Employment Law ~ January 2023

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**Are Adjustments that Disadvantage Non-Disabled Employees Reasonable?**

Are employers obliged to make reasonable adjustments to cater for the particular needs of disabled employees where to do so would cause disadvantage to their non-disabled colleagues? That issue was addressed by the Employment Appeal Tribunal (EAT) in a guideline ruling (Hilaire v Luton Borough Council).

The case concerned a local authority employee who was disabled by depression, a condition that affected his memory, concentration and social interactions. He was faced with redundancy as a result of a restructuring exercise. He and 13 colleagues, who were also at risk of redundancy, were invited to attend interviews for alternative positions in the new structure.

The man argued before an Employment Tribunal (ET) that, because of his disability, the requirement to undergo an interview placed him at a disadvantage when compared with non-disabled colleagues. His claim that his employer had failed in its obligation to make reasonable adjustments in order to alleviate that disadvantage was, however, rejected.

Challenging that outcome, he contended, amongst other things, that the employer should have waived the interview requirement in his case and slotted him into an alternative position. In dismissing his appeal, however, the EAT noted that such a step, whilst alleviating his disadvantage, would have impacted on colleagues who were also taking part in the redundancy selection process.

Making a reasonable adjustment, the EAT observed, is not a vehicle for giving an advantage over and above removing a particular disadvantage arising from a disability. The ET was entitled to conclude that slotting him into a new position was not a reasonable step that the employer was required to take.

The EAT acknowledged that his disability would have at least hindered his effective participation in an interview. However, the ET justifiably found that he would not have attended an interview in any event, having lost all confidence in the employer. His non-attendance was a matter of choice and thus did not relate to his disability.

We can advise you on all aspects of employment law. Contact **<<CONTACT DETAILS>>** for expert guidance.

**Employers – Feelings of Unfairness Cannot Justify Penalising Whistleblowers**

Even employers who feel that they have been unfairly criticised have no excuse for targeting whistleblowers for detrimental treatment. An Employment Tribunal (ET) powerfully made that point in the case of a senior care worker who raised welfare and safeguarding concerns affecting residents in a care home (Letherby v Abraham Nursing Homes Ltd).

After making the disclosures, both to the care home's owner and to public healthcare authorities, the woman was suspended. She resigned in the midst of a disciplinary process and launched ET proceedings.

Upholding her case, the ET found that she had made three protected disclosures in the reasonable belief that the information disclosed was substantially true. She had been subjected to various detriments – including her suspension – the imposition of which was materially influenced by her whistleblowing. In short, she was constructively dismissed because she blew the whistle.

The employer felt that the disclosures were tremendously unfair, but the ET had no hesitation in finding that it conducted itself in a manner calculated to damage or destroy the employment relationship of mutual trust and confidence and did so because she had the temerity to make protected disclosures. The employer thereby fundamentally and repeatedly breached her employment contract.

She did not receive the benefit of a proper investigation and the evidence indicated that the employer had no real interest in discussing her concerns or properly looking into them. The investigating and dismissing officers were one and the same and a disciplinary hearing had been conducted in an unprofessional manner that left her feeling humiliated. She was suspended without reasonable or proper cause.

The employer was ordered to pay her basic and compensatory awards in respect of her automatic and ordinary unfair dismissal, totalling £5,576. She was also awarded £16,875 for injury to her feelings.

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

**ET Fell into Substitution Trap in Sexual Harassment Case**

It is the role of an Employment Tribunal (ET) to make findings on the evidence, not to substitute its own views for those of the employer. A case involving serious sexual harassment allegations provided a textbook example of an ET falling into the so-called substitution trap (Leicester City Council v Chapman).

Following an investigation and a disciplinary hearing, a man who was employed in a local authority leisure centre was summarily dismissed following a finding that he had sexually harassed a female colleague. The decision-maker further found that he had acted in a verbally abusive and aggressive manner towards her and subjected her to a physical assault.

In later upholding his unfair dismissal claim, the ET found that the investigation was not the even-handed and fair process it should have been. Proceeding on the basis that the man and woman had given conflicting accounts of a crucial remark that he was alleged to have made, it found that the decision-maker did not have reasonable grounds for considering him guilty of sexual harassment.

Allowing the local authority's appeal against that outcome, the Employment Appeal Tribunal (EAT) noted that the decision-maker found no such conflict in their accounts in that the man had stated that he had no memory of what he had said. Despite having warned itself against the risk of falling into the substitution mindset, the ET had nevertheless proceeded to do exactly that.

