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Insights

UK HR TWO MINUTE MONTHLY: PHILOSOPHICAL BELIEF; EQUAL PAY; SEXUAL HARASSMENT

Feb 17, 2020

SUMMARY

Our February 2020 update outlines key UK employment law developments from January. It includes cases on ethical veganism as a philosophical belief, equal pay and the difficulties in defending such claims, the impact of the drafting of the employment contract on territorial scope, the EHRC's technical guidance on sexual harassment in the workplace with practical steps employers can take to tackle harassment, and the FCA's letter on non-financial misconduct for wholesale general insurance firms. We also outline other points of note, including the draft Parental Bereavement Leave Regulations 2020 and changes to the ICO guidance on the timescales for complying with a data subject access request.

ETHICAL VEGANISM HELD TO BE A PHILOSOPHICAL BELIEF

An employment tribunal has found that a belief of ethical veganism is a protected philosophical belief under the Equality Act 2010. The Claimant, a qualified zoologist and vegan since 2000, had worked in animal protection most of his working life. He adhered to the philosophy of the Vegan Society and exhausted all reasonable steps to ascertain whether a product or service complied with ethical veganism.

The tribunal noted that "ethical veganism" is not just about choices in diet, but also choices relating to what a person will wear, the personal care products they will use, their hobbies and their jobs. The tribunal also referred to the definition provided by the Vegan Society, "*A philosophy and way of life which seeks to exclude, as far as possible and practical, all forms of exploitation and cruelty to animals for food, clothing or any other purpose…*"

The tribunal concluded that ethical veganism satisfied the test of a philosophical belief finding that: (i) how the Claimant lived his life showed that he genuinely and sincerely held the belief; (ii) ethical veganism carries with it an important "moral essential" and the Claimant personally holds ethical veganism as a belief as distinct from a viewpoint; (iii) the belief is at the heart between the

interaction of human and non-human animal life and, as such, it is a weighty and substantial aspect of human life and behaviour; (iv) it is "without doubt" a belief which obtains a high level of cogency, cohesion and importance; and (v) it does not offend society, instead being worthy of respect in a democratic society and compatible with human rights.

As this was a Preliminary Hearing, the Claimant now awaits a final hearing to determine whether he was dismissed and discriminated against because of his ethical veganism beliefs.

WHY THIS MATTERS

The ex-employer in this case conceded that ethical veganism could amount to a philosophical belief. Further, the tribunal admitted that its conclusion was easy to reach on the back of overwhelming evidence. There is no obligation for other tribunals to take the same approach and each case will be decided on its own facts, particularly as to whether the belief is genuinely held by the individual. Nevertheless, employers should pay heed to this decision and the travel of thinking in this area. The rationale in this case potentially applies to other beliefs, for example climate change. To reduce the risk of successful legal challenge, employers should ensure that they do not dismiss workers' concerns or requests which are connected to their ethical veganism beliefs without careful consideration of what is at the root of those concerns/requests and whether they can be accommodated.

Casamitjana v League Against Cruel Sports

SAMIRA AHMED WINS EQUAL PAY CLAIM AGAINST THE BBC

Ms Ahmed, presenter of Newswatch, has won her equal pay claim against the BBC. It is reported that Ms Ahmed is entitled to £700,000 in back pay. The employment tribunal accepted that Ms Ahmed and Jeremy Vine, presenter of "Points of View", were doing 'like work' because the same skills and experience were required to present the two programmes. It was irrelevant that Mr Vine needed to have "a glint in the eye" and be "cheeky" while Ms Ahmed had to be more sober. Any differences between the two programmes were minor and had no impact on the work the presenters did. The tribunal also found that even if the jobs weren't 'like work', their work was of 'equal value' in terms of the demands made on them.

The BBC sought to show that it had good non-discriminatory reasons for the difference in pay (Mr Vine - £3,000 a show, Ms Ahmed - £440 a show), including differences in the profile of the programmes and the presenters, the presenters' broadcasting range and experiences and in the market rates and market pressures. However, there was no evidence to back up the reasons given by the BBC and the evidence on occasion actually suggested otherwise.

