Employment Law ~ September 2023

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**A Business is Not an Autocracy – ET Fires Warning Shot**

Old-school small business proprietors sadly often place themselves at grave financial and reputational risk by taking an autocratic approach to management. An Employment Tribunal (ET) powerfully made that point in awarding substantial compensation to an unfairly sacked holiday park manager (Tweedale v Tithe Barn Club (Aldwick) Ltd).

The manager had a strong bond with the owner of the park, where he had worked for 26 years. After he suffered a major stroke, the owner – who was himself in very poor health – took steps to cater for his difficulties and generously supported him so that he could work at a reduced pace. However, their relationship later took a dramatic turn for the worse and the owner summarily dismissed him after making numerous allegations of misconduct against him.

Upholding his unfair dismissal claim, the ET noted that some of those involved in the case had referred to the owner as 'old school'. The description of his proprietorial and autocratic approach to the park's management was borne out by the tone of his communications, including the dismissal letter. They conveyed the impression that employee consultation and fair process were, in the context of the case, of no concern to him.

The dismissal took place against the background of a falling out between the owner and his son, whose involvement in the business had acrimoniously ceased. The owner took the view that the manager's loyalties were to his son, rather than to him. On that basis, the ET found that the principal reason for the manager's dismissal was not any misconduct on his part but the owner's desire to make a fresh start in the business.

The ET ruled that the employer's failure to follow the basic requirements of the Acas Code of Practice on disciplinary and grievance procedures justified a 25 per cent uplift in the manager's basic compensatory award. Amongst other things, he was not informed of the disciplinary charges against him prior to his dismissal and was afforded no opportunity to put his case. Even for a small business, the investigation into his alleged wrongdoing was unreasonable.

On the balance of probabilities, the ET found that the manager had disregarded the owner's instruction not to let chalets to a particular tenant. Although he did so in the belief that he was acting in the best interests of the business, he thereby made a 25 per cent contribution to his dismissal. His wrongful dismissal claim was also upheld and he was awarded more than £50,000 in compensation.

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

**Disability Discrimination – Corner Shops Owe the Same Duties as Multinationals**

Small businesses not blessed with human resources departments can find it hard to accommodate disabled members of staff who need to take time off work. However, as an Employment Tribunal (ET) ruling showed, when it comes to catering for their needs, a corner shop owes the same legal obligations as a multinational (Ciesielska v Bertie's (Broughty Ferry) Ltd).

The case concerned a barber who sustained a broken shoulder in an accident. Her constant pain and restricted movement made such tasks as washing and drying her own hair difficult. She took some days off sick when her shoulder was particularly sore but was generally able to soldier on at work with the aid of prescription painkillers. On learning that she required surgery and would need to take at least six months off work, however, her boss dismissed her over the telephone.

After she launched proceedings, the ET found that her injury caused a long-term physical impairment which had an adverse impact on her ability to carry out day-to-day activities. She was thus disabled within the meaning of the Equality Act 2010. The ET was also satisfied that her employer – a small business with fewer than 10 staff – knew, or at the very least ought to have known, that she had a disability from the date of her accident.

The ET found that she was dismissed because her employer had no wish to keep her on during her lengthy period of enforced absence. That absence arose from the requirement to have surgery, a necessity which itself arose from her disability. She had thus been treated unfavourably due to something arising in consequence of her disability, contrary to Section 15 of the Act.

The ET noted that she had previously had a very good working relationship with her boss and felt very sad and disappointed at the loss of her job. A single mother, she was suddenly left without sufficient income to pay bills or buy food. Her pre-existing mental health difficulties were exacerbated to the point where she had thoughts of self-harm or suicide.

She had not shown that her dismissal had caused her financial loss in that state benefits she had subsequently received more than matched sums in Statutory Sick Pay which her employer would have been obliged to pay her had she kept her job. However, the ET awarded her £10,000 in compensation for injury to her feelings, together with £727 in interest.

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

**Employment Status, Control and Mutuality of Obligation – Guideline Ruling**

There is no reason in principle why someone who is a shareholder and controlling director of a company cannot also be its employee. However, as an Employment Tribunal (ET) ruling made plain, the assessment of whether an employment relationship does or does not exist is a highly fact-sensitive exercise (Weiss v Miami Weiss Ltd (In Liquidation) and Another).

The case concerned a woman who was a director and sole shareholder of a hospitality company when it went into liquidation. She subsequently made a claim under the Employment Rights Act 1996 for statutory payments from the National Insurance Fund in respect of redundancy pay, arrears of wages and holiday pay. Her claim was, however, resisted by the Secretary of State for Business and Trade on the basis that she was not employed by the company.