It failed to properly engage with the basis upon which the decision-maker made his decision or to acknowledge the evidential picture that was actually presented to him. It assumed a basis for the decision that did not feature in the explanation provided in the dismissal letter. It thereby substituted its own view of the crucial interaction for that of the decision-maker.

In also overturning the ET's ruling that the man was wrongfully dismissed, the EAT found that it had simply disregarded potentially probative documentary and indirect oral evidence presented by the local authority. The case was remitted to an ET for reconsideration. The EAT heard further argument as to the terms of that remission.

Contact **<<CONTACT DETAILS>>** for individual advice on contentious Employment Tribunal matters.

**HMRC Sustains Resounding Defeat in Trade Union Dues 'Check-Off' Dispute**

HM Revenue and Customs (HMRC) have for years been in breach of thousands of their employees' contracts by failing to deduct their trade union subscriptions directly from their pay. The High Court's ruling to that effect is bound to send shockwaves to the heart of government (Smith v The Commissioners for Her Majesty's Revenue and Customs).

The practice of automatically checking off union dues from employees' pay packets pre-dated the 2005 merger of the Inland Revenue and HM Customs and Excise to form HMRC. The two predecessor bodies employed well over 100,000 civil servants at the time. In 2015, however, HMRC removed the checking-off facility.

Upholding claims brought by four long-serving HMRC employees, the Court declared that they had a contractual right to have sums deducted from their earnings and paid to their trade union, the Public and Commercial Services Union (PCSU). That conclusion arose from the historical context of relevant industrial relations and a natural reading of HMRC's employment handbooks and policies.

There was no basis for implying a term into the employees' contracts that would have entitled HMRC to remove the checking-off facility on giving reasonable notice. There was also no basis for asserting that the employees had, by their conduct since 2015, agreed to a variation of their contracts or that they had waived their contractual right to checking off.

In a further blow to HMRC, the Court also found that the PCSU was entitled, by virtue of the Contracts (Rights of Third Parties) Act 1999, to enforce the terms of its members' contracts notwithstanding that it was not a party to them. That ruling opened the way for the PCSU to seek compensation for damage that it sustained arising from the cancellation of checking off.

It is vital to seek expert advice when dealing with matters relating to employment contracts. Our expert team can support.

**Informed of an Employee Pregnancy? Choose Your Words Carefully**

When an employee announces that she is pregnant, the prospect of maternity leave and potential managerial difficulties may well enter an employer's mind. However, as an Employment Tribunal (ET) ruling showed, simply offering congratulations may, in legal terms, be the safest response (Hedges-Staines v CF Social Work Ltd).

The case concerned a woman who worked under a fixed, six-month contract for a company providing social work support to local authorities. She expressed concern to a manager about visiting a client's home, where a child was suspected to be suffering from a communicable infection.

When she told the manager that she was pregnant, the manager responded with the comment, 'We've only just put you on a contract.' Thereafter, the woman's workload was substantially reduced, and her employment was terminated shortly after the expiry of her contract.

After the woman launched proceedings, the ET found that her pregnancy was not the reason for her dismissal. Her reduced workload resulted from the COVID-19 pandemic, and she had not been treated less favourably than two colleagues who were also on six-month contracts and who also lost their jobs.

However, the ET found that the manager's comment amounted to unfavourable treatment based on her pregnancy. It betrayed her frustration that a recently appointed and valuable member of staff might not be able to carry out her full range of duties and would thereafter be taking maternity leave. For the injury to her feelings, the woman was awarded £4,500 in compensation, plus interest.

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.

**Investigation and Disciplinary Hearings – Why Separation of Functions Matters**

In all but the smallest organisations, fairness generally demands that different people should investigate allegations of workplace misconduct and preside over disciplinary hearings. As an Employment Tribunal (ET) ruling showed, a failure to maintain that separation of functions is a positive invitation to a finding of unfair dismissal (Nyamekye v Phase II Care Ltd).

The case concerned a care worker who was accused of breaching his employer's embargo on staff carrying clients in their personal vehicles. He was also said to have breached professional boundaries by swapping phone numbers with a client without authorisation. He denied wrongdoing but, after an investigation and a disciplinary process, he was summarily dismissed on grounds of gross misconduct.

In upholding his unfair dismissal complaint, the ET noted that the same manager had conducted the investigation and chaired an initial disciplinary hearing. She took against him because he challenged the fairness of the process. She wanted to get rid of him and an external professional was inserted to preside over subsequent elements of the process as a buffer or to provide some form of rudimentary justification for his dismissal. She rubber-stamped the professional's decision.

