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**COVID-19 – Carer Sacked After Visiting Pub Wins Unfair Dismissal Claim**

The pressure put on many employment relationships by COVID-19 was illustrated by the case of a care worker who was sacked by her vulnerable charge's mother after she went to the pub in the very early stages of the pandemic (Meynell v Stephenson).

The carer was one of a team employed by the mother to look after her daughter, who suffers from cerebral palsy and is particularly susceptible to infection. On Friday, 20 March 2020, she went to the pub with her partner and a friend. At almost exactly the same time, the Prime Minister addressed the nation and urged people to avoid pubs, bars, clubs and restaurants. Lockdown was imposed three days later.

After the carer had been on furlough for some months, she was suspended on the basis that there had been an irretrievable breakdown in her relationship with her employer. Following a disciplinary process presided over by a consultant, she was dismissed. The dismissal letter made no mention of her visit to the pub.

In upholding her unfair dismissal complaint, an Employment Tribunal (ET) found that the principal reason for her dismissal was the mother's conviction that she had gone to the pub in breach of the Prime Minister's guidance and that, in turn, could impact on her daughter's health and wellbeing. That amounted to some other substantial reason that could potentially have justified her dismissal.

The Prime Minister had previously warned against congregating in hospitality venues but there was no cogent evidence that the carer heard his speech on the relevant evening. At most, people were at that point being encouraged not to gather in pubs and other crowded spaces. Her trip to the local pub was entirely lawful and not in breach of any instruction given to her by her employer.

She had testified that she observed social distancing in the almost empty pub, also using hand sanitiser, and the ET gave some weight to her assertion that she had been at no greater risk of infection than if she had been out shopping. She did not return to work before being placed on furlough the following Monday and her action had thus put her charge at no additional risk.

Given the special nature of personal care relationships, the ET acknowledged that it was not an easy case and cautioned itself against substituting its own view of the carer's conduct for that of the employer. Overall, however, it found that her dismissal did not fall within the range of responses open to a reasonable employer.

The ET ruled that the amount of the carer's compensation should be reduced by 20 per cent to take account of her own culpable conduct. Given the Prime Minister's previous warning, it would have been wise for her to stay away from the pub and she could have given a more comprehensive explanation of her conduct during social media exchanges with her employer. The amount of her award would be assessed at a further hearing, if not agreed.

Our specialist team can advise you on any matter relating to unfair dismissal claims. Contact <<CONTACT DETAILS>>.

**Disabilities Take Many Forms But Must Always Be Taken Seriously**

No matter what shape or form a disability may take, employers are always required to take them seriously. An Employment Tribunal (ET) made that point in the case of a teaching assistant who suffered from a severe phobia of coming into contact with other people's bodily fluids (A v B).

The woman made no secret of her phobia, which her employer was fully aware of and which was agreed to be a disability. She became anxious after learning that a disabled pupil who required intimate care, including nappy changing, was to arrive at the school. She was, however, informed that she was obliged to provide such care under the terms of her employment contract.

She felt ostracised and bullied by her colleagues because she was not prepared to perform intimate care and, following a staff meeting, she was signed off sick. Her emotional reaction was such that she suffered panic attacks and vomiting and never returned to the school. She ultimately resigned and launched ET proceedings.

In upholding her disability discrimination claim, the ET found that the employer had failed in its duty to make reasonable adjustments to cater for her disability. She was under no clear contractual obligation to provide intimate care and the employer could have taken the practicable and entirely effective step of permitting her to return to work whilst excusing her from any jobs that might expose her to bodily fluids. There was no consideration given to making such an adjustment and the employer had acted with a closed mind.

In also ruling that she was constructively unfairly dismissed, the ET noted, amongst other things, an inexplicable and unconscionable delay in obtaining an occupational health report. After going on sick leave, she was left in limbo at home for long periods without any adequate human resources support or contact. The employer was in fundamental breach of her contract in that her treatment undermined the trust and confidence that should exist in any employment relationship. If not agreed, the amount of her compensation would be assessed at a further hearing.

