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**Care Home Chef Accused of Breaching COVID-19 Bubble Unfairly Dismissed**

Care home owners were possibly the hardest hit of all by the onset of the COVID-19 pandemic. As an Employment Tribunal (ET) ruling showed, however, the crisis did not relieve them of their obligation to treat staff fairly (Meadows v Cherry Tree Lodge Private Retirement Home Ltd).

In response to the first lockdown and the grave risk to residents, a care home owner took steps to organise its employees into an isolated 'bubble'. A chef was amongst those who agreed to move into the home for the duration of the government restrictions, which were initially only expected to last a few weeks.

Whilst in isolation, the chef learnt from her son-in-law that her daughter had given birth. So that the son-in-law could attend his wife in hospital, she visited the family home to babysit her grandchildren. After hearing of the visit, the care home's manager took the view that she had placed residents and staff at risk.

The manager was particularly concerned after it emerged that the son-in-law worked at another care home where there had been an outbreak of the virus and a number of deaths. She initiated disciplinary proceedings that culminated in the chef's summary dismissal on grounds of gross misconduct.

In upholding the chef's unfair and wrongful dismissal claims, the ET noted that the owner had no coherent policy or procedure in place to expressly prohibit staff from coming into contact with people outside the home. In so far as a 'bubble' existed at the time of her dismissal, it was nebulous and inconsistently applied.

The manager had, in breach of the Acas code of conduct, taken on multiple roles in the disciplinary process. After making the initial allegation, she went on to conduct the investigation and to preside over the disciplinary hearing. The allegations that were put to the chef at the hearing were not the same as the reasons relied upon for her dismissal. She was given no advance notice of a claim that she was wrong to take a public taxi to the hearing.

The hearing was in any event perfunctory, lasting only a few minutes, and there was no genuine consideration of her arguments. Mitigating factors were not properly taken into account, including the fact that she had made no secret of the visit and was given a lift by one of the owner's directors. The purpose of her visit was to care for vulnerable children, an exception to the general lockdown restrictions.

Given the high risks involved in operating a care home during the pandemic, the ET accepted that, had the disciplinary process been conducted fairly and with an open mind, there was a 25 per cent chance that she would have been dismissed in any event. On that basis, the amount of her compensation would be assessed at a further hearing, if not agreed.

It is vital to conduct disciplinary hearings properly and in accordance with the Acas code of conduct. For guidance from our specialist team, contact <<CONTACT DETAILS>>.

**Discrimination and the Burden of Proof – Supreme Court Clarifies the Law**

Ever since a crucial alteration was made to the wording of the Equality Act 2010, the question of where the burden of proof lies in employment discrimination cases has been the focus of intense legal debate. An important Supreme Court ruling has, however, resolved the issue once and for all (Royal Mail Group Ltd v Efobi).

The case concerned a postman who was born in Nigeria and identified as black African and Nigerian. He had qualifications in computing and wished to obtain a managerial or technical role within Royal Mail. During a period of more than four years, he made over 30 applications for such a position, all of them unsuccessful.

He launched Employment Tribunal (ET) proceedings, asserting that the rejection of his applications was the result of direct or indirect race discrimination. His claim failed before the ET and, although his challenge to that decision succeeded before the Employment Appeal Tribunal, the latter ruling was reversed by the Court of Appeal.

Ruling on his challenge to that outcome, the Supreme Court noted that the Act set a two-stage test in employment discrimination cases. Claimants had the burden of proving primary facts from which ETs could, in the absence of any alternative explanation, infer that discrimination had taken place. If claimants succeeded in passing that test, the burden shifted to employers to satisfy ETs that discrimination in fact played no part in the treatment of which complaint was made.

The central issue in the case was whether a change to the wording of Section 136(2) of the Act had altered the burden of proof in such cases. The wording relating to the first stage was altered from 'where…the complainant proves facts' to 'if there are facts from which the court could decide'. The postman asserted that the alteration changed the law so that there was no longer a burden on a claimant to prove anything at the first stage. ETs, it was argued, were instead required to consider all the evidence put before them neutrally.

