Employment Law ~ April 2022

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**Bus Driver Sacked Whilst on Sick Leave Succeeds in Unfair Dismissal Claim**

Dismissing a sick employee on medical grounds may be lawful and justified, but it is always something that is likely to attract close scrutiny by an Employment Tribunal (ET). In a case on point, a bus driver who was sacked whilst on sick leave, having suffered a stroke, succeeded in an unfair dismissal claim (Farooqi v East London Bus & Coach Company Ltd).

The driver was hospitalised for 13 days following his stroke and was on sick leave for over six months prior to his dismissal. The DVLA had revoked his Passenger Carrying Vehicle (PCV) licence and he had been told that he could not apply for a new one until 12 months after the date of his stroke. His dismissal letter stated that his employment was being terminated on medical grounds.

In upholding his complaint, an ET noted that, prior to his dismissal, he was making a good recovery. He was having no neurosensory difficulties and his sole remaining symptom was fatigue. Although his doctor had signed him off sick, a more recent occupational health report had stated that he was fit to return to work, albeit with some adjustments.

No account had been taken of the possibility of further significant improvement in his condition. The occupational health report indicated that his day-to-day activities were unrestricted and there was no evidence that it was impracticable to make any adjustments necessary to cater for his fatigue. Overall, the ET concluded that a reasonable employer would not have dismissed him on medical grounds and that the decision to do so fell outside the range of reasonable responses.

The ruling entitled him to a basic award reflecting his four years' service. The ET concluded, however, that his compensatory award should be reduced by 70 per cent on the basis that the revocation of his PCV licence would have provided a potentially fair reason for his dismissal. It meant that, at least temporarily, he was not entitled to drive buses, the role for which he had been employed. If not agreed, the amount of his award would be assessed at a further hearing.

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

**COVID-19 Pandemic Has Brought Employment Status Disputes to a Head**

Strains on the labour market caused by the COVID-19 pandemic have resulted in a great many latent disputes concerning employment status coming to a head. That was certainly so in the case of a woman who, despite her lynchpin role in an events and entertainment management company, was inaccurately described in her contract as a self-employed subcontractor (Lobley-Eames v Pastiche Europe Ltd).

The company was hit hard by the pandemic and, when the first lockdown came into force, it indicated to the woman that it would no longer pay her. She was, however, asked to carry on working for the company, unpaid, so that it would be in a good position to recommence events once pandemic restrictions were lifted. After not receiving wages for several months, she resigned and launched Employment Tribunal (ET) proceedings.

The company denied her claims that she had been constructively unfairly dismissed and that unauthorised deductions had been made from her wages. It asserted that any deductions from her wages were consensual. Pointing to her contract, which throughout described her as a subcontractor, it also contended that she had never been its employee and that her claims thus fell at the first hurdle. The ET considered the latter issue at a preliminary hearing.

Ruling on the matter, the ET noted that she had worked for the company for almost a decade. She was in large part responsible for the day-to-day organisation of events, liaising with clients, organising and training performers, creating performances for particular events and sometimes even performing herself. On joining the company, she had not been offered the opportunity of employment but had been promised progression and ownership in the business in due course.

She was contractually obliged to work 40 hours a week and was expected to work further hours, if necessary, in order to fulfil her duties. She had to seek permission before going on leave and received holiday pay. Tellingly, her contract contained a restrictive covenant inhibiting her ability to work with or for other businesses with which she or the company had dealings in the 12 months prior to the end of her contract.

Given the importance of her role and the extent of the duties placed upon her, the ET found that there was a mutuality of obligation between her and the company that was consistent with employment status. Although she had a degree of autonomy in how she went about her day-to-day work, she formed an integral part of the business and the company exerted considerable control over her working life.

She provided her services to the company personally. Although her contract made provision for the appointment of substitutes to work in her place, the company retained control over that process. Notwithstanding her contractual description as a subcontractor, the ET found that she was in reality an employee of the company, as defined by Section 230(1) of the Employment Rights Act 1996. She was therefore entitled to pursue her complaints to a full hearing.

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

**Furlough Scheme Abuse Whistleblower Receives Substantial Compensation**

Every right-thinking person would agree that workplace whistleblowers deserve not retaliation but praise. However, the opposite sadly happened in the case of a public-spirited factory worker who expressed deep ethical concern about his employer's criminal abuse of the COVID-19 furlough scheme (Gorton v Adria Glass Ltd).

The man, who had a vulnerable daughter at particular risk from COVID-19, complained to management that self-isolation rules were not being followed after one of his co-workers tested positive for the virus. He also objected fiercely after discovering that the company for which he worked had wrongfully continued to claim government furlough support at a time when its employees had returned to full-time work.