WHY THIS MATTERS

While the case does not make any new law, it highlights some of the main difficulties employers can have defending equal pay claims. A lack of clear and transparent pay policies and processes significantly increases the risks of pay discrimination claims. Further, historic discriminatory pay rates that are not rectified for a long time can result in expensive pay discrimination liabilities - in this particular case, the BBC had set the two presenters' rates of pay when they had each first started presenting their respective programmes several years earlier, and had thereafter maintained the status quo.

Ahmed v BBC

EXCLUSIVE JURISDICTION CLAUSE WAS A RELEVANT FACTOR IN DETERMINING TERRITORIAL SCOPE

As general rule employment disputes should be resolved in the jurisdiction where they arise. Parties with no connection to the UK and whose dispute has otherwise no connection to the UK could not establish a connection by specifying the jurisdiction of the UK courts. However, a claim may be brought in the UK if it has a sufficiently strong connection with the UK. Territorial scope cases turn on their particular facts.

In this case the claimant was a UK citizen, working on a vessel moored in Equatorial Guinea territorial waters. The Employment Appeal Tribunal held that an exclusive jurisdiction clause in the employment contract, in favour of Scottish courts and tribunals, was a relevant factor in determining whether the claim had a sufficiently close connection to the UK. It was relevant that the Scottish exclusive jurisdiction clause in the individual's contract was only afforded to employees who were UK nationals - contrasted with US workers whose contracts had a US jurisdiction clause and local workers in Equatorial Guinea whose contracts had a local jurisdiction clause. The EAT said that the Scottish employment tribunal had jurisdiction to hear the claim provided there were other factors independently connecting the claim to the UK.

WHY THIS MATTERS

Provisions in the employment contract can be relevant to the determination of territorial scope. It is necessary to consider the contractual documentation, the reality of the working arrangements and the expectations of the parties.

Hexagon Sociedad Anonima v Hepburn

EHRC TECHNICAL GUIDANCE ON SEXUAL HARASSMENT AND HARASSMENT AT WORK

Producing updated technical guidance was one of the recommendations the EHRC made to the UK Government to tackle the issue of sexual harassment in the workplace, in light of the #MeToo movement. The EHRC notes that the scale of harassment is disturbing; that it has largely gone under-reported and that the fear of victimisation is one of the biggest barriers to people reporting harassment at work.

The guidance is stated to be the authoritative and comprehensive guide to the law and best practice in tackling harassment. Its purpose is to help employers, workers and their representatives understand the extent and impact of harassment in the workplace, the law and best practice for effective prevention and response.

The EHRC is clear in its view that tougher action is needed to deal with harassment in the workplace. Employers can and must take action to change culture and behaviours and eradicate harassment in the workplace. All employers must take reasonable steps to prevent harassment, and what is reasonable will vary from employer to employer.

Employment Tribunals are not obliged to take the guidance into account in their determination of disputes, but it is clear that the guidance may still be used in evidence.

The guidance sets out a number of practical steps for employers to tackle sexual harassment. These factors are likely to be relevant to any reasonable steps defence and include:

- All employers are expected to have effective and well communicated policies and practices which aim to prevent harassment and victimisation and which are shared with organisations that supply workers and services.
- Anti-harassment policies and other measures to prevent and respond to harassment should be developed in consultation with recognised trade unions, or if none, other worker representatives.
- Care should be taken in respect to references in policies to malicious complaints. If not worded carefully, statements that malicious complaints may lead to disciplinary action may discourage complainants coming forward.
- Policies and procedures should be reviewed to ensure that they interact well with the anti-harassment policy and that they create a culture in which the risk of harassment is reduced.
- Employers should ensure that all workers are aware of their anti-harassment policies and consider publishing these on their external-facing website so that employees can access even if they are on sick leave.
- Employers should raise awareness of new policies or amendments to existing policies. Similarly, employers should remind workers of the existence of the policy and what it contains.

