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**A Right of Substitution Does Not Always Decisively Indicate Self-Employment**

A contractual right to substitute someone else to perform your work is a powerful indicator that you are self-employed – but it is not, in every case, decisive. The Employment Appeal Tribunal (EAT) made that point in a guideline ruling (Manning v Walker Crips Investment Management Ltd).

A financial professional was described in his contract with an investment company as an independent contractor. A clause in the contract entitled him to substitute his own employees or agents to provide services to the company on his behalf. His proposed substitutes, however, first had to be approved by the company at its sole discretion.

In Employment Tribunal (ET) proceedings, he claimed that he had been subjected to detriments for whistleblowing and had not been paid in respect of his entitlement to annual leave. Following a preliminary hearing, however, the ET dealt a fatal blow to his claim when it ruled that he was not a 'worker' within the meaning either of the Employment Rights Act 1996 or the Working Time Regulations 1998.

The ET found that the contract was subject to an implied term that the company's consent to the man's provision of a substitute would not be unreasonably withheld. The substitution clause was a genuine provision which meant that he was under no obligation to perform any work or services for the company personally.

Ruling on his challenge to that decision, the EAT found that the ET had erred in implying a term into the contract on the basis that it was necessary to give the substitution clause business efficacy. It was perfectly workable without such an implied term which had the effect of excluding him from any of the statutory rights available to workers. It was also highly relevant that the right of substitution had never been exercised in practice.

In finding that the ET wrongly placed weight on the contract's characterisation of the relationship as one of self-employment, the EAT noted that, to an outsider, the man's role within the company would have appeared identical to that of its employees. The EAT concluded that he did undertake personally to perform work or services for the company. Remaining issues relevant to the question of whether he enjoyed the status of a worker were remitted to the same ET for further consideration.

Contact **<<CONTACT DETAILS>>** for individual advice regarding employment status.

**Cost of Living Crisis Impacting Employee Mental Health – Acas**

A new survey conducted by the Advisory, Conciliation and Arbitration Service (Acas) has found that the mental health of nearly half of British workers (47 per cent) has suffered due to the rising cost of living.

Commenting on the findings, Acas Chief Executive Susan Clews said, "The rise in the cost of living has been challenging for many people and our poll reveals that it has had an adverse impact on the mental health of a substantial number of workers in Britain.

"Employers that create an environment where staff can openly talk about their mental health are better equipped to support them at work. Offering practical tips such as signposting to financial advice can also help."

Acas advice for employers on managing staff mental health includes:

* Be approachable and available and encourage team members to talk to you if they're having problems;
* Keep in regular contact with your team to check how they are coping;
* Respect confidentiality and be calm, patient, supportive and reassuring if a staff member wants to have a chat about their mental health;
* Consider whether someone may need adjustments at work, for example working more flexibly to save on costs;
* Look after your own mental health and get support if you feel under more pressure than usual – this support could be a colleague at work, a mental health network or a counsellor;
* Clearly communicate the internal and external support available to staff – this can include offering practical help such as signposting to financial advice or bringing advice providers into work.

Further information can be found at https://www.acas.org.uk/nearly-half-of-employees-mental-health-impacted-by-cost-of-living

**How Not to Respond to an Employee's Inappropriate Comment**

The dismissal of an employee who has made an inappropriate remark to a customer might in some cases be justified. However, as an Employment Tribunal (ET) ruling made plain, there can be no excuse for jumping to a conclusion after failing to conduct a fair investigatory and disciplinary process (Myles v Enterprise Rent a Car UK Ltd).

The case concerned a mobile vehicle technician who, when he arrived at a client's premises, was informed that he was not expected. In response, he told the client that he was not surprised because 'we have a female Eastern European woman in the office and she's always making mistakes'. He was dismissed by his employer after that comment drew a complaint from the client.

In upholding his unfair dismissal claim, the ET noted that a letter by which he was invited to a disciplinary meeting did not accuse him of discrimination or hostility. Rather he was charged with having spoken of a colleague in a derogatory manner, using language that could be deemed as discriminatory.

