressly provide for termination being automatically triggered in the event of a payment in lieu of notice.

### **Personal injury and injured feelings in discrimination claims**

In *Taylor v XLN Telecom Ltd* the EAT has removed a barrier to claiming damages for injury to feelings or health in discrimination claims.

Mr Taylor was dismissed from his employment with XLN. He was subsequently diagnosed with stress, anxiety and depression and was prescribed sleeping pills, medication for stress-related heart palpitations and anti-depressants. He underwent a course of cognitive behavioural therapy.

On the facts the Employment Tribunal accepted that the dismissal was unfair and constituted an act of victimisation on racial grounds as Mr Taylor's race was directly linked in the evidence to the victimisation. However, Mr Taylor's claim for damages, personal injury and injury to health was rejected. In making their finding the Tribunal applied a strict interpretation to the issue of causation and found that because the injuries were caused by the act of dismissal, rather than by any knowledge that the act was discriminatory, damages could not be claimed.

The EAT rejected this strict test and held that once an act was found to be unlawful Mr Taylor

was entitled to be compensated for the consequences of that act. Here the unlawful act was the dismissal. In this case there was clear evidence that the consequences of that dismissal included injury to health and injured feelings. Knowledge that the unlawful act was discriminatory may increase the injury to feelings or to health (and thus the level of damages) but is not a precondition to establishing a right to recover damages.

This broad approach to causation should be borne in mind in a wider context when employers consider the issue of loss.

### In Brief:

- **Equality Bill set to become law**  
After almost 5 years of discussion, consultation and delays, the Equality Bill has finally been passed and becomes the Equality Act 2010. The Act harmonises the pre-existing equality law and extends it considerably, particularly in areas such as age discrimination, gender reassignment and marriage and/or civil partnerships. Interestingly, in its current form the Act permits a form of positive discrimination at the point of job application, but this is in doubt given the

outcome of the general election. Most of the new Act is expected to come into force from October 2010 but other provisions will be phased in. Employers can expect to be kept busy by this Act and the inevitable caselaw which will follow.

- **New national minimum wage levels**  
The Government has recently accepted the recommendations of the Low Pay Commission on the revised levels for the national minimum wage (NMW). It will come as no surprise to employers that the levels have been revised upwards. The NMW for adults over the age of 21 is set to become £5.93 per hour. Adults between the ages of 18 and 20 will have to be paid £4.92 per hour and 16-17 year olds will receive a minimum of £3.64 per hour. A new apprenticeship minimum wage will apply of £2.50 per hour. The new NMW levels are set to apply from October 2010.

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