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Insights

NO ACAS EARLY CONCILIATION BUT THE CLAIM CONTINUES, AND A GENERAL EMPLOYMENT NEWS ROUND-UP

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SUMMARY

The return of our monthly format for employment law updates sees new cases on whether a failure to carry out ACAS Early Conciliation is fatal to claims progressing, whether a claimant after proceedings are ongoing can add new claims not included in the ET1, and the correct approach for assessing injury to feelings when applying the "Vento" guidelines. We also have a general news round-up including the new regulations for Neonatal care coming into force from 6 April 2025, proposals from the Women's Equality Committee on paid leave for early pregnancy terminations before 24 weeks (including miscarriage), and the latest from the FCA and PRA on "Sexism in the City".

FAILURE TO CARRY OUT ACAS EARLY CONCILIATION (EC) IS NOT FATAL TO A CLAIM PROGRESSING

This December 2024 EAT decision is important because it reverses a previous authority relating to what happens when ACAS EC is not carried out, but the tribunal nonetheless accepts the claim, and the respondent does not raise the issue in the ET3. Where this happens, can a respondent at a later stage apply to have the claim retrospectively rejected for failure to carry out ACAS EC?

In the 2022 case of *Pryce and Baxterstorey Limited*, the EAT said "yes" to the above question. In *Pryce*, the claimant made a procedural error. She sent her ACAS EC certificate **after** submitting her ET1. For this reason she also did not tick the relevant box in the ET1 stating that she had an ACAS EC certificate. She asked that the tribunal read the certificate and the ET1 together.

At a preliminary hearing a few months later, the tribunal noticed the procedural error, along with the lack of a ticked box, and following its interpretation of Rule 12 of the Employment Tribunal Rules

2013 (the Rules), struck out Pryce's claim for want of jurisdiction. Essentially, the tribunal decided it had no jurisdiction to hear a claim where ACAS EC had either not been carried out, or not carried out properly. On appeal, the EAT agreed.

The EAT in this case took a different view and *Pryce* was overturned (see below).

The facts can be summarised briefly. The claimant was made redundant in April 2023, but believed the true reason for her dismissal was whistleblowing. She brought a claim for an automatically unfair whistleblowing dismissal along with an application for interim relief. Under the Rules, an application for interim relief exempts the unfair dismissal claim from ACAS EC because interim relief has very short time limits.

However, the claimant brought a separate detriment claim under section 48 of the Employment Rights Act 1996 (ERA). There is no ACAS EC exemption for a s48 claim, and no ACAS EC was carried out. The tribunal nonetheless accepted the s48 claim and the respondents did not respond to the claim or the application. In fact, the respondents did not respond at all. As a result, the interim relief application was granted, and a judgment in default of defence was entered. A remedies hearing was scheduled.

At this late stage, the respondents reacted and made various applications to the Tribunal, which led to:

- an extension of time for filing ET3(s);
- the interim relief decision being set aside;
- the s48 claim being retrospectively rejected under Rule 12 but; and
- the claimant being given leave to amend her claim to allow her to restore the s48 claim.

The respondents appealed to the EAT regarding the decision to allow the claimant to restore her s48 claim after it had been retrospectively rejected. If the tribunal had followed *Pryce*, argued the respondents, this surely would not have been permitted?

The EAT said the difficulty with the tribunal decision was that no consideration had been given to the 2023 Court of Appeal decision in *Clark-v-Sainbury's Limited*. In *Clark* it was held that, if a claim is not rejected for a failure to carry out ACAS EC at an early stage, a respondent cannot argue at a later stage that the claim **should** have been rejected for that reason. If the tribunal had considered *Clark*, it would not have made the decision to reject the s48 claim and would not have needed to order an amendment of the claim to allow it back into the proceedings.

The EAT based its decision on the following points:

- A failure to carry out ACAS EC does not remove the jurisdiction of the tribunal to hear the claim. The tribunal is still competent to hear the merits;
- A rejection of the claim under Rule 12 **can** be a jurisdictional issue, but not if it involves ACAS EC. Rule 12 deals with ACAS EC issues separately from jurisdictional issues;
- The rejection of a claim under Rule 12 as it relates ACAS EC, is essentially a procedural/administrative step going to whether or not the tribunal issues the claim. Once the claim is in the hands of the tribunal after issue, it has the jurisdiction to hear it;
- The intention of ACAS EC and Rule 12 is that claims are rejected promptly so that post-rejection the claimant can still engage with ACAS as required by the EC scheme. Conciliation will often have the greatest chance of success if it happens before the parties have commenced legal proceedings; and
- Because failure to carry out ACAS EC does not raise a jurisdictional issue, a respondent cannot rely on Rules 28 or 38 to strike out the claim for want of jurisdiction. It is not a matter of jurisdiction.