- Employers should maintain centralised records of complaints for trend spotting.
- Employers should proactively seek awareness of what is happening in their workplace. Can they spot warning signs, e.g. sickness absence, change in behaviour, comments in exit interviews, reduced performance?
- Employers should consider introducing an online or externally run telephone reporting system for complaints.
- Employers should train workers on harassment and victimisation and training should be refreshed at regular intervals.

DEAR CEO FCA LETTER RE NON-FINANCIAL MISCONDUCT IN GENERAL INSURANCE SECTOR

The FCA's focus on non-financial misconduct in the wake of the #MeToo movement and its relevance to the assessment of firms is well documented. On 6 January 2020, the FCA published a "Dear CEO" letter relating to non-financial misconduct specific to the wholesale general insurance firms.

In 2019, there were a number of publicised incidents relating to the wholesale general insurance sector (in particular, allegations of sexual harassment). The FCA's letter sets out its clear expectation that firms should be proactive in tackling non-financial misconduct and identify what drives behaviour and modify those drivers "to shape proper conduct".

The FCA is clear that unhealthy culture is a key root cause of harm to consumers and others, and that how a firm handles non-financial misconduct whether discrimination, harassment or bullying is indicative of a firm's culture.

Non-financial misconduct is stated to be a key focus for the FCA's supervision of firms and senior managers and the letter refers to the 4 key drivers of culture, being (i) leadership (ii) purpose; (iii) approach to rewarding and managing people; and (iv) governance, systems and controls.

On leadership, the FCA refers to the introduction of the Senior Managers and Certification Regime (SMCR) for insurers in December 2018 and for all firms in December 2019. SMCR provides the opportunity for senior managers to take responsibility for what happens in their area. Further, the FCA has flagged that when approving a senior manager, they will consider non-financial misconduct as part of their assessment as to whether the individual is fit and proper, and that firms should do the same as part of their approval process.

On purpose, the FCA notes that a firm with clarity of purpose is more likely to drive the right conduct and that they expect firms to have strong whistleblowing processes and appropriate incentive

structures in place.

The FCA expects their letter to be shared with senior executive committees and Boards and for firms to act promptly if they identify gaps with the FCA's expectations and their current arrangement and practices.

Dear CEO FCA letter re non-financial misconduct in general insurance sector

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ROUNDUP OF OTHER DEVELOPMENTS

Parental Bereavement Leave: draft Parental Bereavement Leave Regulations 2020 and Draft Statutory Parental Bereavement Pay (General) Regulations 2020 were laid before Parliament on 23 January 2020. The draft regulations provide that parents who lose a child under the age of 18 will be entitled to 2 weeks' paid statutory leave (this also applies to those who suffer a stillbirth from 24 weeks of pregnancy). The draft regulations are due to come into force on 6 April 2020.

DSAR Guidance amended: the Information Commissioner's Office has amended its General Data Protection Regulation: Right of access guidance on the timescale for compliance with a data subject access request when the controller requests clarification from the data subject. The one-month and, where relevant, extra two-months' time periods will no longer be paused until the controller receives the requested information.

Increases to statutory payments for time off work: from 5 April 2020, the following weekly rates for various statutory payments are expected to increase - statutory sick pay to £95.85; and statutory maternity pay, statutory paternity pay, statutory shared parental pay and statutory adoption pay to £151.20.

Off-payroll working: the Government's review into the implementation of proposed changes to off-payroll working rules is due to end mid-February 2020. The purpose of this review is to ensure the smooth implementation of the new rules. As part of this review, the Government will be evaluating its online tool, CEST.

Brexit: The United Kingdom left the European Union on 31 January 2020. Under the withdrawal agreement, the transition period will end on 31 December 2020 unless extended. During the transition period the UK will be treated for most purposes as if it is still a member of the EU, including in relation to the application of EU law.

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM

Catherine Turner

London

catherine.turner@bclplaw.com
+44 (0) 20 3400 4943

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