Employment Law ~ June 2023

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**Can Exhaustion from Overwork Be a Disability? Guideline ET Ruling**

Many people have highly demanding jobs that leave them feeling worn out – but can such work-related exhaustion amount to a disability? An Employment Tribunal (ET) addressed that issue in the case of an NHS consultant whose workload and other commitments were, by any standards, punishing (Zagorski v North West Anglia NHS Foundation Trust).

On some days, the consultant worked up to 12-13 hours. His commute to work on two days a week took between two and a half and three hours, one way. He had heavy caring responsibilities for his wife, who had health difficulties, and his three young children. Symptoms arising from his exhaustion prompted numerous medical appointments and sporadic sickness absences from work.

After his employment by an NHS trust came to an end, he launched ET proceedings alleging, amongst other things, disability discrimination. At a preliminary hearing, the ET considered whether his exhaustion and the debility that it caused amounted to a disability for the purposes of Section 6 of the Equality Act 2010.

Answering that question in the negative, the ET expressed sympathy for him. It was hardly surprising that the combination of his workload, long commute and personal responsibilities had left him excessively tired and drained. However, his symptoms were no more than a normal physical and emotional reaction to his extremely demanding work-life conditions.

In finding that they did not amount to an impairment within the meaning of the Act, the ET noted that an athlete may feel progressively more tired during an endurance event and suffer symptoms similar to those the consultant described. That did not, however, make the athlete a disabled person. Although chronic exhaustion may develop into a medical condition such as myalgic encephalitis, chronic fatigue syndrome, fibromyalgia or depression, there had been no such diagnosis.

The ET further noted that he had received medical advice to take more rest and seek additional help with his caring responsibilities. Had he made reasonable changes to his extremely demanding schedule, the adverse effects on his day-to-day activities would not have been substantial. Noting that his condition significantly improved after he left the trust's employ, the ET found that the longevity of his symptoms was directly linked to him not making such recommended lifestyle changes.

The ET was also unpersuaded that serious migraines he suffered during the relevant period had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. Even considered cumulatively, his claimed impairments did not amount to a disability for the purposes of the Act.

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

**Coarse Language in the Workplace – ET Upholds Harassment Claim**

Even if the kind of coarse language used in traditionally male-dominated workplaces was once acceptable, it certainly is not today. An Employment Tribunal (ET) made that point in awarding substantial damages to an office administrator who was harassed by her foul-mouthed line manager (Chard v Jasper Byrne Ltd).

The woman worked at a lambskin processing plant, next to an abattoir. She resigned after less than a year in the job, citing what she viewed as her manager's unacceptable, unpleasant and harassing behaviour. She subsequently launched ET proceedings against her former employer, alleging harassment and direct sex discrimination.

Ruling on her case, the ET noted that the plant was, by its nature, a coarse working environment where industrial language was commonplace. The manager was wont to make lewd remarks and regularly referred to her in insulting terms. His suggestion that the workplace was free from swearing was frankly incredible. Five of her harassment complaints were upheld, all of which were either related to her sex, or of a sexual nature, or both.

The manager's conduct was unwanted, in that she had made it clear that she found it upsetting and wished it would stop. His behaviour met the statutory definition of harassment in that it related to a protected characteristic – her sex – and had the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading and humiliating environment for her.

The ET rejected her claim of direct sex discrimination on the basis that the manager behaved in a similar manner in the presence of both men and women. It was not a case in which she had been treated less favourably than an actual or hypothetical male comparator. It further noted that she had not complained about the manager's conduct prior to her resignation, which coincided with the discovery of a significant bookkeeping error on her part.

The ET acknowledged that the harassment she endured was towards the lower end of the scale of gravity. It nevertheless ordered the employer to pay her £10,000 for injury to her feelings. Together with £500 in respect of lost earnings, plus interest, her total award came to £11,976.

