Employment Law ~ October 2023

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**Not Every Procedural Defect Will Render a Dismissal Unfair – Guideline Ruling**

Deficiencies in a workplace disciplinary procedure will very often render a dismissal unfair – but not always. The Employment Appeal Tribunal (EAT) made that point in finding that a hospital supervisor's dismissal was fair (Greater Glasgow Health Board v Mullen).

The man was accused of behaving in an aggressive and threatening way towards a more junior employee. Following an internal investigation, a disciplinary panel established by his NHS employer upheld the complaint. He was summarily dismissed on grounds of gross misconduct.

After he launched proceedings, an Employment Tribunal (ET) found that the employer held a genuine belief that he was guilty of the alleged conduct. The investigation was reasonable in that all witnesses to the alleged conduct were interviewed and their evidence was properly tested before the panel.

In nevertheless upholding his unfair dismissal claim, the ET detected a number of procedural defects in the disciplinary process: there was, amongst other things, an unacceptable delay in informing him of the allegation he faced. A manager who had previous involvement in the matter should not have formed part of the three-member disciplinary panel.

In allowing the employer's appeal against that outcome, the EAT found that the ET's conclusion was based on a premise that the employer had a different – or real – reason for dismissing him. That premise was inconsistent with its previous finding, unequivocally expressed, that the alleged conduct was the principal reason for his dismissal.

The ET fell into error in failing to recognise that not every defect in a disciplinary process will render a dismissal unfair. Once its inadmissible conclusion that there was some other, real reason for his dismissal was taken out of the picture, the procedural deficiencies identified by the ET had no bearing at all on the issue of whether the alleged conduct amounted to a sufficient reason to dismiss him.

Given its findings as to the reasonableness of the investigation and the employer's genuine belief, the only conclusion to which the ET could properly have come was that the sanction of summary dismissal lay within the range of reasonable responses open to the employer and that his dismissal was fair.

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

**Providing Your Services Via a Company May Not Always Be a Good Idea**

There can be advantages, both in terms of flexibility and tax efficiency, in providing your services via a private company. However, as an Employment Tribunal (ET) ruling showed, such arrangements may also have the less desirable effect of stripping you of any employment rights you might otherwise have had (Kemlo v Blackfaulds House Nursing Home Ltd).

A nurse who worked part time at a care home launched ET proceedings against its owner, alleging unfair constructive dismissal and that she had been subjected to racial discrimination and harassment. The owner denied her claims and, at a preliminary hearing, contended that they could not in any event succeed in that she was not an employee within the meaning of Section 83 of the Equality Act 2010.

Upholding the owner's argument, the ET noted that she had for some years provided her professional services through a private limited company of which she was the proprietor and sole director. Invoices for her work were raised on company-headed notepaper and the owner's remittances were always addressed to the company rather than to her.

She took a salary from the company and took responsibility for paying her own Income Tax and National Insurance Contributions. She was not subject to appraisals or training requirements and did not need the owner's permission to step down from working a shift. When she was unavailable for work she was able to substitute a suitably qualified replacement.

In ruling that there was no contract, whether express or implied, between her and the owner, the ET found that there was no irreducible minimum amount of work that she was required to perform. Her entitlement to provide a substitute indicated that the personal provision of her services was not the predominant purpose of the arrangements. She enjoyed a high degree of autonomy in carrying out her duties and her relationship with the owner was not one of subordination or control.

She did have certain duties and responsibilities with which she had to comply. The ET noted, however, that all nurses must comply with such requirements under the Nursing and Midwifery Council's code of conduct, regardless of their employment status. There was, overall, insufficient mutuality of obligation to give rise to an employment relationship.

The company was not simply a vehicle via which the owner made payments to her. The practical reality of the working arrangements was that she was carrying on a business. The owner was her company's client or customer. Given her lack of employment status, the ET dismissed her claims on the basis that it had no jurisdiction to entertain them.

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

**Sacking Employees for Asserting Their Statutory Rights is Always Unfair**

Workers who exercise their entitlement to take a firm stand on their statutory rights may sadly be viewed askance by some employers. However, as an Employment Tribunal (ET) ruling made plain, dismissing them for doing so is, as a matter of law, automatically unfair (Changleng v Hertsmonceux Pre-School Ltd).

The case concerned an early-years practitioner who worked for a company that ran a pre-school. Various issues had arisen between her and a director of the company in respect of the calculation of her pay, particularly in the context of the COVID-19 pandemic. She was ultimately summarily dismissed on the stated ground that she had committed repudiatory breaches of her employment contract.

After she launched proceedings, the ET noted that it was fair to say that allegations had been made on both sides and that the language of their correspondence had become increasingly forceful and emotive. The director did not appreciate being subject to challenge in respect of his calculations and viewed her pursuit of her rights in respect of her pay as insubordination.

Whilst expressing sympathy for the owner of a small business having to navigate the complexities of employment law, particularly during the pandemic, the ET found that the principal reason for her dismissal was her assertion of her statutory rights in relation to her wages. Her dismissal was thus automatically unfair within the meaning of Section 104 of the Employment Rights Act 1996.

