Employment Law ~ February 2022

**Employment Law Titles ~ February 2022**

Availability of Furlough Scheme Rendered Redundancy Unreasonable

Chronic Fatigue Syndrome Caused Delay in Lodging Discrimination Claim

Employment and an Egregious Case of Pregnancy/Maternity Discrimination

Employment – There is No Single Key for Unlocking Worker Status Disputes

Fear of COVID-19 is Not a Philosophical Belief

Health and Safety – Forklift Truck Driver Sacked for Whistleblowing

Whistleblower Treated as 'Complainer' Receives Substantial Compensation

Workplace Horseplay and Employers' Responsibilities – Guideline Ruling

**Availability of Furlough Scheme Rendered Redundancy Unreasonable**

A great many businesses were plunged into grave financial difficulties by the COVID-19 pandemic, but was it reasonable to make employees redundant at a time when the furlough scheme provided a less draconian option? An Employment Tribunal (ET) considered that issue in a ground-breaking case (Ovies v Muqit).

A woman who was employed as a practice manager by a consultant surgeon was dismissed after the pandemic caused a downturn in the practice's financial position. After she launched proceedings, an ET found that the surgeon had decided to cut staffing costs and that the reason for her dismissal was redundancy.

However, the ET ruled that the surgeon's failure to turn his mind to the impact of the flexible furlough scheme then in operation rendered her dismissal unfair. If she had been placed on furlough, the surgeon would have been able to bring her back to work part time whilst still having the right to claim government support providing 80 per cent of her pay for the hours she did not work.

Had he considered the furlough scheme and applied it to the woman, it was more likely than not that she would have worked part time and resumed her full-time position when the pandemic receded and the practice's income picked up. His decision to make her redundant was, in those circumstances, unreasonable. If not agreed, the amount of her compensation would be decided at a further hearing.

The manner in which the redundancy process is conducted is important and any unfairness or oversight inherent in the process will be clear to judges. Contact us for advice.

**Chronic Fatigue Syndrome Caused Delay in Lodging Discrimination Claim**

Disability discrimination claims that are filed outside a three-month statutory time limit will usually be dismissed without a hearing – but what if the disability itself is the cause of the delay? That issue was considered in a guideline case (Rawlinson v Health Education England and Others) concerning a trainee pharmacist who was stricken by chronic fatigue syndrome (CFS).

The woman suffered from several long-term disabling conditions, including post-viral CFS. The condition was characterised by an overwhelming sense of fatigue and a chronic influenza-like malaise, typically worsened by physical or mental exertion. She was sometimes so unwell that she had to take to her bed for days.

She held a trainee position with an NHS trust for six months before she decided that she could no longer cope with the strain and resigned. She subsequently launched Employment Tribunal (ET) proceedings on the basis that reasonable adjustments had not been made to cater for her disability. She said that she was required to stand for extended periods and was not provided with a suitable chair.

Following a preliminary hearing, the ET noted that she had lodged her claim outside the primary three-month limitation period provided for in Section 123 of the Equality Act 2010. The delay was significant, but the ET found that it was just and equitable to extend time so that her case against the trust could proceed to a full hearing.

The ET acknowledged the serious physical and mental limitations arising from her lifelong condition. For about five months following her resignation she was simply too unwell to carry out necessary inquiries or to issue her claim. Once her health improved sufficiently, she took those steps promptly and at the first available opportunity. She was also permitted to proceed with her claim against two other public bodies involved in the training of pre-registration pharmacists.

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

**Employment and an Egregious Case of Pregnancy/Maternity Discrimination**

Employers who discriminate against pregnant women or new mothers can expect to reap a bitter harvest of financial and reputational damage. An Employment Tribunal (ET) made that point in describing a woman's suspension and dismissal whilst on maternity leave as one of the most egregious acts of discrimination possible (Slade and Another v Biggs and Another).

The woman's boss viewed it as highly inconvenient when she and another employee became pregnant at roughly the same time, and decided to engineer their departure. Not much more than a week before she gave premature birth to her child, she was accused of misconduct and suspended. She was still recovering from the delivery when she was dismissed, purportedly on grounds of gross misconduct.

The ET found that she was subjected to an entirely spurious and vindictive process that was designed to drive her from her job. She was given no detail of the trumped-up charges against her; there was no hearing and she was given no right of appeal. During part of the blatantly unfair process, her baby was in intensive care.

Her suspension when she was in the advanced stages of pregnancy was designed to have maximum effect upon her. Payment of her wages was delayed in the hope that she would resign. In an attempt to somehow avoid liability for maternity pay, the date of her dismissal was spuriously back-dated to the day before she gave birth. Without consultation, her employment was transferred to a company that lacked funds with which to pay her.

The ET described the boss's behaviour when giving evidence as arrogant and misogynistic. Prompted by a desire to throw some dirt at the woman, he made wide-ranging, lurid and entirely fanciful allegations against her and her relatives. A senior manager, whilst doing the boss's bidding, was considered by the ET to be equally to blame for the woman's treatment.