The EAT said there was also no prejudice to the respondents, although it has to be said that it was only the s48 detriment claim that enabled the claimant to join in five additional respondents, including individuals. The claimants could not have joined in other parties, certainly not individuals, to the unfair dismissal claim.

Overall, the EAT held that a failure to comply with ACAS EC did not remove the tribunal's jurisdiction to consider the merits of a claim. It followed from this that the EAT's decision to the contrary in *Pryce* was manifestly wrong and was overturned. It should be noted that *Pryce* was decided before *Clark* and the EAT in *Pryce* did not have the benefit of a Court of Appeal decision to guide them.

The appeal was dismissed and the unfair dismissal and s48 claims were remitted back to the tribunal for a full merits hearing.

WHY THIS MATTERS

The facts of this case are unusual. Respondents are normally alert to the issue of whether ACAS EC has been complied with. In this case the opposite happened as the respondents apparently ignored the claims, including an application for interim relief, until a late stage.

However, it is now clear that, if there are issues with ACAS EC which would normally lead to a rejection under Rule 12 but the claim is accepted, these issues need to be raised very quickly, the latest stage probably being the ET3.

If the tribunal accepts the claim and the respondent does not raise the ACAS EC issue in its ET3, it is probably too late.

A CLAIMANT CANNOT ADD NEW CLAIMS ONCE PROCEEDINGS HAVE STARTED

This case concerns a decision by the EAT to dismiss an appeal regarding a refusal to amend a claim/add claims in an employment tribunal case.

The claimant presented a tribunal claim in March 2023. The claims (initially) were for breach of contract, associative disability discrimination, and failure to comply with the ACAS Code. The claimant was legally represented, and early drafts of her claim included whistleblowing. The final version presented to the tribunal did not.

In August 2023, once the claim was ongoing and after changing lawyers, the claimant applied to amend her claim, adding a new claim and trying to reinstate the whistleblowing claim set out in the early drafts of her claim form. The proposed amendment was to add the following:

- detriment and automatic unfair dismissal connected to protected disclosures (whistleblowing); and
- indirect associative sex discrimination.

The Respondents objected.

The tribunal rejected the amendment application, holding that the claimant, who was legally represented, had made an informed decision not to pursue claims for whistleblowing or associative sex discrimination.

The Claimant appealed to the EAT. She argued:

- The tribunal's conclusion that she had made an "informed decision" to exclude whistleblowing claims was unsupported by evidence; and
- The tribunal should have taken a more inquisitorial approach, such as inviting her to provide oral evidence about her interactions with her former lawyers.

There was a complicating factor in that there were apparently two claim forms prepared for presentation to the tribunal. The first, which was the one submitted, did not include whistleblowing. The second, which was the one not submitted, did include whistleblowing.

The claimant said she believed that it was the second claim form which had been submitted, and that her whistleblowing claim had been included. However, she did not give witness evidence in this

regard. The claimant also did not waive legal privilege in respect of any potential earlier version of the particulars of claim.

The EAT dismissed the appeal. The key findings were:

- The tribunal was entitled to conclude that the claimant had made an informed decision to exclude whistleblowing from her original claim form;
- The tribunal was not required to adopt an inquisitorial approach or invite oral evidence from the claimant. The claim form presented to the tribunal could not be added to – the claimant did not get two bites of the cherry; and

The claimant bears responsibility for the decisions made by her legal representatives. If the claimant had wished to reveal more about this, she could have introduced evidence or waived privilege regarding her former solicitors' advice, but she did not.

WHY THIS MATTERS

The judgment highlights the importance of ensuring that the final claim form includes all the claims the claimant wants to bring. This is obviously important because it may not be possible, as illustrated in this case, to amend or add claims once proceedings have started. This may be particularly so where the claimant is legally represented.

It is notable that the claimant chose not to waive privilege and disclose documents that might have helped her case, but that was the claimant's choice.

Vassallo v Mizuho International plc and another

WHAT IS THE CORRECT APPROACH TO ASSESSING INJURY TO FEELINGS?