In also upholding her wrongful dismissal claim, the ET found that the company had breached her contract by failing to pay her four weeks' wages in lieu of notice. Unauthorised deductions had been made from her pay and pension contributions had been made at rates below her contractual entitlement. If not agreed, the amount of her 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.

**Small Employer Pays Heavily for Ignorance of the Acas Code**

Ignorance of the Acas code of practice on disciplinary and grievance procedures is a positive invitation to Employment Tribunal (ET) proceedings. A small employer found that out to its cost after a cleaner was sacked by text message (Odamtten v M&I Jetmaid Cleaning Services Ltd).

When the woman launched proceedings, the owner of the six-employee business for which she worked contended that she had been dismissed for gross misconduct. He confirmed, however, that he had not followed the Acas Code and that, having never dismissed an employee before or since, he did not know what it was.

She had been accused of rudeness and failing to return to work promptly following a holiday. In upholding her unfair dismissal claim, however, the ET found that, having failed to conduct a fair investigation, the employer had no genuine belief that she was guilty of the misconduct alleged.

No witnesses were interviewed, no warnings were given and there was no meeting with her prior to the text being sent. She was afforded neither a fair opportunity to answer the allegations nor a right of appeal. In the absence of a fair procedure, her summary dismissal fell outside the range of reasonable responses open to the employer.

She had, prior to her dismissal, informed the employer that she had sustained injury when she was thrown about in the back of a works van after the driver's foot slipped onto the accelerator. The ET found that the reason for her dismissal was that the employer, who was in financial difficulties, was concerned that she might make a financial claim.

Her dismissal without notice was also wrongful and the employer had failed in its obligation to provide her with a written statement of particulars of employment. The compensatory element of her award was uplifted by the maximum possible 25 per cent to reflect the employer's unreasonable failure to follow the Acas Code. Her total award came to £8,192, plus costs.

Compliance with Acas Codes of Practice is essential in helping to avoid potentially costly Employment Tribunal proceedings. Contact **<<CONTACT DETAILS>>** for advice.

**Treating Every Employee in the Same Way May Itself Be Discriminatory**

Anti-discrimination laws are often viewed as requiring employers to treat all their staff in the same way. However, as an Employment Tribunal (ET) ruling made plain, the positive duty to make reasonable adjustments to cater for disabled workers' needs may require them to be treated more favourably than their colleagues (Poniatowski v Wealmoor Ltd).

The case concerned a quality controller in a food packing plant who was disabled by back pain and depression. He worked 12-hour night shifts in the refrigerated plant and was on his feet for much of the time. After he had been absent on sick leave for nine months, his employer took the view that he would not be able to return to work and dismissed him on capability grounds.

After he launched proceedings, the employer asserted, amongst other things, that it had a clear and consistent policy in place and treated all its employees on long-term sickness absence in the same manner. Dismissing him, it contended, was a proportionate means of achieving a legitimate aim.

In upholding his disability discrimination claim, however, the ET noted that the duty to make reasonable adjustments, enshrined in Section 21 of the Equality Act 2010, is unique in that it requires employers to take positive action to avoid substantial disadvantage caused to disabled employees by aspects of their workplace.

That can in turn require employers to treat their disabled employees more favourably than others. Having a policy where all employees are treated the same is thus itself discriminatory as it does not allow an employer to treat individuals according to their personal circumstances, including any disability they may have.

Various reasonable adjustments could have been made that might have enabled his return to work. Amongst other things, he could have been deployed part time, given regular breaks, relieved of heavy lifting duties or provided with a seat or perching stool. The failure to obtain an occupational health or medical report prior to his dismissal also amounted to a failure to make a reasonable adjustment.

The ET accepted that lack of capability was a potentially fair reason for the man's dismissal and that the employer genuinely believed that there was no prospect of him being able to return to work. However, in also upholding his unfair dismissal claim, the ET found that that belief was not reasonably held. If not agreed, the amount of his compensation would be assessed at a further hearing.

Contact **<<CONTACT DETAILS>>** for advice on any employment law matter, including disability discrimination.

**Vicarious Liability Can Extend Beyond Those Formally On Your Payroll**

An important Court of Appeal ruling provided a clear warning to employers that their indirect – or vicarious – responsibility for the unlawful acts of those who work for them may not be confined to those who are formally on their payroll (MXX v A Secondary School).

The case concerned an 18-year-old former pupil at a secondary school who returned to his alma mater for a week-long work experience placement. Whilst there, he met a 13-year-old pupil with whom he began to communicate on social media shortly after his placement ended. He started to abuse her a few months later and subsequently pleaded guilty to sexual activity with a child and other sexual offences.

His victim subsequently launched proceedings against the school, seeking £27,500 in compensation for psychiatric injury. Following a trial, however, a judge rejected her claim on the basis that she had failed to establish that the school bore vicarious responsibility for the abuser's wrongdoing.

