Employment Law ~ April 2023

**Employment Law Titles ~ April 2023**

Age Discrimination, Redundancy and the Burden of Proof – Guideline Ruling

Can COVID Scepticism Be a 'Belief' Protected Under the Equality Act 2010?

Disciplined Production Line Manager Succeeds in Sex Discrimination Claim

Intelligent and High-Achieving Dyslexic People May Still Be Disabled in Law

Pregnancy 'Played a Part' in Redundancy Decision – Discrimination Ruling

Veteran Care Worker Succeeds in Constructive Unfair Dismissal Claim

Whistleblowing and the Importance of Proving Motive – Guideline Ruling

**In Brief**

New Law Gives Greater Employment Protection to Seafarers

**Age Discrimination, Redundancy and the Burden of Proof – Guideline Ruling**

Where an older employee is treated less favourably than a younger one in a similar position, the burden shifts onto the employer to prove that age discrimination had no effect on its decision-making. An Employment Tribunal (ET) made that point in the case of an administration manager who was made redundant at the age of 67 (Martin v British Car Auctions Ltd).

The man had worked for a car sales company for more than 20 years when he was selected for redundancy. He contended that his dismissal was pre-determined and motivated by his age. The company asserted that it was conducting a necessary restructuring exercise and that his selection followed a fair procedure.

Ruling on the matter, the ET found that the principal reason for his dismissal was, as the company asserted, redundancy. Due to the impact of the COVID-19 pandemic, the company had to reorganise its business and had a commercial and economic reason for making redundancies.

The ET did not consider that the manager who decided on the man's selection for redundancy was guilty of conscious age discrimination. The man was warned in advance that his job was at risk and steps were taken to conduct a fair consultation and selection process and to minimise job losses.

In nevertheless upholding his age discrimination complaint, the ET found that he was less favourably treated than a younger colleague. There was no material difference between them in terms of skills and qualifications. Given those findings, it was for the company to provide an explanation. It had failed to provide cogent evidence of a non-discriminatory reason for the difference in treatment.

Also upholding his unfair dismissal claim, the ET noted that the redundancy process lacked transparency. It could not be discerned from the available evidence whether the selection criteria were applied fairly. His dismissal also did not fall within the range of reasonable responses in that it was tainted by age discrimination. The amount of his compensation, if not agreed, would be assessed at a further hearing.

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

**Can COVID Scepticism Be a 'Belief' Protected Under the Equality Act 2010?**

A significant minority of people – often referred to as 'COVID sceptics' – firmly believe that measures taken to control the virus are an unwarranted impingement on their personal freedom. The question of whether such beliefs can qualify for protection under the Equality Act 2010 was considered in a guideline employment case (Ellingham v Tempur UK Ltd).

The case concerned a warehouse operative who expressed the belief that COVID-19 testing is flawed, that face masks afford no protection against the virus and that disinfecting surfaces is pointless and possibly dangerous. He was adamant that it was for him alone to decide how to protect his health and that anti-COVID measures taken by his employer were an affront to his free will.

Following his resignation, he lodged an Employment Tribunal (ET) claim, alleging that he had been subjected to indirect discrimination because of his COVID-sceptic beliefs. The employer responded by applying to have his complaint struck out on the basis that it had no reasonable prospect of success.

Ruling on the matter, the ET noted that his conduct, which he said arose from his principled COVID scepticism, might be considered in the eyes of some as putting others at increased risk from the virus. However, there was nothing inherently abhorrent about his beliefs and the employer's argument that they would be likely to be found to conflict with the rights of others was rejected.

The ET expressed doubt as to whether the man would succeed in establishing that his beliefs were more than an expression of opinion and that they had the cogency and coherence required to qualify for protection under the Act. The employer also had an apparently strong argument that its anti-COVID measures were a reasonable means of achieving a legitimate aim.

However, in declining to strike out the complaint, the ET noted that it was not for it to make a value judgment about the man's beliefs. It could not be said that he had no reasonable prospect of establishing that they were protected and that he had been subjected to particular, non-trivial disadvantages because of them. The ET directed that his constructive unfair dismissal claim should also proceed to a full hearing. His further complaint that he suffered discrimination due to his Christian faith was, however, struck out.

Expert employment law advice is vital when dealing with claims relating to protected beliefs and equality law. Contact our team for guidance.