Injury to feelings is an award made in discrimination claims. It is intended as non-financial compensation for hurt and distress suffered by the claimant as a result of an employer's discriminatory action(s).

The amount is calculated by reference to guidelines established in the 2002 case of *Vento v Chief Constable of West Yorkshire*. These bands are updated annually and there are three bands, applied according to the severity of injury inflicted. From April 2024 the bands are:

- Lower band: £1,200 to £11,700 (less serious cases)
- Middle band: £11,700 to £35,200 (more serious cases but not so serious as to merit an award in the upper band)

- Upper band: £35,200 to £58,700 (the most serious cases).

The tribunal should consider all the circumstances of the case, including the impact on the claimant and the severity of the discriminatory conduct.

In this case, the claimant commenced employment with the respondent in October 2020. Six months into her employment, she telephoned the respondent and explained she was feeling unwell with morning sickness.

The following day the respondent reduced the claimant's working hours from full-time to two days per week, without prior consultation or notice. In September 2021, a month before her maternity leave was due to begin, the respondent placed the claimant at risk of redundancy, stating there had been a downturn in work. The claimant was dismissed the day before her maternity leave was set to commence.

The claimant brought a tribunal claim for pregnancy discrimination – the respondent argued it was not aware the claimant was pregnant and suggested that the reason for her dismissal was that there were issues with her performance and conduct. The tribunal did not accept the respondent's argument that it was not aware of the claimant's pregnancy – it found that the respondent was aware from the first day she telephoned the respondent feeling unwell with morning sickness.

The tribunal found in the claimant's favour, determining that the reduction in her working hours was directly linked to her pregnancy-related illness, and that the redundancy was a sham, motivated by her pregnancy.

The tribunal awarded £5,000 for injury to feelings, placing the award around the lower/middle of the lowest "Vento" band, typically reserved for less serious cases of discrimination. The tribunal accepted the claimant mitigated her losses by getting another job and accepted the emotional impact of her treatment. The tribunal also referenced the apparent need to separate the upset due to her work-related situation from other factors such as pregnancy related worries and concerns for her health and that of her child. The tribunal said that it "*wanted to give an award that demonstrated the importance of the protection of pregnancy and maternity rights but which was not disproportionate to the circumstances of the parties*."

Dissatisfied with the award, the claimant appealed, arguing that the injury to feelings award was insufficient given the sustained and serious nature of the discrimination she suffered. The claimant suggested the EAT should substitute a higher award.

The appeal was allowed. The EAT considered that, on the facts of this case, with pregnancy discrimination being so clear-cut, awarding injury to feelings around the lower/middle of the lowest "Vento" band was too low – it was outside the reasonable range of awards the tribunal could/should have made.

The EAT upheld the appeal, identifying several key errors in the tribunal's assessment. The tribunal did not:

- take sufficiently on board the detailed evidence set out in the claimant's witness statement regarding the injury to feeling she suffered as a result of the discriminatory treatment;
- make any findings of fact about the type and nature of injury to feelings suffered by the claimant;
- refer to the case of "Vento" itself – the EAT said it was implausible that the tribunal was unaware of the "Vento" guidelines or even the case of "Vento";
- refer to any statutory provision or other authority relevant to assessing injury to feelings;
- identify the relevant bands for injury to feelings published in the updated Presidential Guidance;
- state within which "Vento" band the injury to feelings fell; and
- explain why the award was set as it was within the band.

Essentially the tribunal did not explain why it did what it did.

The EAT held that this was clearly not a case where there was one-off treatment and, given the period over which the treatment occurred and the effect the claimant said the treatment had on her in her witness statement, it was hard to see how the injury to feelings would not come within the middle band.

The EAT also held that while it is correct that the award was to compensate the Claimant for the injury to feelings caused by the Respondent's discriminatory treatment, the Employment Tribunal should have considered whether the injury to feelings was exacerbated by the fact that the Claimant was pregnant and that she was concerned about her unborn child. These factors should not have been excluded from consideration of the injury to feelings award.

The tribunal also inappropriately took account of the circumstances of the respondent when it made an award that was in the lowest "Vento" band."." An award of injury to feelings should not be reduced simply because the means of the respondent may be limited.

The EAT refused to substitute an award for the one made by the tribunal given that the tribunal made no significant findings of fact about the injury to feelings suffered by the Claimant. The EAT held that the tribunal's decision was totally flawed and as remission to the same tribunal might not result in a significant saving of expense, the EAT decided to remit the assessment of injury to feelings to a different tribunal.