After the first disclosure, he was threatened with disciplinary action and subjected to extensive negative comments by management and colleagues. For months, he was singled out and ostracised, being categorised as lazy and pathetic. Following the second disclosure, his integrity was questioned by managers who knew full well that his concerns regarding the furlough scheme were justified. He eventually resigned and launched Employment Tribunal (ET) proceedings.

In upholding his claim of automatic unfair constructive dismissal, the ET found that the company had shown a cynical disregard for his employment rights. Unbeknown to him, the company had misrecorded and declared his earnings to HM Revenue and Customs, utilising the manufactured figures for the purpose of claiming furlough support. In doing so, the company was acting in breach of its statutory obligations and participating in a number of criminal and fiscal offences.

In also upholding his claims of wrongful dismissal and unlawful detriment for whistleblowing, the ET found that the treatment to which he was subjected was inextricably linked to disclosures he made in good faith and in the public interest. The impact of the serious and sustained detriments could not be overstated: they deprived him of his congenial employment and his formerly good relationship with colleagues. The company was ordered to pay him a total of £18,291 in compensation, including £7,000 for injury to his feelings and £5,000 in aggravated damages.

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

**Inducements to Forego Participation in Trade Union Activities – ET Ruling**

Workers have a right not to have offers made to them which have the sole or main purpose of inducing them not to participate in trade union activities. An outsourcing company found that out to its cost after making a trade union activist a tempting offer of a transfer to a new workplace at a higher rate of pay (Briceno v OCS Group UK Ltd).

The man worked on the site of government-owned premises where the company was contracted to provide cleaning services. He had an active and high-profile role in an independent trade union and had in the past received media attention due to his involvement in promoting strike action. The company vehemently opposed the union's attempts to achieve recognition as an authorised representative of employees working on the site.

With an employee ballot on the recognition issue looming, the company offered to transfer the man to a new site where he would be better paid. He launched Employment Tribunal (ET) proceedings on the basis that the offer was made for the purpose of inducing him not to take part in trade union activities, contrary to Section 145A(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992.

The company asserted that the sole purpose of the offer was to swiftly find suitable cleaners to work at the new site. It contended that the man was chosen because he had appropriate security clearance and because he had previously expressed a desire to move to a different location where he would be better remunerated.

In upholding his complaint, however, the ET found on the evidence that the sole or main purpose of the offer was to induce him not to vote in the finely balanced recognition ballot, not to attend pre-ballot meetings and to refrain from seeking to persuade colleagues to vote in favour of recognition.

The ET noted that the timing of the offer coincided very precisely with critical events in the recognition process. A similar offer had been made to another worker who was also vocal in his support for the union. The offer had not been advertised internally as would normally have been the case. The ET gave directions for a further hearing at which remedy issues would be determined.

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

**Poor Contract Drafting Leaves the Door Wide Open to Employment Disputes**

Inept and non-professional drafting of contracts is an open invitation to employment disputes. That was certainly so in a case where a property manager's contract left substantial room for doubt as to whether he was employed or self-employed (Bown v Victoria Mills Management Ltd).

The man was, under the terms of a written contract, for many years engaged by a company to provide site management services in relation to two blocks of flats. He lodged Employment Tribunal (ET) proceedings against the company but, in order to succeed in his claim, he first had to establish that he was employed, within the meaning of Section 230(1) of the Employment Rights Act 1996 (ERA).

He pointed out, amongst other things, that the contract granted him the right to 28 days' paid annual leave. The company provided him with most of the tools he needed to do his job and had honoured the contractual requirement to give him 30 days' notice of termination. He was provided with a company mobile phone and the contract was silent as to whether he was entitled to substitute someone else to perform his role.

In arguing that he was nevertheless self-employed, the company emphasised that he invoiced for his work on a monthly basis; that no pension arrangements were made for him and that neither tax nor National Insurance Contributions were deducted from his pay. He had a number of other clients, ran his own sign manufacturing business for a time and enjoyed a wide discretion as to when and how he went about his work.

Ruling on the matter, the ET noted that the contract was poorly drafted without any thought having been given to his status. It did not, for example, deal with many of the particulars of employment required by Section 1 of the ERA. Taken as a whole, it was not consistent with the provisions of a contract of employment.

On the limited evidence available, the ET was not satisfied that the company exercised a sufficient degree of control over him and his work to give rise to an employment relationship. On balance, it found that he was self-employed and in business on his own account. The ruling was fatal to his claim.

**What is a Detriment? EAT Ruling Clearly Sets Out the Correct Legal Test**

The question of whether someone has suffered a 'detriment' is the central issue in a great many employment cases where discrimination or victimisation is alleged. In an important decision, the Employment Appeal Tribunal (EAT) has given authoritative guidance on the correct legal test to be applied in such cases (Warburton v The Chief Constable of Northamptonshire).