Any intemperance shown by the employee during the process was understandable given his poor treatment. Because of the circuitous process utilised to justify his dismissal, the ET did not accept that the manager held a genuine belief in his guilt. The far from thorough investigation was one-sided, partial and flawed and there was a steadfast refusal to engage with his arguments in defence.

He was not permitted to state his case properly because his email was cut off following his suspension and he was instructed not to speak to other staff. Overall, his dismissal and his treatment leading up to it fell outside the band of reasonable responses open to an employer of the relevant size and type. If not agreed, the amount of his compensation would be assessed at a further hearing.

We can assist you in dealing with any matters relating to unfair dismissal. Contact **<<CONTACT DETAILS>>** for expert advice.

**Trade Union Settled Employment Dispute Without Member's Authority**

When trade unions negotiate settlements of employment disputes, employers usually assume that they are acting with the authority of their members. As an Employment Tribunal (ET) ruling showed, however, there is a difference between an assumption and a certainty (Jones v Cygnet (DH) Ltd).

The case concerned a healthcare assistant who, throughout a redundancy process, was advised by her trade union. After she and others lost their jobs, the trade union negotiated with their employer via Acas. A full and final settlement, whereby each employee was to receive £750, was in due course agreed.

In the meantime, however, the woman pursued her own, independent ET claim. Her employer contended that the claim should be struck out in that she was named as a party to the settlement and bound by its terms. There was thus no ongoing dispute for the ET to resolve.

Ruling on the matter, the ET noted the woman's uncontested evidence that she was on holiday in Spain at the relevant time and had no knowledge of the settlement. She first became aware of it when the employer responded to her claim. She contacted Acas asking for her name to be removed from the compromise agreement but, by that time, the settlement had been formally executed.

In declining to strike out her claim, the ET found that the trade union had no actual or ostensible authority to reach a settlement on her behalf. She had not, by her words or conduct, granted such authority. She had informed the employer that she was instructing her own solicitors and the employer should therefore have been on notice that she was no longer represented by the trade union. The ET's ruling opened the way for her claim to proceed to a full hearing on its merits.

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**Was Restaurant Chef's COVID-19 Redundancy Inevitable? Guideline Ruling**

When employees are unfairly dismissed, it is commonplace for employers to assert that they would have lost their jobs in any event and that they have thus sustained no financial loss. As a case concerning a restaurant chef showed, however, such contentions are unlikely to be accepted in the absence of solid evidence (Teixeira v Zaika Restaurant Ltd).

The chef was the most junior member of the restaurant's 10-strong kitchen team of non-speciality chefs. Following a downturn in business arising from the COVID-19 pandemic, he was informed by telephone that he was being dismissed. There was no real dispute that his dismissal was by reason of redundancy.

After he launched Employment Tribunal (ET) proceedings, the employer conceded that his dismissal was procedurally unfair in that he had neither been consulted nor warned that he was at risk of redundancy. His compensatory award was, however, reduced to zero on the basis that he would inevitably have lost his job even had a fair procedure been adopted.

Given his junior status, the ET reached what it described as an irresistible conclusion that he would have been the lowest scorer in any redundancy exercise. Had he put his mind to it, his boss could reasonably have placed him in a pool of one and his redundancy would in any event have occurred on the date that it did.

Upholding his challenge to that outcome, the Employment Appeal Tribunal (EAT) noted that, in its experience, employers are nearly always adamant that dismissal was inevitable, whilst employees almost invariably express equal certainty that they would have retained their jobs had a fair procedure been followed. The ET was required to engage in a degree of surmise as to what the particular employer would have done had a fair procedure been followed.

Such speculation, however, must be based on a circumspect appraisal of evidence. The ET erred in law in that its reasoning involved a non sequitur: the possibility of a pool of one being fairly chosen did not inevitably mean that the chef's dismissal would have taken place when it did. Fair consultation might have resulted in some change to the pool or even the outcome. His dismissal might at least have been delayed for some time while consultation took place.

The EAT acknowledged that there may be a compelling reason why a pool of one could fairly be selected absent any warning or consultation. However, it struggled to see any such reason in the chef's case in that the business continued to trade and his colleagues kept their jobs. It could not be said that the lack of a fair procedure made no difference and that there was only one possible outcome. The case was remitted to the same ET for reconsideration.

Consulting legal advisers when entering into redundancy proceedings is vital to avoid unfairness. Contact **<<CONTACT DETAILS>>** for expert guidance.

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