We are experienced in handling claims involving disability discrimination. Contact our expert team for advice.

**Employer Pays High Price for Turning Blind Eye to 'Toxic' Office Culture**

Banter is one thing, but employers who turn a blind eye to workplaces descending into toxic arenas of discriminatory abuse can expect to reap a bitter harvest. That was certainly so in one case in which an Employment Tribunal (ET) ordered a company to pay substantial compensation to a gay former employee who was on the receiving end of a torrent of homophobic slurs (Robson v NGP Utilities Ltd).

The ET found that the culture in the office where the man worked as an energy consultant was accurately described as toxic, involving daily use of homophobic, racist and anti-Semitic language, in which some managers and senior employees actively engaged, treating it as acceptable banter.

No disciplinary action was taken against anyone involved and, although the company had in place what it described as a zero-tolerance equality and diversity policy, no effective measures were taken to achieve that objective. As a result of the foul-mouthed homophobic abuse to which the man was repeatedly subjected, he said that doing his job had become a living nightmare. He eventually resigned.

In upholding his complaints of harassment due to his sexual orientation, constructive dismissal and victimisation, the ET found that he had suffered a very serious course of repeated and frequent homophobic abuse committed by, amongst others, senior employees and managers over a period of six months.

Also upholding his disability discrimination claim, the ET noted that, due to his dyslexia, he visibly struggled to meet the company's targets. Instead of supporting him and making reasonable adjustments to cater for his disability, he was shouted at and humiliated in front of colleagues to the point where he could no longer cope with the treatment and resigned.

The ET found that the company had conducted the proceedings in an intimidating, oppressive and high-handed manner. In the face of clear evidence, it had steadfastly chosen to stand by the perpetrators as they unfairly sought to portray the man as a liar. The company had subjected the man to post-employment victimisation in an attempt to dissuade him from pursuing his harassment complaints and it was to his credit that he was not deterred from doing so.

The man was awarded £20,000 in compensation for injury to his feelings and a further £10,000 in aggravated damages. Together with interest, his total award came to £36,707. Given the company's conduct of the proceedings, the ET also took the rare step of ordering it to pay a penalty of £18,353 pursuant to Section 12A of the Employment Tribunals Act 1996.

Zero-tolerance equality and diversity policies in the workplace are meaningless unless they are effectively implemented and monitored. Our expert employment lawyers can advise.

**Healthcare Support Agency Overturns Direct Race Discrimination Finding**

A finding of race discrimination is always an extremely serious matter and that is why a rigorous approach to evidence and proof is required of Employment Tribunals (ETs). In one case, a healthcare support agency accused of subjecting a black worker to less favourable treatment succeeded in showing that that high standard was not met (Key Care Support Ltd v Johnson).

The worker claimed that the agency failed to respond as it should have done after he twice complained that he had been racially abused by members of another agency's staff. In upholding his direct race discrimination claim, an ET found that the agency had failed actively to investigate his seriously concerning complaints. That failure, the ET ruled, was entirely unacceptable in a modern workplace.

In allowing the agency's appeal against that ruling, the Employment Appeal Tribunal (EAT) noted that the ET failed to ask itself whether the worker had been treated less favourably than a hypothetical comparator would have been. After finding that the failure to investigate was unreasonable, the ET went straight on to infer that the worker had, on the face of it, established a case of race discrimination.

There were no obvious pointers towards such an inference and, in the absence of any explanation or analysis of the features of a hypothetical comparator, the ET erred in reversing the burden of proof against the agency. The EAT remitted the case to a newly constituted ET for fresh consideration.

Our expert lawyers have experience in handling all types of discrimination claims. Contact <<CONTACT DETAILS>> for advice.