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

**Disability Discrimination and Hypothetical Comparators – Guideline Ruling**

Workplace disability discrimination claims often hinge on arguments that a disabled person was treated less favourably than a hypothetical comparator. As a guideline Employment Appeal Tribunal (EAT) decision showed, the circumstances that are imputed to such a comparator are, in many cases, of decisive importance (Boesi v Asda Stores Ltd).

The case concerned a warehouse operative who was disabled by degenerative disc disease in her lower back. She was in near-constant pain and could not bend, walk or sit for more than 10 minutes. After she had been off work sick for about 18 months, her employer dismissed her on grounds of incapability.

In rejecting her claim of direct disability discrimination, brought under Section 13 of the Equality Act 2010, an Employment Tribunal (ET) noted that she had received advice from her physiotherapist and GP that she remained unfit for work and could not undertake the tasks required in her existing role or any alternative, less physically demanding role that had been identified.

In finding that she had not been less favourably treated because of her disability, the ET constructed a hypothetical comparator who did not meet the definition of disability in the Act, but who had been absent from work for the same period as the woman and who had received medical advice to the same or similar effect.

Challenging that outcome, the woman argued that circumstances imputed to the hypothetical comparator were self-contradictory. A person who had been on sick leave for such an extended period, and who had received such medical advice, would essentially be a disabled person. She contended that the ET should have adopted a hypothetical comparator who was, quite simply, not disabled.

In rejecting her appeal, however, the EAT noted that her particular circumstances – the length of her absence from work and the medical advice she had received – lay at the heart of the case. The ET would have failed in its task had it not imputed those circumstances to the hypothetical comparator. It was entitled to find that a hypothetical comparator, in materially the same circumstances, would also have been dismissed and otherwise treated no differently than she was.

The risk of being drawn into costly discrimination disputes can be greatly reduced by having in place adequate provisions and policies to support disabled employees. Our employment lawyers can advise.

**Making Managerial Changes? Transparency is Always the Best Policy**

When changes are being made to a company's management structure, transparent consultation with those affected is always the best policy. An Employment Tribunal (ET) made that point in the case of a senior executive whose role was steadily reduced to the point where he felt that resignation was his only option (Bowden v Opsec Security Ltd).

The man was employed as the operations director of a multinational business's UK division. He was also one of the company's statutory directors. The company was undergoing globalisation and responding to the challenge of COVID-19 when it embarked on a restructuring of its managerial positions.

He asserted that his position was thereafter slowly eroded and undermined and that he was, in effect, demoted. His job title was changed from 'director' to 'leader' and important responsibilities that he had previously fulfilled were removed from his remit. He resigned, citing a complete loss of trust in the company's senior management team, and subsequently launched ET proceedings.

Defending the claim, the company contended that it had in fact intended to promote him and substantially enhance his salary. Amidst the pandemic and the company's expansion, structural changes were being made daily, on the hoof. The company asserted that his resignation was prompted by his disappointment at not receiving a bonus and his belief that he had been overlooked for promotion.

In upholding his constructive unfair dismissal complaint, however, the ET noted that the case bore all the hallmarks of a workplace power struggle. The steady diminution of the man's role and responsibilities was implemented on a drip, drip basis. He could only tolerate so many drips before he had had enough and felt that he had no alternative but to tender his resignation. Shorn of his executive powers, he was effectively rendered a director in name only.

Observing that transparency is preferable to stealth, the ET emphasised that good management demanded that the proposed changes to his role should have been disclosed and discussed with him, rather than being inflicted piecemeal without consultation. In the absence of agreement, the amount of his compensation would be assessed at a further hearing.

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

**Religious Leader's Employment Contract Was 'Illegally Performed'**

Those who seek the protection of the law with metaphorical dirty hands are likely to receive short shrift. An Employment Tribunal (ET) powerfully made that point in the case of a religious leader who had engaged in tax evasion (Singh v Singh Sabha London East).