Dismissing the appeal, however, the Court ruled that the altered wording had not brought about any substantive change in the law. The aim of the alteration was to make it clear that ETs can take into account evidence from all sources at the first stage, not just that adduced by claimants. Such evidence might include material relied on by an employer to rebut or undermine a claimant's case. The only evidence that had to be ignored at the first stage was any explanation given by an employer for the treatment complained of. Such explanations fell to be considered at the second stage.

It remained the law, therefore, that the burden of proof does not shift to an employer to explain the reasons for its treatment of a claimant unless the claimant is able to prove facts from which unlawful discrimination can properly be inferred.

The ET could not, in the postman's case, be faulted in its refusal to draw adverse inferences from the fact that Royal Mail did not call evidence from the many individuals who actually dealt with his unsuccessful applications. Even had he succeeded in showing that a recruiter was aware of his race, and that the successful candidate was of a different race from him, that would not have been sufficient to enable the ET to conclude, in the absence of any other explanation, that unlawful discrimination had occurred.

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

**Employment v Self-Employment – This is Why the Distinction Really Matters**

Employment law has moved on in leaps and bounds since the bad old days of mass casual labour. However, as an Employment Tribunal (ET) decision showed, a large number of people still go to work every day without any clear idea of whether they are employed or self-employed, or any understanding of why that distinction matters (Hallsworth v NAM Global Ltd).

The case concerned a van driver who worked for the same company (C1) for about 17 years before it was taken over by another (C2). The second company accepted that it was obliged by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to take on C1's employees under the same terms and conditions as they had enjoyed prior to the takeover.

The driver launched proceedings against C2 on the basis that, contrary to its TUPE obligations, it gave him a verbal warning for taking unauthorised leave, stopped his holiday pay and ceased providing him with regular work. C2 asserted that TUPE provided him with no protection in that he had never been employed by C1. The ET considered that issue at a preliminary hearing.

Ruling on the matter, the ET noted that, prior to being taken on by C1, he discussed terms with a director of the company. However, throughout his many years with C1, he never had a written employment contract. As if he were self-employed, he invoiced C1 for his services, for which he was paid a daily rate.

The ET noted, however, that the absence of a written contract, and the fact that he paid his own Income Tax and National Insurance Contributions, did not necessarily mean he was anything other than a full-fledged employee. The practical reality of his relationship with C1 was that he worked steadily for the company for many years on terms that were inescapably those of employment.

Working exclusively for C1 under its direction and control, he had no clients of his own and made no decisions for himself. He used company equipment to do his work; he was required to attend work regularly and could not send substitutes to do his job for him. He was straightforwardly an employee of C1 throughout and was thus entitled to benefit from TUPE protection as against C2.

We can assist you in dealing with any legal issues relating to the TUPE process. Contact us for advice.

**'Secular Atheism' a Philosophical Belief Worthy of Human Rights Protection**

It is a fundamental feature of any democratic society that anyone can freely express their philosophical beliefs, even if others may find them offensive. An Employment Tribunal (ET) powerfully made that point in the case of a train conductor who was sacked after venting his secular atheist views on social media (Sleath v West Midlands Trains Ltd).

In welcoming the reopening of pubs at the end of a COVID-19 lockdown, the man wrote an online post urging people not to let their way of life 'become some sort of Muslim alcohol-free caliphate' just to beat the virus. In a further post, he declared himself an atheist and said that he would not want the UK to become any sort of religious or theocratic state. He emphasised that he had no desire for the UK to become an atheist state if that involved banning other beliefs.

After his employer received a complaint, he was accused of making racially offensive and discriminatory posts and dismissed for gross misconduct. He later launched ET proceedings, complaining of unfair dismissal and direct and indirect discrimination. The question of whether the views he expressed constituted a philosophical belief that should be protected under human rights and equality legislation was considered as a preliminary issue.

Ruling in his favour on that issue, the ET noted that he stood by the posts on the basis that there was nothing wrong with them. His social life revolved around pubs, where he enjoyed debating various matters, and he used social media as a means of stimulating discussion. Something of a character, he was prepared to be controversial and was unafraid to express his own individuality.

