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HARASSMENT OF GENDER CRITICAL EMPLOYEE, DISMISSING OFFICER NOT PRESENT AT DISMISSAL MEETING, BEING AN EMPLOYEE AND A WORKER AT THE SAME TIME, AND GENERAL NEWS ROUNDUP

Aug 29, 2023

SUMMARY

Our August update includes cases on the (discriminatory) harassment of a gender critical employee, a case in which a dismissing officer was not present at a dismissal meeting, and a case where a tribunal reached the unusual finding (overturned by the EAT) that an individual could be both an employee and a worker in respect of the same work. We also feature a news update on a new government briefing on AI and employment law, a new website designed to encourage the 45s-65s back into the workplace and new guidance on ethnicity pay gap reporting.

FEMALE EMPLOYEE DISCRIMINATED AGAINST FOR GENDER CRITICAL BELIEFS

The claimant was employed in a senior role from 2008. She held gender critical beliefs which she described to the tribunal:

> "I *believe that sex is immutable… and not to be conflated with "gender identity"…I do not believe that "trans women are women" ("trans women" are men who think they are women). I understand that both my gender critical beliefs and my lack of belief that trans women are women are a protected characteristic for the purpose of ss4 and 10 of the Equality Act 2010 (EqA).*"

The respondent is responsible for providing funds to various organisations. In April 2022, the respondent planned to award a grant to the "LGB Alliance" (LGBA), an openly gender critical charity. The claimant emailed the respondent expressing alarm at the online attacks resulting from the award, in particular the allegations that the LGBA was transphobic. The award, possibly following intense online criticism, was suspended pending an investigation.

The claimant's harassment action was based on two incidents:

a. In April 2022 the respondent's Deputy Chief Executive (DCE) held a "drop-in" session for all staff. He referred beforehand to the suspension of the LGBA award as he expected the issue would come up. The meeting became heated. The DCE made his views clear, calling the LBGA "*a divisive organisation that has a history of trans-exclusionary activity*". He said his personal view was that an award to the LGBA was not in the spirit of bringing communities together. The claimant challenged this at the meeting, commenting that the LGBA is not trans-exclusionary and asking how gender critical views were protected at the respondent. Most employees sided with the DCE. The DCE contacted the claimant in a conciliatory tone after the meeting, acknowledging that it may have been "bruising", offering to meet the claimant to talk things through; and

b. In May 2022, an employee sent an email to all staff, referred to as "an Allies Support Sheet", including a link to a petition open to all staff to make comments. This email/petition was partly in response to comments by the claimant (although she was not named) at the meeting. The petition attracted extraordinarily offensive comments. Gender critical views were equated with racism and were referred to as a "cancer". The LGBA was called a "*glorified hate group that has funds and supporters that also happen to be neo-nazis…*". Senior management at the respondent expressed alarm both at the use of the petition as "twitter/X" like forum, and the vitriolic nature of some of the comments. The petition was removed about 26 hours after being sent out.

The tribunal considered the two incidents. It looked at s26 of the EqA which sets out the relevant tests for harassment including (i) the individual's perception, (ii) other circumstances, and (iii) whether it is reasonable for the individual to feel harassed. It looked at the facts. At the drop-in meeting the DCE had made his views known, including he was not in favour of the LGBA award. However, despite the DCE's comments, the tribunal also took into account that the claimant voluntarily attended the drop-in meeting, contributed to it, had already raised issues about gender critical views being protected and actively wanted to enter into the "drop-in" discussion and debate. The DCE was also conciliatory towards the claimant after the meeting and offered to meet her. Taking this all into account, the tribunal held that the conduct of the DCE/respondent at the drop-in meeting was upsetting for the claimant, but did not cross the line into unlawful harassment.

However, the tribunal was unequivocal about the petition comments. Even if not directed at the claimant, these were held to be unwanted conduct which had the purpose and effect of violating the claimant's dignity and creating a hostile and offensive working environment. The tribunal was also unimpressed by the respondent's justification for not taking down the petition at an earlier stage, which seemed to ignore the interests/feelings of the claimant and its gender critical employees generally. It was held that the petition and the comments constituted harassment against the claimant.

