



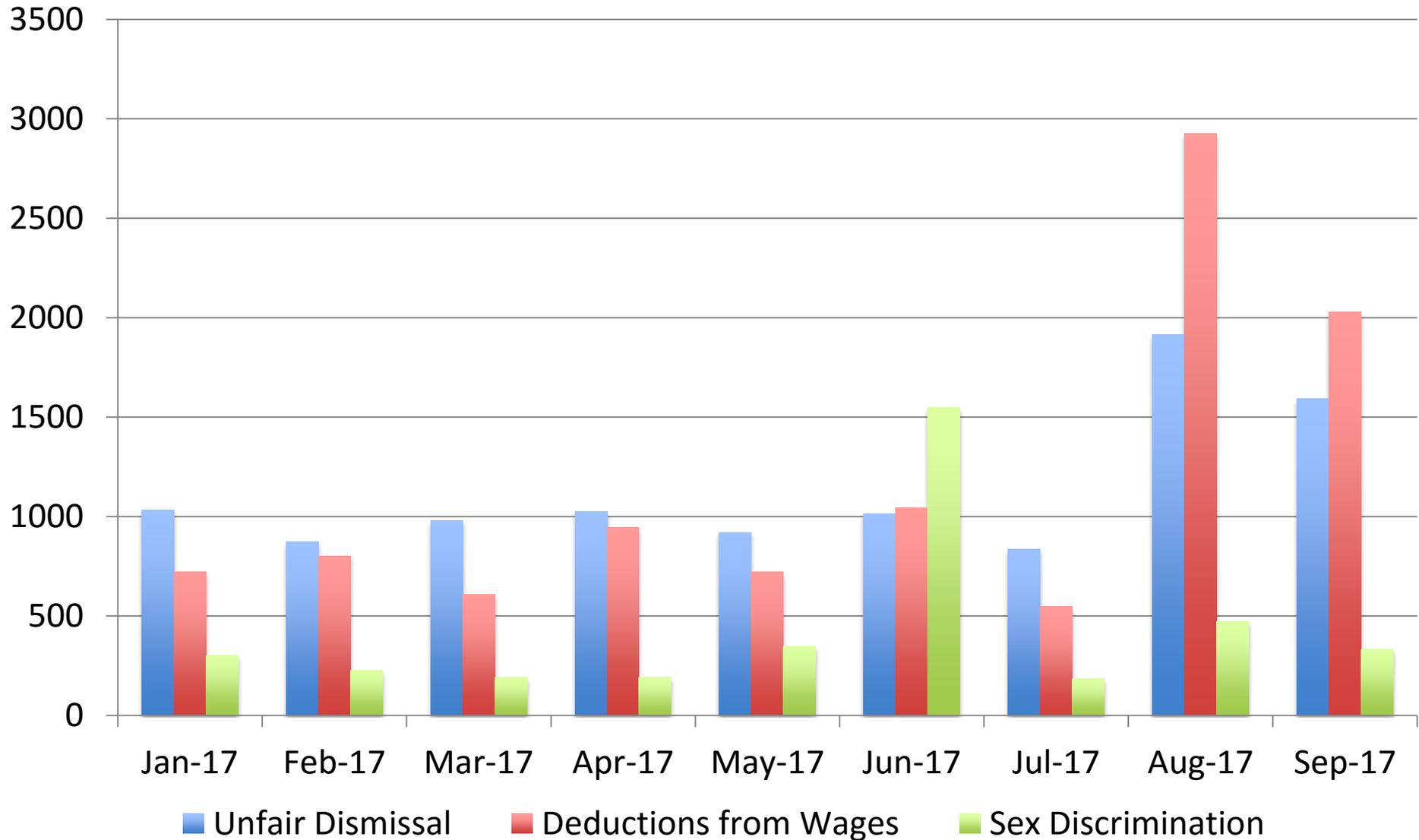
# Employment law update

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# Tribunal Claims



# At the Supreme Court...

- **A v B:** Was a headteacher guilty of misconduct in failing to disclose her friend's conviction for downloading indecent images of children?
- **Pimlico Plumbers v Smith:** was a plumber 'in employment' for purposes of Equality Act and a 'worker' for purposes of holiday pay?
- **Lee v Ashers Baking Company:** was it discriminatory for a bakers to refuse to bake a cake with 'support gay marriage' printed on it?