Describing himself as a secular, pluralist atheist, he said that he wished to live in a state where all political, religious and philosophical beliefs can be expounded and where freedom of speech exists. He said that he wished no harm or disrespect to anyone but that it was important to him that he be free to criticise religion. He said that he had ISIS in mind when making the posts.

The ET found him to be an entirely open and honest witness. He was a humanist who believed in secularism. Whilst rejecting religious dogma and the idea of religious theocracy, he believed that everyone has the right to believe in religion, or otherwise, with complete, unencumbered freedom from interference by the state or others. He believed in the right to criticise others and their religion, even if offence is given, as long as such criticism is non-abusive and causes no harm.

The ET did not consider that his views were intended to be anti-Islam or anti-Muslim. In any event, they did not come anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that should be excluded from human rights protection. He held his coherent, weighty and substantial philosophical beliefs in good faith and they were worthy of respect in a democratic society.

We can advise you on all aspects of employment law, including direct and indirect discrimination.

**Tribunal Condemns 'Inept and Misjudged' Workplace Bullying Investigation**

Employers who fail to conduct workplace disciplinary proceedings fairly risk serious financial and reputational consequences. In one case, an Employment Tribunal (ET) roundly condemned a company's handling of a bullying investigation as a catalogue of ineptitude and misjudgment (Brown v Veolia ES (UK) Ltd).

The case concerned a business development manager who was accused of bullying a subordinate. Whilst accepting that she could sometimes be abrupt, she denied that she was a bully or that she had any intention to cause distress. She was dismissed following a lengthy investigatory and disciplinary process.

After she launched proceedings, the ET ruled that her summary dismissal, without notice, was wrongful. The evidence was entirely consistent with her inadvertently having caused stress to the subordinate. Given the lack of any proof of malign intent on her part, her conduct did not meet the employer's policy definition of bullying and thus did not amount to gross misconduct.

The ET made numerous criticisms of the conduct of the investigatory and disciplinary process. In rejecting her unfair dismissal claim, however, it found that the decision-maker genuinely believed that she had behaved inappropriately. The ET was just persuaded that it fell within the band of reasonable responses for the company to consider that the process was, in the circumstances, adequate.

Upholding her challenge to that ruling, the Employment Appeal Tribunal (EAT) found that it was one of those rare cases where an ET had reached a perverse conclusion. Given the catalogue of failings identified, there was no basis on which a reasonable ET could find that the process fell within a reasonable band. Subject to any submissions to the contrary, the EAT ruled that the unfair dismissal claim should be remitted to the same ET for reconsideration.

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

**Unfair Dismissal and Mitigation of Loss – Guideline Tribunal Decision**

Those who have been unfairly dismissed are entitled to fair compensation. However, as an Employment Appeal Tribunal (EAT) ruling showed, the amount awarded may well be reduced if reasonable efforts to obtain alternative employment are not made (Gavli and Another v LHR Airports Ltd).

The case concerned an airport passenger services operative in his 40s who was the sole breadwinner for his family of five. He was sacked after being accused of bullying, harassing and intimidating new recruits. An Employment Tribunal (ET) subsequently upheld his unfair dismissal claim on the basis that his employer had failed to properly identify what he was alleged to have done wrong, with the result that he was denied a fair opportunity to defend himself.

The ET, however, refused to order the employer to reinstate or re-engage him. His compensation was restricted to £7,086 after the ET found that he had not taken reasonable steps to mitigate his loss. Had he done so, the ET found that he would have found alternative employment within three months.

Ruling on his challenge to that outcome, the EAT understood his genuine sense of grievance. However, in finding that he could have done more to find alternative work, thereby reducing his financial loss, the ET was entitled to have regard to its own knowledge of the buoyant economy in the area. The ET did not accept his evidence concerning his attempts to find other work or the difficulty he was said to have encountered in doing so because of his dismissal.

The EAT could also find no fault in the ET's carefully considered conclusion that the irretrievable breakdown in his working relationship with certain colleagues made his reinstatement or re-engagement impracticable. Arguments that he had been treated inconsistently with another worker, who retained his job after being moved to another part of the employer's business, fell on fallow ground.

