

e-post

Updating you on employment issues



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Welcome to the May issue of *e-Post*.

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In this issue:

- [Once a whistleblower, always a whistleblower](#)
- [Former Archbishop has got it wrong, says Court of Appeal](#)
- [No clean break, no TUPE?](#)
- [Deferred victimisation will still be punished](#)

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Once a whistleblower, always a whistleblower

The Employment Appeal Tribunal (EAT) has confirmed that a whistleblower does not lose protection from victimisation merely by moving jobs. In other words, disclosures made in a previous employment continue to be protected from adverse action by a new employer; though of course the longer the time gap, the harder it will be to prove the necessary link.

In this case the claimant had 25 years' service with BP before joining Petrotechnics, a company that provided health and safety consultancy services to the oil industry. While he was in that post he disclosed some concerns about safety issues to two senior BP employees. When Petrotechnics found out he had done this he was dismissed for gross misconduct, but he went back to BP to work as a consultant a few days later. Once BP found out what had happened in his previous job, they told him there would be no more work. The EAT agreed with the employment judge that in order to be protected, a worker had to be in employment, but the employer at the time of the disclosure did not need to be the same as the employer who penalised him or her for making it.



For the full decision (*BP v Elstone*) click [here](#).

Former Archbishop has got it wrong, says Court of Appeal

A Court of Appeal judge has been bold enough to wade into the controversy generated by the *Ladele* and *McFarlane* cases, in which the courts have said that, broadly speaking, Christian workers can not use their religious beliefs as a reason for opting out of an employer's activities in providing services to same-sex couples. The opportunity to say more on this topic came from an application by Mr McFarlane to take his case to the next level of appeal, having already lost in the EAT and seen Ms Ladele's appeal dismissed by the Court of Appeal.



For the full decision (*McFarlane v Relate Avon*) click [here](#).

Mr McFarlane's appeal was supported by a witness statement from the former Archbishop of Canterbury, Lord Carey, who expressed the commonly-expressed view that recent decisions have been insensitive and hostile to religious beliefs, particularly Christian ones. Lord Justice Laws could have avoided the issue by simply pointing out that the merits of Mr McFarlane's appeal were considerably weaker than those of Ms Ladele, who had already failed. Unlike Ms Ladele, who had had to deal with a change in the law involving the recognition of civil partnerships while she was already in post as a registrar, Mr McFarlane has been fully aware of the range of Relate's services before applying for the job. However, the judge took the opportunity to state that, before the law, religious beliefs enjoyed no special protection just because they were religious: any such protection had to be on the basis that their "merits commend themselves".

It remains to be seen whether these observations will do much to resolve the controversy. Employers should note that these remarks do not necessarily apply outside the employment field, and in any case should not be seen as a green light to treat religious beliefs lightly. In many respects *McFarlane* and *Ladele* are exceptional cases. In most other contexts (particularly with regard to time off and dress codes) it is often the employers who have been required to make the adjustments.

No clean break, no TUPE?

According to the EAT an employment tribunal was entitled to conclude that the award of a contract to provide legal services to one law firm in place of the four previous panel members did not give rise to a TUPE transfer. In a case that involved two solicitor claimants who had lost their jobs as a result, the tribunal had concluded that there had not been a service provision change within the TUPE Regulations because the work in progress had not been transferred: all that had happened at the time the new contract was awarded was that there was an expectation that any new work would be sent to the successful firm, but the files already being worked on stayed put. The work on these files took months if not years to finish. So it reasoned that at the point the new contract was awarded, the definition of a service provision change had not been met because this work would not be undertaken by the new firm.

This decision will give some encouragement to firms which win tenders for legal and other professional services, and discouragement in equal measure for the firms that are displaced. But probably the wider significance of the decision lies in the EAT's confirmation that deciding whether or not there has been a service provision change is largely a question of fact for the tribunal. The EAT accepted that it would have been possible for the decision to go the other way. The tribunal could have characterised the service being provided to the client organisation in a different manner, which gave equal weight to the availability of firms on the panel to do work in the future, rather than concentrating solely on the work actually being done at the point the new tender was awarded.



For the full decision
(*Ward Hadaway v Love*)
click [here](#).

Deferred victimisation will still be punished

We have reason to be grateful for another group of litigating solicitors, this time to illustrate the wide reach of the protection our discrimination legislation gives to people who have asserted their rights under it. This case involves a partner in a legal firm, ironically specialising in employment law. He had settled a sex discrimination claim brought by one of his firm's employees on terms that required him to provide a reference, which was favourable enough for her to secure new employment. Some years later, when she had been made redundant, she again approached him for a reference, but this time the reference was considerably less favourable.

The EAT supported the tribunal's conclusion that an inference could be drawn that the reason for the change in the terms of the reference was a continuing resentment about the earlier claim. The legal reasoning behind the decision is as valuable as the factual illustration which it provides, because it contains a useful analysis of some difficult victimisation cases of the past. It also decides that the rule on reversing the burden of proof, which has been applied in cases of direct and indirect discrimination for many years, applies also to all types of victimisation claims. Under that rule, once the claimant has shown that the facts can support an inference of discrimination or victimisation, it is up to the employer to provide positive evidence that it has not broken the law.



For the full decision
(*Pothecary Witham Weld
v Bullimore*) click [here](#).

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