Employment Law ~ November 2021

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**Badly Treated by Your Employer During the Pandemic? See a Solicitor Today**

Hospitality businesses endured a torrid time during COVID-19 lockdowns, but the majority did their best to treat staff fairly. As an Employment Tribunal (ET) ruling showed, however, those that did not can expect to reap a bitter harvest (Gibson v Lothian Leisure).

The case concerned a man with mental health difficulties who had been praised and promoted for his work as a pub chef. After the pandemic struck and the pub had to close, he was placed on furlough. Whilst at home, he was in close contact with his father, who suffered from a number of serious medical conditions, including a brain tumour, and for that reason was shielding during the health crisis.

As the end of a lockdown approached, the man was asked to return to work to help out. He raised issues with his employer about the possibility of his father catching COVID-19 from him. He asserted that staff were not issued with personal protective equipment and that no precautions were taken to create a COVID-secure working environment. He said that his employer's response to his concerns was robustly negative and that he began to be viewed as a nuisance.

Without any discussion or process, his employment was terminated with immediate effect, by text. A director of the employer explained that the format of the business would be changing at the end of lockdown and that it would require a smaller team. After the man launched ET proceedings, the employer put in no response to his complaints.

On the basis of his clear and cogent evidence, the ET found that, until he raised his concerns, he had been a successful and valued member of the pub's staff. He had either been dismissed or selected for redundancy because he had taken steps to protect his father from what he reasonably believed to be the serious and imminent danger posed by the virus.

The ET noted that he had also not received all the furlough pay that was due to him and that, for a period of five months, pension deductions from his wages had not been paid into his pension. He also received no notice pay or holiday pay during the relevant period. His total compensation, including more than £20,000 in respect of his unfair dismissal, came to £23,624.50.

Our expert lawyers have experience in handling all types of employment law issues. Contact <<CONTACT DETAILS>> for advice.

**Carillion Group Insolvency Triggers Guideline Worker Consultation Ruling**

There may be 'special circumstances' that excuse an employer from full compliance with worker consultation requirements before making mass redundancies – but what exactly does that mean? The Employment Appeal Tribunal (EAT) considered that issue in a case arising from the compulsory liquidation of the Carillion group (Carillion Services Ltd (In Compulsory Liquidation) and Others v Benson and Others).

The multinational construction and business services group employed about 18,000 UK workers when it entered liquidation in January 2018. The insolvency process was described as the largest and most complex of its kind in UK history. About 1,000 of those employees who were made redundant launched Employment Tribunal (ET) proceedings, seeking protective awards on the basis that the group had failed to comply with the consultation requirements enshrined in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

The group conceded that there was a failure to consult workers' representatives. It contended, however, that there were special circumstances, within the meaning of Section 188(7) of TULRCA, that meant that it was only required to take all such steps towards compliance as were reasonably practicable.

It asserted that it was presented with a sudden and unforeseen disaster over the weekend preceding its entry into liquidation. Although it had been confident of survival, the group's nadir came after the government refused financial help or to support an administration process. When key stakeholders in turn declined to approve short-term lending arrangements, compulsory liquidation became the only option. From that point onwards, mass redundancies were inevitable.

Following a preliminary hearing, however, the ET found that those circumstances were not special, in the sense of being uncommon or out of the ordinary, and that there had been no sudden intervening events over the crucial weekend. The group had been in decline since at least July 2017 and there was no evidence that the government was in the habit of providing support to businesses in the group's position. Lenders had, prior to the weekend, indicated that any further support from them was conditional on support from the government.

In dismissing the group's challenge to that ruling, the EAT could find no flaw in the ET's conclusions. The ET directed itself correctly in law and, having found that there were no special circumstances, it was not obliged to go on to consider whether the group had done all that was reasonably practicable to comply with its consultation duty.

The EAT noted that the obligation to consult workers' representatives includes a requirement to provide information on a wide range of matters, including the reasons for proposed redundancies, the method of carrying out dismissals and the method of calculating redundancy payments. Even if dismissals could not be avoided, such information would be highly valuable to employees facing the distressing prospect of redundancy.

The manner in which the redundancy process is conducted is important. Contact us for advice.

**Disability Discrimination – Diabetic Cake Shop Worker Compensated**

Discrimination against disabled employees is a social evil with which Employment Tribunals (ETs) will have no truck. In one case, a cake shop worker who was dismissed because of her diabetes was awarded thousands of pounds in compensation (Nicholson v Desire Cakes and Shakes Ltd).

The woman's condition meant that, without daily insulin injections, she would suffer a hypoglycaemic episode and fall into a coma. At the date of her dismissal, she was in stage B renal failure. In sacking her by text, her manager expressed the view that she needed to find a job more suitable to her health requirements.

Upholding her disability discrimination claim, an ET found that the only possible explanation for her dismissal was the fact of her disability and her unavoidable need to go home at a particular time of day so that she could inject herself with insulin in temperature-controlled and hygienic conditions.