The woman's employer, her boss and the manager were ruled jointly and severally liable for the acts of pregnancy or maternity discrimination she endured. The ET also found that her dismissal was unfair and that there had been a failure to comply with the Transfer of Undertakings (Protection of Employment) Regulations 2006. She had not received four days' holiday pay. Overall, she was awarded more than £90,000 in compensation, including £25,200 for injury to her feelings.

After the award was challenged, various issues were resolved by agreement or otherwise. It was, amongst other things, agreed that the boss and the manager were not personally liable in respect of the unfair dismissal and holiday pay awards. A modest downward amendment was also made in the light of a calculation error made by the ET. All live issues that came before the Employment Appeal Tribunal were, however, resolved in the woman's favour.

We can assist you in dealing with any issues arising as a result of pregnancy or maternity to ensure that you do not act in breach of the law.

**Employment – There is No Single Key for Unlocking Worker Status Disputes**

There would appear to be little prospect of a let up in the plethora of employment disputes concerning the vexed issue of worker status after the Employment Appeal Tribunal (EAT) noted that there is no single key that can unlock such cases, each of which must be decided on its own facts (Johnson v Transopco UK Ltd).

The case concerned a licensed black cab driver who lodged Employment Tribunal (ET) proceedings against the operator of a taxi app. He complained that he had been treated detrimentally for whistleblowing, that unlawful deductions had been made from his wages and that he had received neither working-time holiday pay nor the National Minimum Wage.

His case, however, foundered after the ET ruled that he was not a worker, as defined by Section 230(3) of the Employment Rights Act 1996 and other relevant legislation. Apart from the odd trip, he had made active use of the app only for a period of about nine months and the ET ruled that he had throughout worked full time as an independently licensed Hackney Carriage driver on his own account.

The ET found that, when he accepted a job via the app, his obligation was owed to the app operator, not to the passenger. The operator was not merely acting as his agent. Passengers contracted with the operator for transportation services, which were then delivered by the driver under a separate contract with the operator.

Throughout the relatively brief period when he was making active use of the app, however, he had continued to source work directly as a self-employed black cab driver. The ET's finding that the operator was a client or customer of his taxi-driving business precluded him from having worker status.

Dismissing his challenge to the ET's decision, the EAT noted that guidance given by the Supreme Court in its landmark February 2021 ruling in a case concerning the cab-hailing app Uber did not provide a panacea leading to the easy resolution of all driver status issues. Such questions could not be determined by a mere mechanistic, tick-box exercise and each case turned on its own facts.

In a ruling that was a model of focused and articulate reasoning, the ET was entitled to conclude that, although the app operator was the more powerful contracting party in scale and financial terms, the driver was not in fact in a relationship of dependency or subordination to it. Jobs that he performed via the app formed part of his own taxi business.

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

**Fear of COVID-19 is Not a Philosophical Belief**

A fear of contracting COVID-19 or infecting others with the virus is both worthy of respect and readily understandable. However, an Employment Tribunal (ET) has ruled in a novel case that it does not amount to a philosophical belief (X v Y).

The case concerned a woman who said that her wages had been withheld after she declined to return to work in July 2020. She believed that the pandemic at that time continued to pose a serious and imminent health and safety risk. She was worried about contracting the disease in her workplace and, in particular, feared passing on the virus to her partner, who was at high risk of becoming gravely ill.

She lodged an ET complaint on the basis that the failure to pay her wages amounted to discrimination on grounds of her philosophical belief, contrary to Section 10 of the Equality Act 2010. She defined that belief as 'a fear of catching COVID-19 and a need to protect myself and others'. The question of whether that amounted to a philosophical belief was considered by the ET as a preliminary issue.

There was no dispute that her concerns were genuine and worthy of respect in a democratic society. The ET accepted that they were intelligible, serious, cogent and cohesive. Fears about harm caused by COVID-19 were weighty and substantial and certainly not minor or trivial. They concerned aspects of human life and behaviour.

Ruling against her, however, the ET found that a fear of physical harm, and views about how best to reduce or avoid a risk of such harm, is not a belief for the purposes of Section 10. Her claimed belief was a time-specific reaction to her own desire to protect herself and others, principally her partner. Her concerns extended beyond the workplace and would only last for as long as the dangers arising from the pandemic persisted.

Rather than being a belief, her fear was an opinion or viewpoint based on the present state of information available. The ET noted that most, if not all, people instinctively react to perceived or real threats of physical harm in one way or another. Fear of COVID-19 could be described as a widely held opinion, based on the present state of information available, that taking certain steps, for example attending a crowded place during the height of the pandemic, may be dangerous.

