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Insights

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SPECIFIC DISCLOSURE, VOLUNTARY REDUNDANCY/UNFAIR DISMISSAL, RELIGIOUS BELIEF HARASSMENT AND CHANGES TO TRIBUNAL PROCEEDINGS

May 11, 2022

SUMMARY

Our May update considers key employment law developments from April 2022. It includes an interesting case on specific disclosure requests, details about the future "road map" for employment tribunal proceedings, the new code for "fire and rehire" practices and a case involving potentially controversial facts looking at the test for religious belief discrimination.

SPECIFIC DISCLOSURE REQUESTS REQUIRE SPECIFIC JUSTIFICATION

The EAT has allowed in (small) part an appeal regarding an application for specific disclosure of documents that the claimant believed would provide evidence that allegations of wrongdoing were factually correct.

The claimant, Miss Dodd, was in-house legal counsel for the respondent, UK Direct Business Solutions Limited, an energy consultancy acting as an intermediary between suppliers and business customers. The claimant worked for the respondent from January to August 2020, when she resigned.

The claimant claimed she was subjected to detriments as a consequence of making 14 protected disclosures and was constructively unfairly dismissed for the same principle reason. The claims are contested and ongoing. Specifically, the claimant claimed she made protected disclosures during April 2020, including that the respondent was fraudulently claiming furlough grants in respect of three employees who were continuing to work and was also "mis-selling".

The tribunal rejected the claimant's application for specific disclosure. Despite the claimant's arguments the judge noted, *"the documents sought are of limited relevance, and bearing in mind the overriding objective, I am not persuaded that their disclosure is necessary for the fair disposal of the case"*. The judge also held the requests were not focused on the substantive claimed protected

disclosures and dispute, and that the exercise would be time-consuming and incur disproportionate expense.

The EAT dismissed the majority of the appeal as it held the tribunal had correctly ruled on the essential guiding principles of law. The application was indeed unfocused and too wide-ranging. The EAT agreed that the claimant should have presented a more focused application and should have explained the reasoning as to why each category of disclosure was necessary to a live issue or relevant to a protected disclosure.

However, the EAT also considered whether the tribunal had erred, using the above reasoning, in simply refusing the disclosure requests as a whole and therefore considered each of the 11 requests for specific disclosure in turn. After (re)reviewing each request, the EAT concluded that three of the claimant's disclosure requests, relating to the claimed "furlough grants" protected disclosure, should be reconsidered. The EAT believed these three requests warranted further consideration as to whether they may have been justified. The appeal was therefore allowed in respect of those requests and counsel have been allowed further time to make submissions as to the terms of the order.

WHY THIS MATTERS

This decision serves as a reminder of the approach taken in considering specific disclosure applications. The test of relevance is strict – the greater the importance of the requested documents to the issues in the case, the greater the likelihood that they will be the subject of a disclosure order. Applications must also be in line with the overriding objective, which includes the principle of proportionality, saving expense and avoiding delay.

However, even if the request is wide and poorly focused, that does not necessarily mean that all the documents requested are irrelevant, and notwithstanding the request being a poorly drafted one, in terms of the documents requested, each request should still be considered on its merits.

Dodd v UK Direct Business Solutions Ltd and another

REASONABLE PROSPECTS OF SUCCESS IN UNFAIR DISMISSAL CLAIM EVEN WHERE EMPLOYEE HAS APPLIED FOR VOLUNTARY REDUNDANCY

The EAT held the employment tribunal erred in striking out a claim for unfair dismissal mainly because the claimant, Ms White, had volunteered for redundancy.

The claimant was employed by HC-One Oval as a part-time receptionist at a care home in West Sussex. Towards the end of 2018, the respondent announced it intended to reduce the number of employees carrying out receptionist and administrative work in the care home. The claimant was

provisionally selected for redundancy. Subsequently, Ms White requested voluntary redundancy, which was agreed.