**Key Employee Departed to Work for a Competitor? Consult a Lawyer Today**

There are few things more concerning for any business than the departure of a key employee to work for a competitor. However, as a High Court case showed, there is a great deal that expert lawyers can do to guard against customer defection and other damaging consequences of such a move (The Delivery Group Ltd and Another v Yeo).

The case concerned the head of client services of a company operating in the mail and parcel delivery sector. Following his resignation, he took up a similar post with a competitor. The company asserted that the competitor ran a business which was a carbon copy of its own operation.

The company took action against their former employee alleging that he had breached a number of restrictive covenants in his contract which, amongst other things, forbade him from soliciting or dealing with certain of the company's existing or prospective customers for 12 months following his departure.

He offered undertakings that went some way to meeting the company's concerns but was unwilling to accept any restriction on his ability to deal with the company's existing clients. He asserted, amongst other things, that such a restriction would profoundly and wrongly interfere with his incipient new career, effectively preventing him from doing his job with the competitor.

In granting an interim injunction that forbade the employee from engaging in such dealing, however, the Court noted that the company had a legitimate business interest in maintaining its client connections and workforce stability. It was more likely than not that it would succeed at trial in establishing that the non-dealing covenants were justified and enforceable. The injunction, together with the employee's undertakings, would remain in force pending an expedited trial.

The Court, however, refused to make an order restraining him from misusing the company's confidential information. In the absence of any evidence that he had retained or copied any of the company's documents, or threatened to misuse them, there was no arguable case that he had breached or intended to breach any obligation of confidentiality.

**Postman Sacked Following Flawed Investigation Wins Unfair Dismissal Claim**

A finding of dishonesty against an employee is a grave matter that is highly likely to negatively impact on their future working life. In upholding a postman's unfair dismissal claim, an Employment Tribunal (ET) emphasised that such a finding can only be justified following a thorough and reasonable investigation (Khanzadeh v Royal Mail Group Ltd).

The postman was accused of stealing a letter from a bank that had been left sticking out of a householder's letterbox. The evidence against him included CCTV footage from a video doorbell. He was dismissed after the allegation was found proved by a disciplinary panel. His internal appeal against that outcome failed.

In denying the allegation, he said that he was stressed at the time, having taken on an unfamiliar round with a view to earning overtime. He asserted that, after realising that he had made mistakes and posted some mail through the wrong doors, he retraced his steps, removing letters from letterboxes before re-posting them correctly. That was in accordance with the employer's policy that, where items are mis-delivered, an attempt to retrieve them must be made.

In upholding his claim, the ET identified a number of flaws in the investigation of his alleged wrongdoing and ruled that the panel had no reasonable grounds to believe that he was guilty of theft, dishonesty or a lack of integrity. The decision to dismiss him thus fell outside the band of reasonable responses.

The ET noted, amongst other things, significant gaps in the CCTV evidence and the panel's failure to investigate points made in the postman's defence. There was no proof that the householder had any item of mail missing or that the postman had taken anything at all. In reaching its decision, the panel breached an agreement with a trade union by relying on GPS data to track the postman's movements.

The postman was ruled 20 per cent responsible for his dismissal on the basis that, but for the mis-delivery and his failure to ensure that post was pushed all the way through the householder's letterbox, the matter would not have arisen. If not agreed, the amount of his compensation would be assessed at a further hearing. At that hearing, it would also be open to him to seek reinstatement in his job.

We can advise you on all aspects of employment law, including unfair dismissal.

**Should the National Minimum Wage Be Paid During Induction Training?**

Many employers require prospective employees to undergo induction training before they are taken onto the payroll – but, during such training, are prospects entitled to receive the National Minimum Wage (NMW)? The Employment Appeal Tribunal (EAT) addressed that issue in an instructive decision (Opalkova v Acquire Care Ltd).

The case concerned a care professional who was offered a job by a company that provided home-based services for adults. She was required to carry out a week of induction training before she was given a formal employment contract to sign. The training was compulsory and unpaid.