When applying to become a police officer, a man at the outset disclosed to the force concerned that he was in the process of pursuing an employment claim against another force, alleging unlawful discrimination. There was no dispute that that disclosure amounted to a protected act.

Following interview and assessment, the force made him a conditional offer, subject to pre-employment checks. However, he was subsequently told that his application had been unsuccessful due to his failure to meet the force's vetting requirements. He launched proceedings against the force, alleging that he had been victimised, but his claim was rejected by an Employment Tribunal (ET).

In upholding his challenge to that outcome, the EAT found that the ET's failure to set out in terms in its decision the legal definition of 'detriment' meant that it was at least uncertain that it had applied the correct test. The man's victimisation claim was remitted to a differently constituted ET for fresh consideration.

The EAT noted that the concept of detriment is interpreted widely and that the key test is whether treatment is of such a kind that a reasonable worker would or might take the view that, in all the circumstances, it was to their detriment. In order for a worker to establish that they have suffered a detriment, it is not necessary for them to show that they have suffered any physical or economic consequences.

Although the test is framed by reference to a reasonable worker, it is not wholly objective. To pass the test, it is enough that a reasonable worker might take the view that they have suffered a detriment. Even where an ET takes a perfectly reasonable view that there is no detriment, if a reasonable worker might differ then the test is satisfied. The EAT noted that, on the application of the correct legal test, it should not be particularly difficult to establish a detriment.

In asking itself whether the protected act was the cause of his application being rejected, the ET had also failed to apply the right legal test. The correct question was whether the protected act was the 'reason why' he was rejected, in the sense of having a significant influence on the outcome.

Expert employment law advice is vital in situations such as these. Contact our team for guidance.

**Workplace Banter May Be Fine, But Not If it Tips Over Into Harassment**

A certain amount of foul-mouthed banter is only to be expected in a robust working environment. As an Employment Tribunal (ET) ruling showed, however, employers who allow it to tip over into hostile and discriminatory abuse are likely to pay a high financial and reputational price (Moore v Sean Pong Tyres Ltd).

The case concerned a white worker, aged in his early 50s, who was employed by a tyre recycling company. He worked as part of a small team in which white people were in a minority. He said that a younger black colleague had subjected him to verbal abuse, amongst other things referring to him as an old, white guy. He asserted that it was that abuse which led to him taking a period off sick with depression. He eventually resigned and launched ET proceedings.

Ruling on the matter, the ET acknowledged that it is possible for two men in a tough working environment to use abusive language to each other without any bad feeling. There is, however, always a risk that such behaviour will tip over into bullying and aggression and that is what had happened in this case. Although the man had himself used some bad language, he was essentially standing up for himself.

He had raised concerns about bullying with his boss, but nothing had been done beyond having a quiet word. There were indications that the boss had minimised his concerns and sided with the younger worker. In his resignation letter, the man said that the abuse had caused him stress, sleepless nights and loss of appetite. To maintain his own sanity, he felt that he could not return to work.

Upholding his harassment claim, the ET found that the age- and race-related abuse he endured created a hostile and intimidating working environment for him. In also ruling that he was constructively unfairly dismissed, the ET was satisfied that the harassment triggered his resignation. The company was ordered to pay him £7,486 for unfair dismissal and £14,541 in respect of discrimination, a total of £22,027.

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

**You May Be Disabled in Common Parlance But Not in Law – Guideline Ruling**

People have differing views as to what does or does not constitute a disability but, in employment law terms, the word has a very specific meaning. An Employment Tribunal (ET) succinctly made that point in finding that a workshop manager who suffered lower back pain and sciatica was not, in the legal sense, disabled (Hackney v James Glancy Design Ltd).

Following his dismissal by a design company, the man lodged proceedings with the ET complaining of, amongst other things, alleged disability discrimination. The issue of whether his condition met the legal definition of a disability, within the meaning of Section 6 of the Equality Act 2010, was considered as a preliminary issue.

Ruling on the matter, the ET noted that his work involved some physical exertion and required him to walk several miles a day. During the period prior to his dismissal, his back condition amounted to a physical impairment that caused him pain whilst performing day-to-day activities. He took prescribed painkillers and suffered particular discomfort during flare-ups of his condition.

On the other hand, the ET observed that his lifestyle was at the time an active one. He liked to go on annual snowboarding trips abroad and, at home, enjoyed rearing birds for their eggs and engaging in substantial DIY projects. On the evidence, the ET was not satisfied that his pain was constant or that it caused him difficulty in sleeping, using the toilet at work or brushing his teeth.

The ET emphasised that the fact that someone can only carry out normal day-to-day activities with pain does not establish that they are disabled in the statutory sense. It found that the man's physical impairment during the relevant period did not have a substantial adverse effect on his ability to carry out such activities. As he had failed to establish that he was disabled, his discrimination claim failed.

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

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