Having had an exemplary record throughout her working life, she was distressed and embarrassed by the circumstances of her dismissal and worried that she would never find another job. She felt completely worthless and limited because of her disability. The company that employed her was ordered to pay her a total of £7,343 in compensation and interest, including £5,000 for injury to her feelings.

For expert advice on all matters regarding employment law and discrimination, contact us.

**Employee or Self-Employed Partner? Guideline Tax Tribunal Ruling**

When discerning whether an individual is an employee or a self-employed partner in a professional firm, judges look beyond the label attached to their engagement and focus on the reality of the relationship. A tax tribunal ruling provided a prime example of that multi-factorial approach in operation (Wilson v The Commissioners for Her Majesty's Revenue and Customs).

The case concerned an international tax specialist who was engaged by a UK firm of accountants. HM Revenue and Customs (HMRC) took the view that he was a self-employed partner in the firm and was therefore personally liable to pay National Insurance Contributions (NICs) in respect of a period of about 17 months.

Although he had formally been appointed a member of the firm, he asserted that he was a partner in name only and that he was, in substance, the firm's employee. He contended that the level of control the firm exercised over how he went about his work with clients was consistent with a contract of service. His argument that liability to pay the relevant NICs fell upon the firm by reason of his employment status was, however, rejected by the First-tier Tribunal (FTT).

Ruling on his challenge to that outcome, the Upper Tribunal (UT) noted that, under the terms of his partnership agreement, he was neither required to contribute to the firm's capital nor did he have a right to any surplus assets on a winding up. On the other hand, he had a voice in the management of the firm's affairs and a significant part of his income was dependent on it making a profit.

Dismissing his appeal, the UT rejected arguments that the FTT was over-influenced by the partnership label attached to his engagement. The FTT was entitled to find on the evidence that he was a partner in the sense that he was carrying on business in common with other members of the firm with a view to profit. He was thus a self-employed earner for NICs purposes.

**Employer Pays for Bypassing Trade Union – Supreme Court Ruling**

Employers cannot with impunity make direct offers to trade union members with the aim of pre-empting the collective bargaining process. The Supreme Court made that point in confirming awards of compensation to 57 workers whose employer bypassed their trade union in search of a pay deal (Kostal UK Ltd v Dunkley and Others).

The manual and shop floor workers were all members of a trade union. Following a ballot of workers, their employer recognised the union on a non-legally binding basis and they commenced formal annual pay negotiations. A pay offer was made but, after a further ballot, it was rejected.

The employer's response was to make pay offers directly to workers, thus bypassing the union. Workers were warned that they might be given notice if no agreement were reached and 97 per cent of them accepted direct offers. The employer then reached a collective agreement with the union on similar terms to the direct offers.

The workers involved in the case complained to an Employment Tribunal (ET) that the direct offers contravened Section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992. Their claims were upheld and they were each awarded £3,800 in respect of each direct offer that had been made to them. The awards were confirmed by the Employment Appeal Tribunal but the employer later appealed successfully to the Court of Appeal.

Ruling on the workers' challenge to that outcome, the Supreme Court noted that, in certain circumstances, Section 145B confers on workers who are members of an independent trade union which is recognised, or seeking to be recognised, a right not to have offers made to them by their employers.

The provision takes effect where the acceptance of an offer by a group of workers would have the prohibited result that terms of their employment would not, or would no longer be, determined by collective agreement with a union. Employers bear the burden of proving that their sole or main purpose in making such offers is not to achieve that prohibited result.

In upholding the appeal, the Court noted that what Section 145B prohibits is an offer which, if accepted by all the workers to whom it is made, would have a particular result. It is the causal link between the presumed offer and the prohibited result that matters, rather than the particular content of the offer. There must at least be a real possibility that, had an offer not been made and accepted, workers' terms of employment would have been set by collective agreement.

On the basis of that interpretation, the Court ruled that there is nothing to prevent an employer making an offer directly to its workers in a matter which falls within the scope of a collective bargaining agreement provided the employer has first followed, and exhausted, the agreed collective bargaining procedure.

What the particular employer had done, but could not do with impunity, was to make a direct offer to its workers, including union members, before the collective bargaining process that it had agreed, albeit in honour only, to follow had been exhausted. The workers' compensation awards were restored.

Legal advice is essential if you want to avoid falling foul of trade union legislation. Contact <<CONTACT DETAILS>> for guidance.

**Employment Contracts and the Implication of Terms by Custom and Practice**

Workers wishing to discern the extent of their entitlements need usually do no more than read their employment contracts. As one case showed, the occasions when further rights are to be implied into a contract, having been established by custom and practice, are few and far between (Thomas and Others v FW Farnsworth Ltd).

The case concerned a claim by 27 ex-employees of a food company to enhanced redundancy payments. Their contracts did not expressly give them a right to such payments, but they argued that the company and others in the same group had an established track record of making redundancy payments well in excess of the statutory minimum. On that basis, they asserted that a custom and practice had developed, giving rise to legitimate expectations, and that an entitlement to enhanced payments should be implied into their contracts.