The man launched proceedings after his engagement as a temple's head priest was terminated. Following a hearing, the ET found that he was an employee and that his dismissal was unfair. His complaints that he had not received the National Minimum Wage or holiday pay to which he was entitled were also upheld.

The ET found, however, that he and the employer had agreed at the outset that he would be treated as self-employed. That was a mischaracterisation of their true relationship. He either knew or ought to have known that he was, in truth, an employee.

The ET was satisfied that he knew from the start that the employer would not be deducting Income Tax or National Insurance Contributions (NICs) from his pay via the PAYE system. Over a period of three years, he took no steps himself to declare his income from his work at the temple to HM Revenue and Customs (HMRC). His failure to pay tax and NICs on that income was neither careless nor inadvertent, but deliberate and seriously wrong.

The employer turned a blind eye and its failure to take steps to ensure that he was declaring his income to HMRC, in circumstances where it knew that it was not doing so, was at best reckless and seriously wrong. However, the man was, if anything, more at fault in that he knew for a fact that no tax or NICs were being paid on his income, either by the employer or by him. His conduct was extremely serious and amounted to tax evasion.

Although there was no suggestion that his employment contract was itself illegal, the ET found that it was performed in an illegal manner. On that basis, the entirety of his claim was dismissed. Given that his complaints were otherwise meritorious, the ET recognised that this was a severe sanction.

However, when his receipt of voluntary donations from his congregation was taken into account, the sums in unpaid tax and NICs were very substantial and were likely to far exceed any compensation he might have been awarded. There was thus a real risk of him being unjustly enriched were he to succeed in his claim. Given the central public importance of upholding the integrity of the tax and justice systems, the outcome of the case was, the ET ruled, proportionate.

We can assist you in dealing with any matters relating to employment and Income Tax. Contact **<<CONTACT DETAILS>>** for expert advice.

**Restructuring Exercises and Redundancy – Guideline EAT Ruling**

Not every corporate restructuring or cost-cutting exercise gives rise to a genuine redundancy situation. The Employment Appeal Tribunal (EAT) made that point in addressing a risk manager's unfair dismissal claim (Campbell v Tesco Personal Finance PLC).

Following a review of its business with a view to cutting costs, the woman's employer resolved to consolidate its three risk teams into two. She and another risk manager were warned that they were at risk of redundancy. Following consultation and a selection process – in which she was found to have scored lower than her colleague – her employment was brought to an end.

In arguing that her dismissal was unfair, she contended, amongst other things, that there was no genuine redundancy situation in that the number of risk managers remained the same after the restructuring as it had been before.

An Employment Tribunal (ET) found that the two risk manager posts under the old structure had been replaced by two new risk manager posts within the new structure. One of the latter had a leadership function. The ET found on the evidence that a genuine redundancy situation had arisen and that her dismissal was fair.

Ruling on her challenge to that outcome, the EAT noted that, in order to give rise to a redundancy situation, it is not always essential for a restructuring process to result in a reduced headcount or in a diminution of the overall number of hours worked. Such a situation can arise from a reorganisation which enables the same amount of work to be performed by fewer employees or within a smaller number of working hours.

Upholding her appeal, however, the EAT noted that at no point in the ET's ruling did it expressly seek to apply the statutory definition of redundancy, contained in Section 139 of the Employment Rights Act 1996, to the facts of the case. In particular, there was nothing in the ET's reasons to explain how it came to the conclusion that the employer's requirement for employees to carry out risk management work had diminished.

The fact that three risk teams had become two did not, of itself, assist in resolving that issue. Although the ET had described the two new posts within the new structure as not the same as the old roles, the only difference it identified was that one of the new positions included a leadership function. The addition of that function was not directly relevant to the question of whether the employer's need for risk managers had lessened.