The abuser was not the school's employee and the judge noted that affording him work experience was an altruistic gesture. The limited activities that he performed were required to be closely supervised by qualified staff and his presence was a burden to the school, rather than a benefit.

Ruling on the victim's challenge to that outcome, the Court found that the abuser's position vis-à-vis the school was nevertheless akin to an employment relationship. He was required to read and accept the school's procedures and guidance; he assisted with the school's business and it regulated his time, supervised him and directed and controlled what he did. Pupils were told to treat him with the same respect due to any member of staff. There were powerful pointers in the evidence that he began grooming the victim during his placement.

In dismissing the appeal, however, the Court found that the abuser's wrongdoing was not so closely connected to his relationship with the school as to give rise to vicarious liability. He was not placed in a position of authority over pupils and had no caring or pastoral responsibilities. The abuse did not begin until many weeks after his placement came to an end. Overall, it would not be fair, just or reasonable to hold the school indirectly responsible for his unlawful acts.

To gain a thorough understanding of potential vicarious liability risks attached to your organisation, contact our expert team.

**Whistleblowing and the Importance of Causation – Guideline EAT Ruling**

To succeed in a whistleblowing claim it is necessary to show not only that there has been a protected disclosure and a detrimental act but also that there is a causal link between the two. As an Employment Appeal Tribunal (EAT) ruling made plain, that last element is in many cases the hardest to establish (McNicholas v Care and Learning Alliance & Another).

In upholding a teacher's whistleblowing claim, an Employment Tribunal (ET) found that she had made protected disclosures about practices within the nursery school where she worked. It also concluded that, as a result of making those disclosures, she had been subjected to detrimental treatment and that her dismissal was thus automatically unfair.

The ET found, amongst other things, that her joint employers had not acted in good faith when they referred her to a teaching disciplinary body. It doubted that there was any real or genuine substance to complaints made against her by other members of staff.

The ET took the view that the complaints were retaliation against her, driven by her disclosures, and that her employers were aware of this at the time of the referral. It found that the true motive for the referral was to discredit her disclosures and to appease the school's principal client, a local authority.

When it came to assessing the value of her claim, however, the ET noted that, in the event, the body had decided to further investigate her fitness to teach. That decision, it found, was a new intervening act which broke the chain of causation between the employers' detrimental act and her loss.

On that basis, the ET limited her awards for future loss, psychiatric injury and injury to feelings by reference to the date of the body's decision. She was denied an award in respect of pension loss and the ET's ruling also had serious consequences in terms of legal costs.

Upholding her appeal against that outcome, the EAT found that the body's decision was not, on the face of it, an independent and supervening cause of her loss. Rather, it was a natural and reasonable consequence of the employers' wrongful act in making the reference. That wrongful act remained the effective cause of her loss.

The ET's ruling was also irreconcilable with its factual findings in respect of liability. On those findings, the referral was, in law, malicious in that it was made without proper cause and for improper purposes. The case was remitted to the same ET for reassessment of the teacher's award in the light of the EAT's decision.

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

**Workplace Disputes and 'Without Prejudice' Discussions – Guideline Ruling**

Litigation should always be a last resort and, as an Employment Tribunal (ET) ruling made plain, it is very much in the public interest to encourage employers to embark on confidential, without prejudice discussions with a view to achieving a non-confrontational resolution of workplace disputes (McDonald v Fife Council).

The case concerned a local authority employee who suffered from mental ill health and had been off work for some time. After he complained of alleged discrimination, a senior manager invited him to a meeting. No resolution was, however, achieved and he subsequently resigned and launched ET proceedings, claiming disability discrimination and constructive unfair dismissal.

The employer, who denied his claims, argued that all reference to the meeting and any documents relating to it should be excluded from the hearing of the case. Such evidence was, it contended, inadmissible in that the meeting was plainly held on a confidential, without prejudice basis. The invitation was marked as such and the man had clearly indicated that he was content with that position.

For his part, the man argued that the without prejudice rule should be disapplied due to impropriety on the employer's part. He alleged, amongst other things, that unfair advantage was taken of his mental ill health, that an attempt was made to browbeat him into resigning and that he was presented with an ultimatum that he would be dismissed if he did not accept an exit package which he considered inadequate.

Ruling on the matter, the ET emphasised the public interest in ensuring that all sides in a dispute are afforded an opportunity to enter into free and frank discussions with a view to settlement and without running the risk that anything they say may subsequently be used against them in litigation.

In upholding the employer's arguments, the ET found that there was absolutely no impropriety on the part of its representatives at the meeting. The man's attendance was voluntary and it was made abundantly clear to him that the meeting would be conducted on a without prejudice basis. There was nothing untoward about the discussion and an entirely reasonable view was taken that a without prejudice meeting, face to face, might help to defuse the dispute and achieve an amicable resolution.

Contact **<<CONTACT DETAILS>>** for advice regarding resolution of employment disputes.

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