In allowing his appeal in part, the EAT found that the ET erred in refusing to consider whether his award should be uplifted in light of the employer's failure to comply with the Acas code, which is designed to ensure the fairness of disciplinary proceedings. It also erred in not making an award in respect of his loss of pension benefits. Those aspects of the case were remitted to the same ET for fresh determination.

**Whistleblowing Nurse's Dismissal 'Grossly Unfair', Tribunal Rules**

There are few things more serious in an employment context than sacking a whistleblower for performing a valuable public service. The Employment Appeal Tribunal (EAT) made that point in the case of a highly regarded nurse who was treated grossly unfairly for doing what she considered to be her duty (University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall).

The nurse had an unblemished employment record stretching to 38 years and had received commendations for her leadership skills, positivity and enthusiasm. On a number of occasions, she expressed concern to her NHS trust employer that her dedicated team of district nurses was being subjected to an excessive workload, resulting in an increasing number of absences due to stress and anxiety.

She bore responsibility for risk management and safeguarding issues and, following a patient's death, informed her manager that she wished formally to instigate the trust's whistleblowing procedure. She went on a brief period of leave soon afterwards and returned to find herself suspended. A disciplinary process followed, culminating in her dismissal.

After she launched proceedings, an Employment Tribunal (ET) found, amongst other things, that she had been automatically unfairly dismissed by reason of whistleblowing. The loss of her job was the grossly unfair result of a process, involving numerous people, that was designed to get rid of her because she had made protected disclosures in the public interest.

Rejecting the trust's appeal against that ruling, the EAT noted that it was hard to see how the findings of the ET could have been more critical of the trust. An attempt had been made to beef up the case against her by suggesting that she had dishonestly handled charitable donations made by patients. There were no reasonable grounds for any such accusation and those responsible for her dismissal had no genuine belief that she had done anything wrong.

The ET had described in excruciating detail the manifest failings and fundamental unfairness of the trust in dealing with her suspension, the investigation into her conduct, her dismissal and the rejection of her internal appeal. It was therefore unsurprising that the trust had not challenged the ET's further findings of wrongful dismissal and ordinary unfair dismissal.

The EAT found that the ET had given insufficient reasons when dealing with alleged incidents of whistleblowing detriment that preceded her dismissal. Those matters were sent back to the same ET for further consideration. In all other respects, the trust's appeal was dismissed. The amount of compensation due to her would also be considered at a further hearing, if not agreed.

Says <<CONTACT DETAILS>>, "It is important to recognise when workers' rights under the whistleblowing legislation are engaged. Contact us for expert advice."

**Women are More Likely to Bear Childcare Responsibilities – That's a Fact**

Judges do not operate in a vacuum and are entitled to take the view that some facts are so obvious that there is no requirement to prove them. In an important ruling, the Employment Appeal Tribunal (EAT) found that that principle applies to the fact that women are more likely to bear childcare responsibilities than men (Dobson v North Cumbria Integrated Care NHS Foundation Trust).

The case involved a community nurse who was primary carer for her three children, two of them disabled. Due to her responsibilities as a mother, she worked only on Wednesdays and Thursdays. Her NHS trust employer introduced a flexible working regime that required her to work on weekends every so often. After she made it clear that she could not meet that requirement, she was dismissed.

Her complaints of unfair dismissal and indirect sex discrimination were subsequently rejected by an Employment Tribunal (ET) on the basis that the flexible working requirement was applied to all members of her nursing team, both male and female. There was no evidence that the requirement put female members of the team, as a group, at a particular disadvantage when compared to male colleagues.

In upholding her challenge to that outcome, the EAT found that the ET erred in limiting the pool for comparison to the team in which she worked. The flexible working requirement was applied to all community nurses across the trust and logic dictated that the appropriate pool was therefore all community nurses.

The ET was also wrong to reject the discrimination claim on the basis that there was no evidence of group disadvantage. It should have taken judicial notice of the fact that women are more likely than men to have childcare responsibilities and are thus less likely to be able to accommodate certain working patterns. The case was sent back to the same ET for reconsideration in the light of the EAT's ruling.

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

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