Ms White then made a claim for unfair dismissal (both substantive and procedural) alleging the following:

- Just before the redundancy process began, a receptionist (who had no childcare responsibilities) had been offered full-time work at a higher rate of pay whilst the two part-time receptionists, including the claimant, were dismissed.
- An administrative role became available during the redundancy consultation process and this was not offered to the claimant.
- The claimant had raised a grievance in July 2018 in relation to her covering an additional administrative role (whilst continuing her receptionist role) and not receiving extra pay.

The claimant argued the redundancy exercise was not legitimate and went as far as to argue that it was a sham. The respondent denied the allegations and applied for the claim to be struck-out, based heavily on the argument that the claimant could not argue at the tribunal that a redundancy was substantively and procedurally unfair when she had volunteered for it.

The tribunal struck out the claim on the basis that the claimant had no reasonable prospects of success because she had volunteered to be dismissed for redundancy. It held that, in these circumstances, the respondent would be able to establish a genuine redundancy situation within s139 of the ERA, show the reasonableness of the decision to dismiss the client and show that the procedure followed was fair.

The claimant appealed, mainly on the on the ground that the tribunal had erred in law by assuming that a voluntary redundancy would automatically constitute a fair dismissal and that, by volunteering to be dismissed for redundancy, an employee would effectively lose the right to claim unfair dismissal.

The EAT found in favour of the claimant and allowed the appeal. It held that the tribunal's assumptions were incorrect as a matter of law. A full merits hearing would be required to determine the reason for dismissal and, given there were a number of facts in dispute between the parties, a strike-out was in any event inappropriate. The EAT remitted the case back to the tribunal for a full merits hearing.

WHY THIS MATTERS

This decision is an important reminder for employers to ensure they follow a fair and proper process when carrying out a redundancy process even if there are volunteers for redundancy. If employees volunteer for redundancy, employers must still be able to demonstrate that they conducted the redundancy process fairly and reasonably. Essentially the EAT held that, in terms of a

claim for unfair dismissal, an employee who has volunteered for redundancy is in the same position as an employee who is the subject of a compulsory redundancy, and no rights are lost or compromised as result of volunteering for redundancy.

White v HC-One Oval

SACRED MUSLIM PHRASE USED IN FAKE TERRORIST EXERCISE DOES NOT CONSTITUTE RELIGIOUS BELIEF DISCRIMINATION

Redline Security was responsible for security at Heathrow Airport. It sometimes ran safety checks by leaving obviously suspicious (and fake) packages on Heathrow Express trains to assess public reaction and response.

In August 2017, it left an unattended bag with visible wiring and a piece of paper stating "*Allahu Akbar*" (in Arabic). The claimant was a Muslim employed by Heathrow Express. He claimed the inclusion of the message, which is a sacred Islamic phrase, was discriminatory because it offended against his religious belief. He said the juxtaposition of the phrase with a fake bomb conveyed the message that all Muslims were terrorists.

The claimant brought claims at the employment tribunal for direct discrimination and harassment, both because of religious belief. The claim for direct discrimination failed because the claimant could not show that the alleged discriminatory act was directed at him. He was not at work on the day of the incident and only saw the message because an email with photographs was circulated to staff.

The harassment claim was another matter. The tribunal looked closely at the definition of harassment in section 26 of the Equality Act. The first limb of the definition specifies that the conduct has to be unwanted, that it violates the claimants' dignity or creates an intimidating or offensive working environment. The first limb, essentially a subjective test, seemed to be satisfied. However, the second limb in section 26(4) states that, in deciding whether the first limb has been satisfied, the tribunal must take other matters into account, including the other circumstances of the case (s26(4)(b)) and, critically, an objective test as to whether it was reasonable for the alleged harassment to have the effect it had on the claimant (s26(4)(c)). Based on the more objective tests in sub-sections (b) and (c), the tribunal dismissed the claim.