**Disciplined Production Line Manager Succeeds in Sex Discrimination Claim**

For businesses equipped with sophisticated human resources departments, it should be second nature to treat men and women equally. As an Employment Tribunal (ET) ruling showed, however, costly lapses into discrimination remain all too common (Swaciak v Rowse Honey Ltd).

A male production line manager was accused of bullying by a female colleague. Her complaint was immediately treated as a formal grievance and, following a period of suspension, he was issued with a final written warning. He ultimately resigned and launched ET proceedings, alleging that he was less favourably treated because of his sex.

In upholding his claim, the ET noted that he had also made a complaint against his colleague. It was not, however, treated as a formal grievance or taken seriously. Her grievance was dealt with more quickly and expeditiously than his complaint and she was neither suspended nor subjected to disciplinary proceedings.

On the contrary, she was stepped up to fill his leadership role during his suspension. Following his return to work, his conduct was monitored for six weeks, a step that he found humiliating. There was a range of procedural failings in the grievance and disciplinary procedure followed; there was no clear rationale given for the final written warning and he was unable to appeal against it.

Given those factual findings, the employer bore the burden of proving that there was no discrimination. In awarding the man £9,000 for injury to his feelings, the ET was not satisfied that it had discharged that burden or that the man's treatment was not motivated or influenced in a significant, more than trivial way by his sex.

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

**Intelligent and High-Achieving Dyslexic People May Still Be Disabled in Law**

Dyslexic people may be both highly intelligent and high-achieving but still be disabled in the legal sense of the word. An Employment Tribunal (ET) made that point in a case concerning a worker whose difficulties were such that she could not recall the last time she managed to finish a book (Wilkinson v Coventry University Students' Union).

The woman lodged a disability discrimination complaint against her former employer, a university students' union. To succeed in her claim, she first had to establish that she was disabled within the meaning of Section 6(a) of the Equality Act 2010. That question was addressed by the ET as a preliminary issue. The union accepted that her dyslexia was a lifelong condition that impaired her ability to carry out normal day-to-day activities. It denied, however, that the impairment was substantial.

Ruling on the matter, the ET noted that, despite her obvious intelligence and many abilities, she encounters difficulties in reading, writing and processing information which are only partially ameliorated by coping strategies. She has issues with grammar and spelling; she mispronounces words and names and can take an unusually long time to complete tasks that involve literacy skills.

Noting that it is possible to be both high-achieving and disabled by dyslexia, the ET found that the impairments arising from her condition were substantial, in the sense of being more than minor or trivial. Although she was capable of most workplace activities, she could only do some of them with difficulty and often to a less high standard and taking a longer time to complete them.

Although she also has dyspraxia, resulting in some physical clumsiness and difficulty in performing certain tasks, such as holding a pencil, the ET found that the condition makes a relatively minor contribution to the overall picture of her disability. Taken by itself, her dyslexia was a sufficient impairment to meet the statutory definition. The ruling entitled her to proceed with her discrimination claim.

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

**Pregnancy 'Played a Part' in Redundancy Decision – Discrimination Ruling**

Maternity leave is every expectant mother's entitlement and, if you feel that you have suffered pregnancy discrimination, you should contact a solicitor without delay. The point was powerfully made by the case of a woman whose pregnancy played a part in her employer's decision to make her redundant (Yasin v Swift Lawyers Ltd).

Having twice become pregnant, the woman took successive periods of maternity leave which together lasted over two years. Not long after returning to work, she became pregnant for a third time and asked for arrangements to be made for a further period of maternity leave. The decision to dismiss her on grounds of redundancy followed about two months later.

After she launched proceedings, an Employment Tribunal (ET) found that the main or principal reason for her dismissal was indeed redundancy. A decision having been taken not to progress the line of work in which she was involved, she was effectively in a pool of one and was not selected for redundancy because of her pregnancy. Her dismissal was thus not automatically unfair.

In nevertheless upholding her 'ordinary' unfair dismissal complaint, the ET found that there was no genuine or meaningful consultation process prior to the redundancy decision. The process involved merely going through the motions and was effectively a box-ticking exercise. There was a failure to give due consideration to whether there was a suitable alternative position that she could fill.

Also upholding her pregnancy discrimination claim under the Equality Act 2010, the ET found that she had established facts from which, in the absence of an alternative explanation, it was possible to conclude that her pregnancy played a part in her dismissal. The evidence gave rise to an inference that she would have been treated differently had she not been pregnant. If not agreed, the amount of her compensation would be assessed at a further hearing.