# Gender Pay Gap Reporting

- Public sector figures due 31 March (week before private sector)
- Mean and median gender pay gaps, mean and median bonus gaps, male and female proportions of each pay quartile
- Remember, each pay quartile has an equal number of employees!
- Don't sweat the small stuff!
- What's the narrative?

# Data protection

- General Data Protection Regulation comes into force in May 2018
- Re-jigs and strengthens current data protection rules
- Some of the changes are being overstated
- Key principles remain unchanged:
  - Limited data collection
  - Data confined to legitimate purposes
  - Data security
  - Right to access

# Check-off

- Expected that from 10 March 2018, public sector employers can only operate check off if:
  - Union members have option to pay subscription by other means and
  - Arrangements have been made for union to make reasonable payments to employer
- Employer must be satisfied that the payments are ‘substantially equivalent’ to the cost of making the deductions

# Holiday Pay

- ECJ will continue to affect interpretation of holiday pay requirements up to and beyond Brexit
- **King v Sash Windows:** 'self employed' salesperson found to be a worker after he retires
- ECJ says he can claim all holiday pay due over the 12 years of his employment
- Not subject to 18 month carry over limit applicable in cases of sickness absence
- Throws doubt on legality of two year limit on unlawful deduction claims and the 'three month' rule in Bear Scotland

# Dudley Metropolitan Borough Council v Willets

- Must holiday pay take account of voluntary as well as compulsory overtime?
- Yes says EAT
- Issue is what workers are 'normally paid'
- Did not matter that employer was not requiring them to work additional hours
- Voluntary overtime is still work, so pay for it is still payment for work done

# Defining Working Time

- Well established that on call time spent on employer's premises counts as working time for Working Time Regs
- **Ville de Nivelles v Matzac**: ECJ finds volunteer firefighter was working when on call but at home
- Key is that the location was specified by the employer and requirement for immediate response left worker with no control over how he spent his time

# Compensatory rest

- Lots of exceptions to rest-break entitlements (shift workers, mobile workers etc) – but all entitled ‘where possible’ to ‘equivalent period of compensatory rest’
- **Crawford v Network Rail**: employee was relief cover signalman working 8 hour shifts in single person signal box. Six trains per hour
- Could have lots of short breaks – but no one break of 20 minutes or more
- That was not a period of compensatory rest, because it was possible for Network Rail to roster a relief signalman to cover the 20 minute rest break.

# Royal Mencap Society v Tomlinson Blake (EAT 21/4/17)

- Issue: when is a sleeping worker actually working for minimum wage purposes?
- Exclusion of on-call time spent sleeping only applies if worker is not otherwise working
- Number of factors
  - Purpose of work
  - Extent of restriction
  - Level of responsibility
  - Who wakes the worker?

# HMRC Social Care Compliance Scheme

- Declare your underpayment to the HMRC to avoid financial penalty and being publically named
- Involves committing to paying any underpayment by 31 March 2019
- Employers have until 31 December to declare their underpayments to HMRC

# TUPE

- The transfer of employees under TUPE is automatic – happens even if parties are unaware of it
- In **Eyres v Air Vane Compressors Ltd**, parties thought that employee was not covered because he was also a director – he stayed with original employer then left when pay stopped
- Tribunal wrong to find there had been express agreement that he be re-employed by original employer
- Case remitted to decide whether agreement had arisen by implication when he eventually left