Her complaint that she should have been paid at least the NMW during the training period was rejected by an Employment Tribunal (ET) on the basis that she was not at that time employed by the company and would not have been permitted to carry out caring duties until she had completed her training. Her contract made plain that her employment only commenced after she had passed the training course.

Ruling on her challenge to that outcome, the EAT noted that she understood the training period would be unpaid and took no issue with that either at the time or when she signed her employment contract. The ET was entitled to conclude that, as a matter of pure contractual provision, she was not entitled to be paid during the induction course.

That conclusion, however, had no bearing on the issue of whether she was entitled to receive the NMW. The ET erred in law in failing to consider whether she had, prior to starting her training, entered into a contract with the company under which she was entitled to be treated as a worker, within the meaning of Section 54 of the National Minimum Wage Act 1998.

The ET also failed to turn its mind to the question of whether the time she spent on the course fell to be treated as work time, within the meaning of the National Minimum Wage Regulations 2015. The woman contended that it did in that she attended the course under the company's control and direction. The matter was remitted to the same ET for fresh consideration in the light of the EAT's ruling.

We can assist you in dealing with any legal issues relating to the National Minimum Wage. Contact us for advice.

**Worker Sacked for Black Lives Matter Comment Wins Unfair Dismissal Claim**

Race discrimination is amongst the most sensitive issues that any employer needs to address, and all the more so since the tragic death of George Floyd at the hands of a US police officer and the growth of the Black Lives Matter (BLM) movement. An Employment Tribunal (ET) made that point in ruling that a supermarket worker was unfairly dismissed for making a comment concerning a children's toy (Cunnington v Sainsbury's Supermarkets Ltd).

After picking up the soft toy, which appeared to represent a black rabbit, the white British woman made a comment to a co-worker that included a reference to BLM. There was continuing dispute as to the precise words she used. However, she was adamant that she was not a racist, that she had not meant to offend anyone and that she had made no criticism of the BLM movement, which she supported.

Another employee, who was black, overheard what she said and took exception. After she lodged a formal complaint, the worker was the subject of an investigation and disciplinary proceedings. She was suspended and ultimately dismissed for gross misconduct. She lodged ET proceedings after her internal appeal against that outcome failed.

In upholding her complaint, the ET found that her dismissal was both procedurally and substantively unfair. The inexperienced manager who initially investigated the matter omitted to apply the supermarket chain's fair treatment policy or to address her mind to the correct procedure. The ET noted that her lapses were not entirely her fault and ultimate responsibility for them lay in a lack of adequate training.

The shortcomings in the investigation were not corrected by the disciplinary process, which was fatally flawed from the beginning. Amongst other things, the worker was not told in advance precisely what words she was alleged to have used or why the comment attributed to her breached the chain's diversity and equality policy.

The decision to dismiss her was based on the degree of offence taken by the complainant to words that she had possibly misheard. There was no finding that the worker's comment was made anything other than innocently and a false assumption was made that she had received diversity training. She had in fact received no such training in the 16 years prior to the incident.

Given her anguish that she might be considered a racist after inadvertently causing offence, a finding that she had shown minimal remorse was unjustified. There was no evidence that weight was given to her 28 years of unblemished service to the chain and its predecessor. That and other mitigation should have led to a less serious disciplinary sanction being considered.

Overall, the clear impression given by the disciplinary process was one of a lack of impartiality and a lack of understanding of the chain's policies and the correct application of them. The fact that sensitivities were raised in the wake of George Floyd's death was all the more reason for great care to be taken to follow procedures thoroughly, objectively and fairly so that justice could be done.

Given the size and resources of the chain, the ET noted that the fact that so many procedural errors were made was unacceptable. Not only had the worker been treated unfairly, but the disciplinary process was a disservice to the complainant and to the chain's aim to be an inclusive employer. In the absence of agreement, the amount of the worker's compensation would be assessed at a further hearing.

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