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

**Health and Safety – Forklift Truck Driver Sacked for Whistleblowing**

Workplace whistleblowers operate very much in the public interest but, all too often, they are punished rather than praised for their activities. The point was made by the case of a veteran forklift truck driver who was summarily dismissed after repeatedly alerting his employer to a serious health and safety risk (Rajtmar v Uneek Clothing Company Ltd).

After witnessing an incident in which a pallet weighing up to 500 kg fell from a height of nine metres, the driver three times expressed concern to his employer that pallets were being overloaded. On the final occasion, he used his mobile phone to take photos of one such pallet and showed them to his supervisor.

He was first suspended and then dismissed on grounds that he had breached a strict company policy that banned employees from making mobile phone calls or sending texts on the shop floor. He launched Employment Tribunal (ET) proceedings on the basis that he had been subjected to detriment for making protected disclosures – whistleblowing – and that his dismissal was therefore automatically unfair.

Upholding his complaint, the ET found that his whistleblowing was the real and principal reason for his dismissal. Acting in the public interest, he reasonably believed that the information he provided to the employer revealed a health and safety risk. Having taken his mobile phone briefly from his locker in order to take the photos, he had neither spoken to anyone on the device nor sent a text. By doing so, he used reasonable means to protect himself and fellow workers.

The ET also found that his dismissal amounted to a breach of contract and that the employer had failed in its obligation to pay him whilst he was suspended. If not agreed, the amount of his compensation would be assessed at a further hearing.

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

**Whistleblower Treated as 'Complainer' Receives Substantial Compensation**

Whistleblowers perform a vital role in the public interest and managers who persist in viewing their activities merely as inconvenient belly-aching expose themselves to condemnation by Employment Tribunals (ETs). That was certainly so in the case of a warehouse worker whose health and safety concerns were ignored (Cooley v Ocado Retail Ltd).

The man reported a number of health and safety issues to his managers. Amongst other things, he noticed that cardboard and pallets were being stored in a way that prevented access to fire extinguishers and fire exits, and that a safety switch on a conveyor belt was not working because it was blocked with a cable tie.

He said that his activities resulted in a witch hunt against him. He was given unpleasant jobs to do, was three times denied promotion and was insulted and harassed by way of the warehouse's public radio channel. He resigned after his mental health deteriorated to the point where he dreaded going to work and had suicidal thoughts. He later launched ET proceedings.

In ruling on the matter, the ET found that he was constructively dismissed. He was badly treated on a number of occasions in a manner that amounted to a fundamental breach of the relationship of trust and confidence that should be a feature of any employment relationship. The mistreatment had caused his resignation.

He reasonably believed that his concerns were justified and that he had raised them in the public interest. Managers, however, ignored his disclosures and marked him down as a complainer. The various detriments to which he was subjected were connected to his whistleblowing activities and his dismissal was thus automatically unfair. His former employer was ordered to pay him £20,959 in compensation, including £6,000 for injury to his feelings.

It is important to recognise when workers have rights under the whistleblowing legislation and to investigate thoroughly matters raised in such circumstances. Contact **<<CONTACT DETAILS>>** for advice.

**Workplace Horseplay and Employers' Responsibilities – Guideline Ruling**

Irresponsible horseplay in the workplace can cause serious injury, but to what extent should employers be held indirectly – or vicariously – liable for such behaviour? The Court of Appeal considered that burning issue in a guideline case (Chell v Tarmac Cement and Lime Ltd).

A fitter was bending down to pick up a length of steel when a workmate placed two pellet targets on a bench close to his right ear. The workmate struck the targets with a hammer, causing a loud explosion. As a result, the fitter suffered noise-induced hearing loss in his right ear and tinnitus.

He launched a compensation claim against the company that employed the other man and operated and controlled the site where the incident occurred. His claim was, however, rejected on the basis that the company bore neither direct nor vicarious responsibility for the other man's practical joke.

Rejecting his challenge to that outcome, the Court noted that the targets had been brought onto the site by the other man and were not part of the work equipment provided by the company. He had no supervisory or other role in respect of the fitter's work and his wrongful act was not authorised by the company or carried out in the course of his employment. It was therefore neither just, fair nor reasonable to impose vicarious liability on the company.

The Court noted that the fitter and his team were external contractors. There was some friction between them and other workers directly employed by the company. There was, however, no suggestion that those tensions had previously resulted in actual violence or threats of violence. It could not be said that the incident was reasonably foreseeable by the company.

It was unrealistic to suggest that the company should have specifically instructed workers on the site not to engage in horseplay. That went without saying in that common sense decreed that such behaviour was inappropriate. There was in any event a site rule in place that forbade workers from intentionally or recklessly misusing equipment. That was a warning against exactly what the other man did.

These articles are provided for general interest and information only. They do not constitute legal advice. Whilst every effort is made to ensure that the content accurately reflects the law in England as at the date of its transmission, no liability is accepted for any loss or damage arising from any act or omission resulting from any information contained herein.