WHY THIS MATTERS

The case, apart from reminding everyone how sensitive and divisive this area is, illustrates that employers should be very cautious about allowing employees to initiate and make written comments in a "twitter/X" like workplace forum, particularly perhaps when the forum itself comes from a place of bias. The more measured "drop-in" session in April, which was "live" and where the claimant was a willing participant, was viewed very differently.

It also reinforces the legal point that harassment under s26 EqA does not have be directed at the individual.

Fahmy-v-Arts Council England

DISMISSING OFFICER NOT PRESENT AT DISMISSAL MEETING

An employee's dismissal was held to be fair, despite the dismissing officer not conducting and not being present at the dismissal meeting.

In January 2019, the claimant (a relationship manager at a bank) emailed the manager of the London office attaching a file containing confidential information. The claimant copied in her trade union representative and blind copied her solicitor. The following day, she forwarded the email to her personal email address and copied in her brother, who worked at another bank. The respondent was not aware that the claimant's solicitor and brother had seen the email or attachments. The claimant later forwarded the email again to the respondent's HR manager, copying in her trade union representative.

The claimant, having copied in third parties to confidential information, was suspended pending a disciplinary investigation. An investigation meeting took place on 28 January 2019 with Marinos Vathis, the London office manager. The claimant provided a written account of her actions. The claimant alleged that she had been "tired" and copied her trade union representative in error, but at the investigation meeting did not disclose she had copied the information into her solicitor, her personal email account or her brother, who worked at another bank.

A disciplinary meeting took place on 12 February 2019 with Michael Hood, the respondent's country risk manager. Following this meeting, the respondent became aware of the additional emails. The respondent then invited the claimant to a further disciplinary meeting. At this meeting, the claimant admitted to sending the emails but again maintained that her sending confidential information outside the respondent was unintentional.

Following on from the second disciplinary meeting, the claimant was summarily dismissed by letter sent by Marinos Vathis on 4 March 2019. The claimant's appeal was heard by the respondent's HR director and was not upheld.

The claimant's claimed she had been unfairly dismissed. The tribunal took the view that the respondent held a reasonable belief that the claimant had committed misconduct, that there were reasonable grounds for that belief and that the investigation had been reasonable. The tribunal acknowledged the procedure was "less than ideal", noting a blurring between the investigation and disciplinary process. The tribunal also accepted that Marinos Vathis, the ultimate decision maker and author of the dismissal letter, was not present at the dismissal/disciplinary meeting itself.

The tribunal concluded that the absence of Marinos Vathis did not make the decision to dismiss unfair and that the disciplinary process, overall, fell within the range of reasonable responses. It referred to two previous formally recorded disciplinary meetings in which the claimant was given the opportunity to state her case and present mitigating circumstances. The tribunal also held that the appeal process was thorough and had been capable of correcting any imperfections.

The claimant appealed, arguing the tribunal erred in law when it found that the dismissal was fair when the dismissing officer, Mr Vathis, was not present at the dismissal meeting. The claimant relied in part on a previous case which established the principle that a dismissal will be unfair if the dismissing officer does not hear directly from the employee. Even without a binding legal principle, the claimant said the only conclusion a reasonable tribunal could have reached was that the dismissal was unfair as Marinos Vathis was not present at the dismissal meeting and did not hear directly from the claimant.

The EAT disagreed and upheld the tribunal's decision, finding that the reasonableness requirement was for the employee to have the opportunity to explain their position. Although the EAT noted that it was always desirable and good practice for the dismissing officer to be present, a dismissal without that presence was not necessarily unfair.

The EAT noted that the dismissal was not procedurally ideal, in particular that the dismissal meeting itself was more of an investigation/disciplinary meeting. Overall however, and bearing in mind the thoroughness of the appeal process and the fact the claimant had been given every opportunity to defend her conduct, the manner in which the procedure was carried out fell within the range of reasonable responses.

WHY THIS MATTERS

Although the facts are unusual, this case is helpful for employers in establishing the possibility of an overall fair dismissal in cases where there is no meeting between the employee and dismissing officer. However, the EAT accepted that there may be cases where this might not be the case and where the absence of the dismissing officer from the dismissal meeting **would** make the process unfair. As such, it remains best practice for the dismissing officer/decision maker to conduct and be present at the final meeting to ensure the employee is able to make representations directly and limit the risk of procedural unfairness.