The ET found that the reason for his dismissal was that his employer believed that he was hostile and discriminatory towards Eastern European women. There was no reasonable basis for that belief and such an allegation was never put to him. He thus had no opportunity to respond. At no point in the investigatory process was he asked whether he held discriminatory views or whether he was hostile to Eastern European colleagues.

He had recently received a positive work appraisal, commending his good attitude, and there had been no previous complaints about his behaviour from colleagues or customers. That indicated that he was not in fact hostile or discriminatory and there was no evidence that he was. It was therefore unlikely that a full and thorough investigation would have revealed evidence that would have allowed a fair dismissal to take place.

The ET acknowledged that his behaviour was inappropriate and that he should not have complained to the client about mistakes being made by the employer's organisation. He had, however, apologised and it was a case of minor misconduct on his part. On that basis, his compensation – which would be assessed at a further hearing if not agreed – would be reduced by 15 per cent.

The risk of being drawn into unfair dismissal disputes can be greatly reduced by having in place and adhering to strict disciplinary procedures. Our employment lawyers can advise.

**Phone Call to Disabled Postman on Sick Leave Ruled an 'Act of Harassment'**

Treating an employee on sick leave with distrust rather than sympathy is to positively invite Employment Tribunal (ET) proceedings. That was certainly so in the case of a disabled postman who was at home, suffering from work-related stress, when he received a harassing phone call from a senior manager (McCalam v Royal Mail Group Ltd).

The postman suffered from, amongst other things, anxiety and depression and his employer conceded that he was disabled. He had been on sick leave for four weeks when the manager phoned him. The manager asked him what was preventing him from working and what activities he was currently completing at home.

The manager accepted that his choice of words was clumsy. He asserted, however, that he was merely asking standard questions and was intent on offering support to the postman with a view to understanding what types of activities he was able to perform at home.

In finding that the phone call amounted to an act of harassment related to the postman's disability, however, the ET noted that his employer was in possession of his sick notes which identified stress at work as the cause of his absence. It had knowledge that he was suffering some form of mental health problem and the manager ought to have been aware of the likelihood that he had a mental health disability.

Observing that an act of harassment need not be deliberate, the ET found that the manager's ill-considered question relating to his activities at home was redolent with distrust. It implied that he was fit to carry out activities notwithstanding his absence from work through illness. The question violated the postman's dignity and created a hostile, humiliating or offensive environment for him. The amount of the postman's compensation would be assessed at a further hearing, if not agreed. His other complaints against his employer were rejected.

For expert advice on harassment claims, contact **<<CONTACT DETAILS>>**.

**Protected Beliefs and Same-Sex Relationships/Transgender Issues**

The often-heated debate concerning same-sex relationships and transgender issues can hardly have escaped anyone's notice. In the case of a school pastoral worker who was dismissed after expressing her forthright views on the subject on social media, however, the Employment Appeal Tribunal (EAT) sought to impose legal order on the fray (Higgs v Farmor's School).

The secondary school where the woman worked had received complaints about her social media posts relating to relationships education in primary schools. She was suspended and, following a disciplinary process, dismissed. She later launched Employment Tribunal (ET) proceedings asserting that she had suffered direct discrimination because of, or harassment relating to, her protected beliefs.

In rejecting her claim, however, the ET concluded that the reason for her dismissal was not because of, or related to, her protected beliefs. It found that the measures taken by the school were due to its concern that someone reading her posts could reasonably form the opinion that she held homophobic and transphobic views, something she vehemently denied.

Upholding her challenge to that outcome, the EAT noted that it was expressing no views as to the merits of the national debate and that its role was confined solely to determining questions of law. It emphasised, however, the fundamental importance of the woman's human rights to freely express herself and to manifest her religious beliefs. Such rights are, it noted, the pillars of any democracy and it matters not whether the beliefs in question are popular or mainstream or even whether their expression may cause offence.

The ET was entitled to find that it was the school's concern about how others might view the posts that underlay each of the steps taken against her. It failed, however, to ask itself whether there was a close or direct link, or nexus, between her posts and her protected beliefs. Had it done so, it would have concluded that there was such a nexus.

When determining the reason why the school acted as it did, the ET was required to consider whether its actions were prescribed by law and necessary for the protection of the rights and freedoms of others. It was thus obliged to perform a proportionality assessment before deciding whether the actions were because of, or related to, the manifestation of her protected beliefs, or were in fact due to a justified objection to the manner of that manifestation. The case was remitted to the ET for rehearing.