Rejecting their claims, however, an Employment Tribunal (ET) ruled that consistent past payment of enhanced redundancy by an employer over a period of time does not, in and of itself, suggest that there is a legal obligation to do the same in future. It noted that, for a variety of reasons, some employers choose to benefit their staff over and above their statutory entitlements. Such discretionary benevolence may be driven by, amongst other things, a desire to foster a happy, more productive workforce or to encourage customer confidence or better industrial relations.

Rejecting the employees' challenge to that outcome, the Employment Appeal Tribunal found that they had failed to prove the existence of an established custom and practice. The occasions on which the company or others in its group had paid enhanced redundancy were few in number and some years in the past. There was also a lack of consistency in the formulae used to calculate such payments. The ET's conclusions on the evidence were plainly right.

We can advise you on the intricacies of employment contract law. Contact our specialist lawyers for guidance.

**Leaky Victorian Drains Trigger Successful Unfair Dismissal Claim**

It almost goes without saying that employers who fail to provide their staff with a safe working environment positively invite Employment Tribunal (ET) complaints. A case on point concerned an opticians' shop that was afflicted by leaks and nasty smells arising from an antiquated drainage system (Quinn v Boots Opticians Professional Services Ltd).

An optical consultant who worked in the shop suffered from multiple sclerosis. Leaks from the Victorian drains caused her particular anxiety because medical treatment she was undergoing suppressed her immunity from disease. She ultimately tendered her resignation and lodged ET proceedings.

Upholding her constructive unfair dismissal claim, the ET found that the drainage problem, whilst not constant, was ongoing. It resulted in leaks, nasty odours and possibly fly infestations. It was simply unacceptable that the shop remained open on occasions when it was bereft of working or accessible toilet facilities.

In failing to take the drainage issue seriously, the employer exposed its staff to an unsafe working environment. Given the health-based nature of its business, it was surprising that there was no evidence that it sought to move the shop to alternative premises whilst the problem was resolved. It was understandable that the woman felt continuously anxious about her health and safety in the workplace.

She did not want her condition to prevent her from working and maintained as good an attendance record as possible. However, she had to take time off work for medical reasons and the ET found that the employer failed to properly manage her absences. Managers did not empathise with her appropriately or appreciate that, due to her condition, she was likely to feel anxious and vulnerable.

The final straw came in the early days of the COVID-19 pandemic when a customer who was complaining of flu-like symptoms was permitted to attend an appointment at the shop. Although the shop's manager was unaware of the customer's symptoms, it was reasonable for the woman to conclude that she could not have confidence in management to keep her workplace safe.

The woman's complaint that the employer failed to make reasonable adjustments to cater for her medical condition – which was agreed to be a disability – was also upheld. If not agreed, the amount of her compensation would be assessed at a further hearing.

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

**Would Your Workplace Disciplinary Procedures Withstand ET Scrutiny?**

Workplace disciplinary hearings should always be conducted on the assumption that the fairness of the procedure followed is in future likely to be rigorously tested by an Employment Tribunal (ET). A case on point concerned an adult education worker who was sacked after she shouted at a client (Kenworthy v Think Employment Ltd).

The woman worked as an engagement manager with a company that provided adult education services to clients, many of whom were homeless, had language problems or were otherwise vulnerable. The company's code of practice stated that its staff were expected to treat clients fairly, politely and with respect.

She was suspended after one of her colleagues sent an email to the company's management complaining about her alleged behaviour. The most serious allegation was that she had shouted at a client in front of three others. Following an investigation and a disciplinary hearing, she was summarily dismissed on grounds that she had behaved in an unprofessional and unacceptable manner.

After she launched proceedings, an ET found on the balance of probabilities that she could be unfriendly, unapproachable and impatient in her dealings with clients. The manager who presided over the disciplinary hearing genuinely believed, on reasonable grounds, that she was guilty of misconduct. The company thus had a potentially fair reason for dismissing her.

Upholding her unfair and wrongful dismissal complaints, however, the ET found that the internal investigation into her conduct fell outside the band of reasonableness. The scope of the investigation had been expanded beyond the allegations made in the email and neither the email writer nor any of her other colleagues had been interviewed concerning specific alleged incidents.

The procedure followed during the disciplinary hearing was also unreasonable. The allegations she faced were never specifically put to her and she was given no opportunity to respond in a neutral way. The outcome was pre-determined in that the presiding manager had decided in advance that she was guilty of gross misconduct. She was thus placed under the burden of proving her innocence.

The ET found that she did shout and behave inappropriately in relation to the client and that she thereby contributed to her dismissal. Had fair procedures been adopted, there was evidence that could have led to her being fairly dismissed. The amount of her compensation – which would be assessed at a further hearing, if not agreed – would be reduced in accordance with those findings.

<<CONTACT DETAILS>> says, "Employers must be able to evidence a fair approach to disciplinary procedures, should the matter be raised in an Employment Tribunal. We can help to ensure the right procedures are in place."

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