Charalambous v National Bank of Greece

CAN A TAXI DRIVER BE BOTH AN EMPLOYEE AND A WORKER?

This is essentially a case about employment status, but the structure of the organisation was not straightforward.

The (second) respondent was an operator of taxis and a provider of taxi work – basically providing taxis and taxi work to taxi drivers. It had byelaws which specified that its shareholders, who were predominantly taxi-drivers and included the first respondent, paid a monthly subscription in return for taxis and access to taxi work. A shareholder could drive the taxi themselves or, if they wanted to, engage another driver or drivers.

The claimant applied to register as a taxi driver with the second respondent in March 2009. From March 2009, he was "engaged" through a shareholder, Mr Parkinson. The claimant became licenced to drive a hackney carriage as well as a private vehicle. However, 95% of his work was through the second respondent. From July 2014, he was engaged through the first respondent, who effectively replaced Mr Parkinson.

After the relationship ended the claimant brought tribunal proceedings, claiming he was either an employee or a worker of the first or second respondents.

The tribunal held that the claimant was an employee of the first respondent from July 2014 to 14 March 2020 - the terms of the agreement between them amounted to a contract of service. The tribunal held:

1. The claimant was paid weekly by the first respondent in the form of 50% of the taxi fares paid by the claimant's passengers - in return, the claimant operated the taxi. The tribunal held this showed a mutuality of obligation;

2. The claimant was subject to a degree of control by the first respondent - control over the hours the claimant worked, his ownership and control of the taxi the claimant used, and the expectation that the claimant would comply with the second respondent's byelaws;

3. The service provided by the claimant was personal - he was not able to substitute another driver to carry out his work; and

4. The claimant did not have any opportunity to market his own services to the passengers that he drove in the first respondent's taxi.

The tribunal went further. As well as finding that the claimant was and employee of the first respondent, it went on to decide that the claimant was also engaged by the second respondent as a worker, from 1 March 2009 to 14 March 2020. The second respondent had no control over when and where the claimant worked. The second respondent could control the information provided to the claimant in relation to jobs available and controlled the way in which the claimant delivered his

driving services (for example, he had to comply with the second respondent's dress code, use their taxis and ensure that the taxi displayed the second respondent's signage). The tribunal found there was an implied contract between the claimant and the second respondent, regulated by the second respondent's byelaws.

Both respondents appealed, essentially on the basis that (a) the claimant was a self-employed contractor carrying on his own business undertaking and that, in any event, (b) it was not legally possible to conclude that an individual could simultaneously be an employee and a worker in respect of the same work.

The EAT found that the tribunal erred in finding that the claimant was simultaneously an employee and a worker. Instead, the EAT substituted a finding that the claimant was a worker (not an employee) of the first respondent and neither a worker nor an employee of the second respondent. The EAT concluded that the first respondent had insufficient control over the claimant to be his employer. The first respondent controlled his hours of work but the claimant still controlled/had a choice over the jobs he took, including whether they were private hire jobs or taxi jobs.

There was no implied contract with the second respondent. The mere fact that the claimant was registered with the second respondent and had to comply with its byelaws was not enough to imply the existence of a contract.

Finally, it was held that the tribunal did not err by failing to find that the claimant was carrying on his own business undertaking. He did not own his own taxi, he was not free to obtain work from other taxi companies and, although he could carry out private hire work, that income was still shared with the first respondent.

WHY THIS MATTERS

This case is a reminder that employment status cases continue to be complex and challenging.

The main point is clarification that an individual cannot have two parallel employment/worker relationships in respect of the same work. Also, and in the wake of the *Uber* case, employment status is always a legal question to be applied to the relevant facts. Ultimately, the degree to which an organisation exercises control over its staff is a key element to consider when determining employment status.