On appeal by the claimant, the EAT closely reviewed the objective test. In particular they took into account the "other circumstances of the case" under s26(4)(b). In 2017 there had been three high-profile terrorist attacks perpetrated by extremist Muslims, including at Manchester Arena and London Bridge, in which the phrase "*Allahu Akbar*" was used. The EAT held that, although the use of the phrase might be offensive to the claimant, this had be balanced against other circumstances, including the said high-profile attacks, all of which used the same phrase. In addition, there was the

circumstance that the role of Redline Security was to run scenarios that involved "obviously" suspicious packages. The EAT agreed with the Tribunal's view that:

"……the conduct was not directed at the claimant because of his religion…the phrase [allahu akbar] had been used in…recent high-profile terrorist attacks…it was, for that particular reason, chosen to reinforce the suspicious nature of the package, and…the claimant should reasonably have appreciated that"

The EAT upheld the tribunal's decision that a balance had to be struck between the sensitivities of the individual and the matters to be taken into account in the second limb of the harassment test. The claimant may have been offended but the conduct was not directed at him and it was legitimate for Redline Security to use the phrase bearing in mind its use in recent high-profile terrorist attacks.

WHY THIS MATTERS

The EAT's decision highlights the "objective" limb of the test for discrimination harassment and shows the extent to which the test is not purely subjective. Even if the alleged harassment is unwanted and potentially creates an offensive working environment, the other circumstances of the case have to be taken into account and the question as to whether it is reasonable for the conduct to have that effect on the claimant has to be carefully considered. It can be an uncomfortable exercise, but one that must be carried out.

It is also worth noting that (a) the objective limb of the test is likely to be less effective in cases where there is no "public" element to the conduct complained of, such as sexual misconduct or targeted racial harassment and (b) the fact that the specific phrase was written in Arabic and not English (and therefore would not be understood by the majority of potential passengers) was not considered.

Ali v (1) Heathrow Express Operating Company Limited (2) Redline Assured Security Limited

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ROUND UP OF OTHER DEVELOPMENTS

UPDATED "ROAD MAP" FOR EMPLOYMENT TRIBUNAL PROCEEDINGS

A new "road map" for employment tribunal proceedings in 2022/2023 has been published by the Presidents of the Employment Tribunals in England and Wales. There will not be a return to the pre-pandemic "normal" proceedings but the Presidents propose to reduce reliance on virtual hearings. The default position from 1 April 2022 is as follows:

- Preliminary hearings listed in private for case management purposes will continue to default to telephone or video;

- Preliminary hearings in public to determine a straightforward preliminary issue will continue to default to video. Complex preliminary points will make greater use of in-person hearings;
- Preliminary hearings to consider an application to strike out or for a deposit order will continue to default to video;
- Applications for interim relief will continue to default to video;
- Judicial mediations will continue to default to video;
- Final hearings of short track claims will continue to default to video but there will be greater use of in-person hearings where the case involves significant disputed evidence;
- Final hearings of standard track claims will be treated differently. The Presidents would like them to return in greater numbers to in-person hearings but it is accepted this will take time as there is a considerable backlog in parts of England, especially in London and the South East;
- The Presidents' firm desire is for final hearings of open track claims to default to in-person hearings; and
- Other hearings dealing with applications for reconsideration or costs/expenses will default to video.

STATUTORY CODE OF PRACTICE TO BE ISSUED ON “FIRE AND REHIRE PRACTICES

The government has announced plans to introduce a new Statutory Code of Practice on “fire and rehire” practices. This follows on from events in relation to mass redundancies made in March 2022 by P&O Ferries. The new code will provide practical steps for employers and will outline the expectation on businesses to undertake transparent and fair consultations on proposed changes to employment terms. Tribunals will be obliged to consider the code when deciding on cases. Tribunals may apply an uplift of up to 25% of an employee’s compensation, if an employer unreasonably fails to follow the code.

This article was co-written with Trainee Solicitor Gin Kynigos.

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