# Date of Dismissal

- Effective date of termination (EDT) is date 'dismissal takes effect'
- In **Feltham Management Ltd v Feltham** employee walked out after row – no formal steps taken
- Months later she asked to return and was told that she had resigned when she walked out – she disagreed
- Eventually accepted employment was over when second letter insisted she was no longer employed
- Held – EDT was the date of the second letter, not the first insistence that she had resigned. She was entitled to challenge the employer's view and then eventually accept it

# Whistleblowing

- 2013 change – any disclosure must, in reasonable belief of claimant, be ‘in the public interest’
- A disclosure must be information showing wrongdoing – a mere allegation or complaint is not enough
- Can you separate the fact of the disclosure from the employee’s overall conduct?

# Chesterton Global Ltd v Nurmohamed

- Whistleblowing allegations must ‘in the reasonable belief’ of claimant be made in the public interest
- Employee alleged employer doctored internal accounts to suppress profits and reduce commission
- Contractual wrongdoing, but applying to 100 colleagues
- Court of Appeal uphold finding that public interest test was met

# Parsons v Airplus International Ltd

- Employee dismissed for 'poor cultural fit'
- Had made a number of complaints about compliance issues
- EAT found they were not in the public interest because they simply concerned employee's personal liability
- In any event, employer had shown it was concerned with behaviour, rather than the disclosures themselves

# Beatt v Croydon Health Services NHS Trust

- Heart surgeon in department with poor working relationships
- Objects when a nurse is suspended during working day – claims it led to death of a patient
- Dismissed for making false and unsubstantiated claims
- Tribunal finds he acted in good faith
- Dismissal automatically unfair – doesn't matter that employer thought disclosures were not protected
- Permission to appeal to Supreme Court denied

# Royal Mail Ltd v Jhuti

- New employee makes protected disclosure – line manager is hostile
- Increased hostility leads to stress-related absence
- Employee fails probation and is dismissed
- Dismissal carried out by different manager in good faith, but based on misleading information from line manager
- Not an automatically unfair dismissal
- But damages for detriment could include loss flowing from dismissal

# Unfair Dismissal

- Reasons for dismissal
- Relationship between unfair and wrongful dismissal
- Relevance of previous warnings

# Expiry of fixed-term contracts

- Non-renewal of a FTC is a dismissal under the Employment Rights Act '96
- The expiry of the term can be 'some other substantial reason for dismissal' - **Royal Surrey County NHS Foundation Trust v Drzymala**
- But that case also stresses that reasonableness is judged in same way as for express dismissal
- So Tribunal entitled to find dismissal unfair because employer failed to give proper consideration to alternative work

# Right to work in the UK

- Employer has 'statutory defence' to civil penalty for employing illegal workers if proper document checks have been done
- But that does not mean that employment is unlawful in absence of those checks
- In **Baker v Abellio London Ltd** a Jamaican national with right to live and work in UK was dismissed on Home Office advice fro lack of paperwork
- Held not to be a 'statutory ban' dismissal – he was not subject to immigration control
- Was SOSR – issue for ET was reasonableness – was Home Office given proper information?

# Arnold Clark Automobiles Ltd v Spoor

- Employee with 42 years' service loses temper and 'grabs' apprentice – 'handbags between two guys'
- Manager not planning formal action but HR intervenes and insists on zero tolerance to violence
- EAT upholds finding of unfair dismissal – even though actions were gross misconduct, could still be unreasonable to dismiss
- No evidence of actual zero tolerance policy
- Employer should have had regard to length of service and surrounding circumstances

# Demotion and dismissal

- **Rochford v WNS Global Services:** Employee seeks to return from long-term sick – employer insists he returns to more junior position (on full pay)
- He refuses to do that and (after a few months is sacked)
- ET finds demotion was discrimination, but dismissal was not (though procedurally unfair)
- Court of Appeal upholds – work was within his contractual duties and he was fit to do it. Discrimination did not entitle him to abstain from work completely