The ET focused inappropriately on the reduction in the number of teams and failed to consider whether that truly gave rise to a redundancy situation. It made no specific finding that there was a diminution in the employer's need for employees to carry out risk management work. The woman's unfair dismissal claim was remitted to a differently constituted ET for redetermination.

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.

**Stable Lass Compromised Employment Dispute 'Under Duress'**

Under the auspices of Acas, employment disputes can be formally compromised by way of so-called 'COT3' agreements, thus obviating the need for litigation. However, as a guideline ruling showed, such agreements are unlikely to be worth the paper they are written on if they are entered into under duress (Caulkett v Johnson and Another).

The case concerned a stable lass who lived in tied accommodation. When faced with disciplinary proceedings, she entered into a COT3 agreement with her employer. She subsequently lodged Employment Tribunal (ET) complaints of unfair dismissal and pregnancy/maternity discrimination. The employer asserted that, in light of the COT3 agreement, the ET had no jurisdiction to hear her case.

In addressing that matter as a preliminary issue, the ET found that the disciplinary allegations against her were unsubstantiated. Pregnant at the time, she was highly dependent on her employment and, in particular, her tied accommodation. She believed that she was homeless and would be sacked.

The employer had indicated its intention to dismiss her and had restricted her access to her tied home. It had induced her to enter into the COT3 agreement by telling her that it was for her benefit in that she would receive notice pay and be provided with an eviction letter, which she urgently needed in order to establish an entitlement to local authority housing as an unintentionally homeless person.

In ruling that she had entered into the COT3 agreement under duress, the ET found that she had acted in haste and under illegitimate pressure. She had no access to legal advice, whilst the employer was represented by a solicitor. The only financial benefit to her was two weeks' notice pay, to which she would have been entitled in any event. The COT3 agreement was clearly to the employer's advantage in that it terminated her employment with immediate effect, together with her right to occupy her tied home and any other associated liabilities.

In rescinding the COT3 agreement, which was neither valid nor enforceable, the ET accepted jurisdiction to consider her complaints.

It is vital to have expert legal advice when entering into Employment Tribunal proceedings. Contact **<<CONTACT DETAILS>>** for guidance.

**Store Manager Targeted in 'Witch Hunt' Wins Right to Compensation**

Employers are sometimes tempted to conduct witch hunts against members of their staff, digging up dirt on them in an attempt to justify disciplinary proceedings. As an Employment Tribunal (ET) ruling showed, however, exposure of such conduct is likely to have costly consequences (Hannah v Travis Perkins PLC).

The case concerned a successful branch manager who worked for a retail chain. He resigned, giving about three months' notice, after finding a better-paid job elsewhere. Three of his colleagues handed in their notice on the same day. The resignations gave rise to a great deal of anger on the part of other members of the branch's staff.

He was suspended without warning partway through his notice period, pending a disciplinary investigation. He faced an allegation that he had sold stock to his father at a grossly excessive discount. He resigned for a second time a few days later, this time with immediate effect, and subsequently launched ET proceedings.

In upholding his constructive unfair dismissal claim, the ET found that he had been subjected to a witch hunt. Following his initial resignation, outside managers had been deployed to the branch to look for dirt on him and the others who had given notice. There was nothing suspicious about the transaction with his father that warranted any kind of investigation and any suggestion of fraud on his part was unsustainable.

The ET did not accept that his line manager, who was the key figure in driving the witch hunt, genuinely believed that the transaction was suspicious. Angered by his resignation, the line manager was looking to pin something on him. His suspension without reasonable or proper cause was likely to seriously damage or destroy the employment relationship and amounted to a repudiatory breach of his contract.

The amount of the employee's compensation would be assessed at a further hearing if not agreed. The ET further ruled that his compensatory award should be uplifted by 25 per cent to reflect the employer's unreasonable failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures 2015.

Compliance with disciplinary and grievance procedures is essential in avoiding potentially costly tribunal proceedings. Contact **<<CONTACT DETAILS>>** for advice.

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