WHY THIS MATTERS

This case is a reminder of the correct manner in which to apply the “Vento” guidelines when assessing injury to feelings, including that the means of the respondent are not to be taken into account.

Shakil v Samsons Limited

NEONATAL LEAVE AND PAY TO COME INTO FORCE FROM 6 APRIL 2025

Working families with babies in neonatal care will soon be entitled to additional paid time off as a day-one right, subject to certain criteria. This is a result of The Neonatal Care (Leave and Pay) Act 2023 coming into effect.

From 6 April 2025, parents can have up to 12 weeks’ Neonatal leave on top of other leave they are entitled to, including maternity/paternity leave, and shared parental leave. Neonatal leave is paid, providing employees meet minimum service requirements and earnings thresholds.

At present, parents of newborn babies requiring neonatal care do not receive any extra time off or pay, relying on statutory leave not intended for long hospital stays or the discretion of their employer, and in some cases have to return to work while babies are still in hospital.

The new rules cover parents whose babies are admitted to neonatal care within the first 28 days after birth and require a hospital stay of seven full days or longer. Neonatal leave can be taken in blocks of one week and leave must be taken in the first 68 weeks of the baby’s birth.

It is estimated that around one in seven babies are admitted to neonatal units each year in the UK.

Statutory neonatal care pay will be available to those who meet the necessary criteria, including a qualifying employment period and a minimum earnings threshold.

We await the full implementing Regulations.

WOMEN’S EQUALITY COMMITTEE (WEC) RECOMMENDS EXTENSION OF PARENTAL BEREAVEMENT LEAVE TO COVER PRE-24 WEEK PREGNANCY LOSS

On 15 January, the WEC published a report into miscarriage and bereavement leave.

The report noted that although there is protection for employees who experience pregnancy loss after 24 weeks, in the event of a miscarriage or pregnancy loss before 24 weeks, neither the mother

nor her partner has any statutory rights to any kind of leave. The Employment Rights Bill (ERB) includes proposals to widen bereavement leave, but not in the event of pre-24-week pregnancy loss.

The report finds that the physical and emotional impact on those who experience loss in early pregnancy can be severe, and comparable to other forms of bereavement. Sick leave does not provide employees with sufficient confidentiality/dignity, and could put them at risk of discrimination. The low rate of SSP also means that many women and their partners cannot afford to take time off.

The WEC recommended the following:

- An extension of the same rights to statutory parental bereavement leave and pay currently available in the event of the death of a child or stillbirth to employees who experience pre-24-week pregnancy loss. This should include miscarriage, ectopic pregnancy, molar pregnancy, IVF embryo transfer loss and terminations for medical reasons; and
- The government should work with organisations such as the CIPD, ACAS and the TUC to promote the benefits of pre-24-week pregnancy loss leave policies, and strengthen guidance to ensure that, where these policies are in place, staff are aware of them.

The report contains suggested amendments to the ERB, intended to give effect to the WEC's proposals. The WEC intends to table these amendments to the ERB at the report stage but the government has not indicated whether the amendments will be supported.

PRA AND FCA RESPOND TO TREASURY COMMITTEE QUESTIONS ABOUT SEXISM IN THE CITY

In December 2024, the House of Commons Treasury Committee published letters relating to its "Sexism in the City" inquiry, which provide information on progress made against its recommendations:

- The FCA has prioritised work on the link between non-financial misconduct (NFM) and its rulebook, and intends to publish a final policy statement on NFM in early 2025. The FCA is working through a large volume of feedback and intends to set out next steps jointly with the PRA in the second quarter of 2025. It is exploring ways in which diversity and inclusion reporting might be simplified. In 2025, the FCA plans to strengthen its messaging to whistleblowers and better promote whistleblowing reporting channels. This will include providing clearer guidance for whistleblowers who are impacted by NDAs, but who wish to report to the FCA; and
- The PRA acknowledges that developments in government policy (including proposals on gender equality action plans) may have an impact on its reporting and target setting

proposals. It comments on the removal of the bonus cap, reiterating the PRA and FCA expectation that firms should take care to avoid consequential and adverse impacts on pay gaps. The PRA states it will seek to review the impact of the bonus cap policy and whether it affects gender pay gaps when sufficient evidence is available.

This article was written with trainee solicitor Alesha Patel.

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