Ruling on her claim, the ET noted that there were times during the early days of the business when she worked very long hours for which she often paid herself below the National Minimum Wage. However, her caring responsibilities for her two young children necessitated her engagement of a manager to run the business day to day during its last 18 months or so of trading. Although she continued to provide cover where necessary, she could effectively pick and choose her own hours, doing as much or as little work as she wanted to do.

The ET acknowledged that her position as the company's director and owner did not, as a matter of principle, preclude her from having employment status. She had, however, retained complete control of the business even after the manager's appointment. She continued to make all the important managerial decisions and had no one to answer to.

Whilst others who worked in the business had formal employment contracts, she did not. Unlike them, she did not have to clock in and out of work. She had no right to paid holidays or a pension and was not subject to the company's disciplinary and grievance procedures. She took a fixed monthly sum of money from the business irrespective of the number of hours she worked.

In rejecting her claim, the ET found that she was not subject to an implied contract of employment. On the particular facts of the case, her dealings with the company lacked the essential elements of control and mutuality of obligation without which it is all but impossible for an employment relationship to exist.

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

**Lost a Key Employee? This is How to Mount a Damage Limitation Exercise**

The shock departure of a key employee is a troubling moment for any business. As a High Court ruling showed, however, effective steps can often be taken to prevent them trailing confidential information and important clients in their wake (Celebrity Speakers Ltd v Daniel and Others).

A company that specialised in finding and booking motivational or keynote speakers for corporate events launched proceedings following the resignation of one of its directors. Amongst other things, it alleged that he had, whilst still in its employ, been instrumental in preparing to establish a rival business with a longstanding friend.

The allegations were disputed by the director, his friend and the rival business, but their statement of case was struck out after they failed to comply with a raft of court orders. Judgment having been entered against them on liability issues, the factual basis of the company's claim was taken as having been established.

The Court noted that the director was subject to a panoply of restrictive covenants in his employment contract which were designed, amongst other things, to protect the company's confidential information and to restrain him from soliciting its established clients or involving himself in competing businesses for nine months following his departure.

Ruling on the matter, the Court concluded that the company's loss of one particularly successful speaker was caused by breaches of contract on the part of the director and his friend. Whilst the latter had no written contract with the company, he had worked for it as a sub-agent in circumstances that the company argued gave rise to an expectation of good faith and loyalty. On the basis of the company's pleaded case, breaches of duty on the part of the rival business were also established.

The Court issued an injunction with a view to restraining any further breaches of the company's rights. It further awarded the company £220,453 in damages and interest, including £50,000 in respect of interference with its rights in its confidential database of clients and speakers.

Our expert lawyers can help to protect you from losing confidential information and valued clients when key members of staff leave the business. Contact **<<CONTACT DETAILS>>** for advice.

**School Inspector Sacked for Touching Pupil Succeeds in Unfair Dismissal Claim**

It is obviously impractical for employers to have in place disciplinary policies that set out each and every form of frowned-upon conduct. However, as an Employment Appeal Tribunal (EAT) ruling showed, employees are generally entitled to some forewarning of the types of behaviour that may result in immediate dismissal (Hewston v Ofsted).

The case involved a school inspector who, during an inspection visit, encountered a group of pupils who had come in soaking from the rain. He brushed water from the hair or forehead of one boy and put his hand on the child's shoulder. After the school complained, he expressed the view that the incident did no more than exhibit his caring attitude and had been blown out of all proportion.

Following an investigation and disciplinary process, however, he was dismissed for gross misconduct. His employer, Ofsted, took the view that his uninvited touching of the boy was inappropriate and contrary to its core values. His unfair dismissal complaint was subsequently rejected by an Employment Tribunal (ET).

Ruling on his challenge to that outcome, the EAT noted that Ofsted had no written policy which forbade touching of pupils. It acknowledged, however, that it was not incumbent on Ofsted to identify every type of misconduct which would be viewed as gross, thereby justifying dismissal for a single instance. However long such a list might be, it could never cover every circumstance that might arise.

The conduct in question was not regarded as giving rise to a safeguarding issue. It was not so serious as to render it inherently obvious that it could result in summary dismissal. The EAT observed that it was not fair to dismiss an employee for conduct which he does not appreciate, and could not reasonably be expected to appreciate, might attract dismissal for a single occurrence.

Whilst recognising that certain kinds of physical touching will obviously be regarded as gross misconduct, the EAT found that the incident did not fall into that category. The inspector had received no fair notice or forewarning that the particular conduct in which he engaged would attract the sanction of summary dismissal.

In substituting a conclusion that his dismissal was unfair, the EAT also noted that he had not been afforded access to certain documents prior to the disciplinary hearing, including the pupil's statement and the text of the school's complaint. If not agreed, the amount of his compensation would be assessed at a further hearing before a freshly constituted ET. His additional complaint of wrongful dismissal, previously rejected, was also remitted for redetermination.