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

**Sexualised Labelling of a Work Colleague is Never Acceptable**

Some people persist in thinking that applying sexualised labels to work colleagues is no more than a bit of innocent fun. However, the case of a woman who was referred to as 'blondie' by a more senior colleague showed how very wrong they are (Tubby v Hills Park Veterinary Group Ltd).

The man insisted that he never used the word in a derogatory manner, that he used it because it was easier to call out 'blondie' if he needed assistance and that he had no idea it upset her. After she launched proceedings, however, an Employment Tribunal (ET) found that his use of the word was belittling and patronising.

The fact that she was not the only woman in their workplace to whom he attached the same moniker merely served to magnify its effect. It diminished her dignity as an individual. The label referred to an aspect of her physical appearance – her hair colour – and was shorthand for a woman who was attractive in a sexual context.

A number, although not all, of her other sexual harassment complaints were also upheld. She was a strong character and the ET found that, with bills to pay, she had, over an extended period, put up with a low or moderate level of harassment in the use of names referring to her physical characteristics, sexual innuendoes and unwanted touching.

The man's conduct created an intimidating, offensive and humiliating environment for her, even if he failed to realise this and even if he gave no thought to the impact his words and actions had on her and other female colleagues. She eventually resigned in circumstances that amounted to unfair and wrongful constructive dismissal. The amount of compensation due to her would be assessed at a further hearing, if not agreed.

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

**Want to Stop a Key Employee Joining a Competitor? Consult a Solicitor Today**

If you are concerned that a former employee is preparing to work for a competitor in breach of a restrictive covenant in their employment contract, enforcement of your rights may well depend on how quickly you consult a solicitor. The potential consequences of delay in doing so were underlined by a High Court ruling (Jump Trading International Ltd v Couture and Another).

The case concerned a specialist researcher in algorithmic trading who worked for a global investment firm. After he resigned, giving one year's notice, he was placed on garden leave. His contract included a non-compete clause that was designed to protect the firm's confidential information, intellectual property rights, goodwill and business connections.

The clause forbade him from directly or indirectly engaging in competitive activity for a period after the end of his garden leave or notice period. Unusually, the length of that period was at the firm's discretion. In the event, it elected for a period of 12 months, the maximum permitted under the contract.

After the firm learned of the man's intention to take up a position with what it viewed as a competitor, it launched proceedings and sought an interim injunction preventing him from starting his new job shortly after the end of his garden leave. Resisting the application, the man argued, amongst other things, that the clause was unenforceable in that it was too widely drawn to be considered reasonable. The period during which he would be restrained from starting his new job – in effect, two years – was, he contended, too long.

Ruling on the matter, the Court formed a preliminary view that the man's arguments had considerable force and were stronger than those of the firm. The latter, however, had raised serious issues to be tried which would ordinarily have justified the grant of an interim injunction to maintain the status quo pending trial.

In finding that it would be unjust to grant the order sought, however, the Court ruled that the firm's unreasonable delay in launching proceedings was decisive. There was no explanation as to why it did nothing at all for almost four months after becoming aware of the man's intended start date in his new job.

The delay would prejudice the man's position, not least by causing further atrophy of his marketable skills. His new employer would also suffer in that it had already recruited other members of his prospective team. An opportunity for arbitration had also been lost. The Court directed a speedy trial of the firm's underlying claim.

It is vital to source legal advice as soon as possible when seeking to enforce non-compete clauses. Contact **<<CONTACT DETAILS>>** for guidance.

**In Brief**

**Carer's Leave Legislation Expected for 2024**

New legislation that will allow employees to take up to one week of unpaid carer's leave per year is expected for 2024, after the Carer's Leave Bill gained Royal Assent.

Carer's leave will be available to workers regardless of how long they have worked with their employer, and they will not need to provide evidence of how the leave is used or who it will be used for. Employees will also be able to take the leave flexibly to suit their caring responsibilities.

Further details of the Carer's Leave Act 2023 can be found at <https://bills.parliament.uk/bills/3199>

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