The manner in which the redundancy process is conducted is important and irregularities will be easily discovered by Employment Tribunals. Contact us for advice on the fair and proper course of action.

**Veteran Care Worker Succeeds in Constructive Unfair Dismissal Claim**

Employers are often contractually entitled to require their personnel to move from one place of work to another. However, as one case showed, doing so without consultation is a positive invitation to Employment Tribunal (ET) proceedings (Pye v Bolton Cares (A) Ltd).

The case concerned a care worker who had over 30 years of loyal and unblemished service behind her. She was employed at a location that was an easy, half-hour commute from her home. She was shocked and upset when her manager informed her that she was to be transferred to another of her employer's numerous care facilities, a move that would involve a much more difficult journey.

Her commuting time to the new location was at least 50 minutes. The journey would, however, often take much longer than that because one of the two bus services that she would need to catch only operated once an hour and did not start until 10am on Sundays. She was concerned that she would not get home from work until 10pm and that, if she missed the bus, she would face a lengthy walk.

There was a mobility clause in her contract that entitled her employer to require her to move from one of its workplaces to another. When she raised her concerns with her manager, the latter told her that everybody has to travel to work and that her transfer to the new location was non-negotiable. She resigned and subsequently launched ET proceedings.

Noting the mobility clause, the ET was not satisfied that the decision to move her by itself amounted to a breach of the implied duty of trust and confidence owed to her by her employer. However, in upholding her constructive unfair dismissal claim, it found that the failure to consult her did constitute such a breach.

She was given short notice of the decision and the failure to consult, combined with her manager's non-engagement with her concerns, was likely to destroy or seriously damage the employment relationship. There were good reasons why she could not attend the new location and, given her many years of conscientious service, there was no potentially fair reason for her dismissal. If not agreed, the amount of her compensation would be assessed at a further hearing.

Contact **<<CONTACT DETAILS>>** for individual advice on unfair dismissal claims.

**Whistleblowing and the Importance of Proving Motive – Guideline Ruling**

Establishing that an employee has made a protected disclosure is the first step on the path to success in any whistleblowing claim. However, as a case concerning a dismissed care homes manager showed, it is often much harder to prove that detrimental treatment is motivated by such a disclosure (Penicela v Sanctuary Care Ltd).

The woman had been in post for only about six months when she was dismissed at the end of her probationary period. Her employer asserted that she was dismissed on grounds of capability or performance. She contended, however, that the motive underlying her dismissal was that she had made protected disclosures by raising concerns that understaffing was putting residents' safety at risk.

Following a hearing, an Employment Tribunal (ET) found that she had made a single protected disclosure. In rejecting her claim of automatic unfair dismissal, however, it found that the disclosure played no part whatsoever in the decision to terminate her contract. The decision-maker was wholly uninfluenced by the disclosure and the reason for her dismissal was, as the employer contended, her lack of capability.

Upholding her challenge to that outcome, the Employment Appeal Tribunal noted that the decision-maker had in part relied on a probation report prepared by the woman's former line manager. It was the central plank of the woman's case that it was the report that prompted her dismissal and that, in writing it, the line manager was herself influenced by the disclosure.

In asking itself whether the disclosure was the principal reason for her dismissal, the ET was thus required explicitly to consider the motives of not only the decision-maker but also the line manager. The ET had not spelt out in its decision that it had taken that course. The issue was sent back to the same, or a similarly constituted, ET for fresh consideration.

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.

**In Brief**

**New Law Gives Greater Employment Protection to Seafarers**

Royal Assent has been granted to the Seafarer's Wages Act 2023, after it passed the final parliamentary stages at the end of March.

The new law is aimed at ensuring that seafarers who work on ships regularly docking at UK ports are paid at least the National Minimum Wage.

The legislation is part of the government's nine-point plan for seafarer protections, which is intended to 'boost and reform seafarer employment protections and welfare, ensuring they are paid and treated irrespective of flag or nationality, whilst closing down legal loopholes that could give employers the ability to avoid doing so'.

Further information on the plan can be found at [https://www.gov.uk/government/publications/nine-point-plan-for-seafarers-our-commitments-to-protect-seafarers/](https://www.gov.uk/government/publications/nine-point-plan-for-seafarers-our-commitments-to-protect-seafarers/nine-point-plan-for-seafarers-our-commitments-to-protect-seafarers)

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.