Mr R Comolly –v- (1) Mr R Tidman (first respondent) and (2) United Taxis Limited (second respondent)

NEWS ROUNDUP

HOUSE OF COMMONS LIBRARY PUBLISHES RESEARCH BRIEFING ON AI AND EMPLOYMENT LAW, INCLUDING PROPOSALS FOR REGULATORY REFORM

The House of Commons Library has published a research briefing on artificial intelligence (AI) and employment law. The briefing looks at the use of AI at work, reviews the employment law implications of AI and sets out current proposals for regulatory reform.

While acknowledging that there are no explicit UK laws governing the use of AI at work, the briefing identifies the following areas of law that might impact its use:

- The duty of mutual trust and confidence in relation to employers explaining decisions, which may be difficult where an employer has relied on AI to make the decision;
- The Equality Act 2010, due to the potential for bias and discrimination when using AI;
- Where AI has been involved in a dismissal decision, the workings of algorithms may make explaining such decisions difficult;
- The right to privacy under Article 8 of the European Convention on Human Rights, in particular where workers are monitored; and
- The UK GDPR and the Data Protection Act 2018, in particular the restrictions on data processing, the right to object and the limitations on solely automated decision-making.

The briefing also provides a useful summary of the UK government's approach to regulation of AI (as set out in its March 2023 AI white paper). It compares the UK position with the more interventionist approach in the EU and the "lighter touch" approach of the US.

The briefing does not break any new ground but it is helpful to have the relevant information in one place.

DWP LAUNCHES WEBSITE INTENDED FOR WORKERS AGED 45-65

The Department for Work and Pensions (DWP) has launched a "Midlife MOT" website intended to help “older workers” aged circa 45-65 to review their skills and tackle actual or perceived barriers to re-entering/remaining in employment. The website provides access to various resources, including a jobseeker toolkit, charity support, financial planning and health guidance.

The website is an expansion of an in-person “Midlife MOT” service originally launched in Jobcentres in England. The new “digital” Midlife MOT aims to reach more people and is part of the government's initiative to persuade “older” workers to enter or remain in the workforce. The number of people able to access in-person Midlife MOT support through local Jobcentres will also increase significantly from 8,000 to 40,000 a year.

NEW GUIDANCE ON ETHNICITY PAY GAP REPORTING

The government has recently published new guidance on ethnicity pay gap reporting. The guidance, published by the Race Disparity Unit, Equality Hub and the Department for Business and Trade aims to develop a consistent approach to ethnicity pay gap reporting.

Unlike gender pay gaps, there is no legal requirement for UK businesses to disclose ethnicity pay data. In 2017, a government-commissioned review examined the progression of ethnic minority groups in the UK labour market with a key recommendation to introduce mandatory ethnicity pay gap reporting for organisations with 50 or more employees.

Initially the Government rejected the recommendation, but in 2018 the Department for Business, Energy and Industrial Strategy launched a consultation, moving towards mandatory ethnicity pay reporting.

That consultation closed in January 2019 - no government response was published. Therefore these new guidelines are in effect the first response from the government for some time.

The new guidance mirrors the approach used for gender pay gap regulations. The intention is to help businesses avoid having to run separate processes to collect the pay data required to run both the gender and ethnicity pay gap calculations.

The key reporting measures recommended are:

- Percentage of each ethnic group in each hourly pay category;
- Mean (average) ethnicity pay gap using hourly pay;
- Median ethnicity pay gap using hourly pay;
- Percentages of employees in different ethnic groups in an organisation; and
- Percentage of employees who did not disclose their ethnicity – who either answer ‘prefer not to say’ or gave no answer.

There is updated guidance on collecting ethnicity data and a recommendation to use the Government Statistical Service harmonised standards. When collecting data, it is also important to be mindful of the requirements of the Data Protection Act 2018 and the General Data Protection Regulation.

Sadly, analysis also found that, unless the government makes ethnicity pay gap reporting mandatory, it will take 30 years for businesses to even know what their pay gaps are.

The consensus is that employers will only engage fully once reporting is mandatory, and even when that happens, progress is slow. With six years of mandatory gender pay gap reporting in the UK

complete, real progress has been elusive and unfortunately average gender pay gaps have not closed, despite many leading employers taking positive action and making gains.

This article was written with Trainee Solicitor Meg Royston.

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