# Agoreyo v London Borough of Lambeth

- Primary school teacher suspended for alleged 'inappropriate force' with two disruptive children
- Resigns same day – claims breach of contract
- High Court upholds claim – employer's reason for suspension was unclear, and no exploration of alternatives
- In circo, with teacher asking for support which had not been given, decision to suspend was a fundamental breach of contract

# Stratford v Auto Trail VR Ltd

- Employee dismissed for using mobile phone on shop floor
- Employer held that it was not gross misconduct but dismissed anyway - this was 18<sup>th</sup> offence, employer cites trust and confidence
- EAT agrees with ET that dismissal was fair
- Expired warnings were part of background and employer could take them into account
- Be very careful with this!

# University of Sunderland v Drossou

- Compensatory award for unfair dismissal capped at 52 x week's pay
- EAT holds that week's pay includes employer pension contributions
- Also holds that any reduction for contributory fault should be applied equally to both compensatory award and basic award

# Unlawful inducements

- Unlawful to make an offer with purpose and effect that any of employee's terms no longer covered by collective bargaining
- **Kostal UK Ltd v Dunkley and others:** employer makes individual pay offers to employees when union negotiations break down
- EAT holds that offer was unlawful even though full recognition stayed in place for next year
- Expect an appeal - £400K at stake!

# Jet2.com Ltd v Denby

- Pilot also a BALPA activist – confrontation with chairman over recognition
- Leaves for another job and applies to return some years later
- Refused on basis that he was ‘disruptive’ when employed
- EAT accepts that was a manifestation of his union membership – unlawful to refuse to employ him

# Lynham & Rooney v Birmingham City Council

- Employer offers VR scheme for 'eligible' employees
- Seeks to exclude employees who are destined for compulsory redundancy anyway
- But it had used 'eligible' and 'affected' interchangeably
- Meant that all 'affected' employees could apply
- Breach of contract not to let them – but what loss did they suffer?

# Direct disability discrimination

- Direct discrimination: less favourable treatment because of 'a' protected characteristic
- **Chief Constable of Norfolk v Coffey:** Employer refuses officer who fails to meet hearing standard – wrongly believes her duties would be restricted
- **Held:** direct discrimination, even though not alleged her hearing loss actually amounted to a disability

# Knowledge of disability

- S.15 discrimination and duty to make reasonable adjustments only apply if employer knows or ought reasonably be expected to know that employee is disabled
- **Donelian v Liberata UK Ltd**: CofA says employer can put weight on well-reasoned OH opinion
- OH had said there was no real medical impairment and employer was entitled to rely on that despite ET finding that there was a disability

# Charlesworth v Dransfields Engineering Services Ltd

- Employee absent for cancer treatment
- While he is away, employer works around his absence
- Finds that they can reorganise and delete his job – make him redundant
- Held no s.15 discrimination – dismissal was not ‘because of’ absence even though absence gave opportunity for dismissal

# Williams v The Trustees of Swansea University Pension and Assurance Scheme

- Disabled employee forced to take early retirement
- Enhanced pension based on salary at time of retirement
- Disability had forced him to work part-time – pension would have been higher if disability had been sudden
- Court of Appeal says no ‘unfavourable’ treatment
- Actually treated favourably, even if some disabled employees would have done better still
- Permission given to go to Supreme Court!

# Government Legal Services v Brookes

- GLS uses multiple choice 'situational judgment test' to sift trainee lawyer candidates
- Claimant has Aspergers – makes it harder to choose best option, would prefer short narrative answers
- GLS refuses, claimant fails
- Held to be s.15 discrimination, indirect discrimination and failure to make reasonable adjustments

# Disability harassment

- Unwanted conduct 'related to' a protected characteristic
- In **Peninsula Business Services Ltd v Baker** employer orders surveillance of employee who claimed that he was disabled due to dyslexia
- EAT say that can't be harassment because not established that employee was disabled
- Also disclosing fact of surveillance not harassment because it was required under Acas Code of Practice

# Keep in touch...



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