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

**Sexual Harassment and the Rights of Accused Employees – Guideline Ruling**

Sensible employers take accusations of sexual harassment very seriously indeed. As an Employment Appeal Tribunal (EAT) ruling underlined, however, the rights of any employee accused of such harassment must be treated with equal gravity (Iourin v The Chancellor, Masters and Scholars of the University of Oxford).

The case concerned a male scientist who was accused of sexual harassment by a female colleague. Following a lengthy grievance procedure, a panel found, on the balance of probabilities, that he had attempted to hug and kiss her when they were in a car together and that he had subsequently put chocolates on her desk, accompanied by a note apologising for his somewhat clumsy behaviour.

The panel found that his conduct, although unwanted, was not aggressive or forceful and amounted neither to harassment nor sexual harassment. In concluding that his conduct was not of a sexual nature in the context of the relationship, the panel noted evidence that he viewed the woman as like a daughter to him and that she regarded him as a grandfatherly figure.

The man later lodged proceedings against his employer, alleging, amongst other things, that he had been subjected to direct sex discrimination and victimisation during and after the grievance process. In particular, he said that it was humiliating and insulting that he was, despite the outcome of that process, required to undergo training relating to harassment and bullying whereas the woman was not. The Employment Tribunal (ET), however, rejected that complaint.

Upholding his appeal against that ruling, the EAT found that the ET had proceeded on a clearly mistaken factual premise. It erred fundamentally in stating that the panel had made a finding of harassment against him, although not amounting to sexual harassment. There was in fact no such finding and the error undermined the entirety of the ET's subsequent analysis of the relevant complaint. The matter was remitted to a freshly constituted ET for redetermination.

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

**Veteran Train Depot Controller Succeeds in Unfair Dismissal Claim**

Workplace investigations and disciplinary proceedings, if not conducted fairly, commonly have equally unfair results. That was certainly so in the case of a veteran train depot controller who was summarily dismissed after a locomotive hit the buffers (Smith v Abellio East Anglia Ltd T/A Greater Anglia).

Due to a failure in the radio system used by the depot's staff to communicate with one another, the controller did not hear a colleague's crucial message. As a result, he failed to stop a train that he was shunting before it struck the buffers, causing a safety risk and £25,000 in damage. Following a disciplinary hearing, he was found to have been grossly negligent and was dismissed without notice.

Ruling on his unfair dismissal claim, an Employment Tribunal (ET) acknowledged that the depot was a hazardous environment where safety measures were of primary importance. The employer genuinely believed that he was guilty of misconduct and had a potentially fair reason for dismissing him.

In upholding his claim, however, the ET found that the allegation was not reasonably investigated. Witnesses who had highly relevant evidence to give concerning longstanding problems with the radio system were never interviewed. Overall, the investigation was conducted with a closed mind and evidence that might have exculpated him was not sought.

The disciplinary hearing was unfair in that he was not provided with copies of the employer's policies and procedures beforehand. He was not informed that he had a right to call witnesses. Having been forbidden from speaking to colleagues during a period of suspension, he could not ask them to testify in his defence. He was thereby placed in a disadvantageous and highly unfair position.

It was the employer's case that he was distracted and not paying attention prior to the collision, yet evidence on that point was not sought from the only witness who could have spoken to his demeanour at the relevant time. Overall, the investigation and disciplinary procedure did not reflect either the equity of the case or the size and administrative resources available to the employer. Had fair procedures been adopted, he would have stood a 40 per cent chance of keeping his job.

In ruling that he had not contributed to his dismissal, the ET found that he would not have had reason to think that something was wrong until some seconds after the failed radio message. Thereafter, he had only about 16 seconds to react and he could not reasonably be said to have been negligent, let alone grossly so. His wrongful dismissal claim was also upheld. 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.

**In Brief**

**TUC Launches AI Taskforce Aimed at Safeguarding Workers' Rights**

The Trades Union Congress (TUC) has announced the launch of a new AI taskforce in a bid to fill UK employment law gaps in AI regulation at work.

The TUC is partnering with specialists in law, technology, politics, human resources and the voluntary sector to deliver the taskforce, which will draft proposed new legal protections aimed at ensuring that AI is regulated fairly at work for the benefit of employees and employers.

The taskforce plans to publish an expert-drafted AI and Employment Bill early in 2024 and will lobby to have it incorporated into UK law.

Further information regarding the taskforce can be found at https://www.tuc.org.uk/news/tuc-launches-ai-taskforce-it-calls-urgent-new-legislation-safeguard-workers-rights-and-ensure

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