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Insights

UK HR TWO MINUTE MONTHLY: COVID-19 AUTOMATICALLY UNFAIR DISMISSAL; OBJECTIVE JUSTIFICATION TO DISCRIMINATION ARISING FROM DISABILITY; CONSTRUCTIVE DISMISSAL AS DISCRIMINATORY ACT OF HARASSMENT

Aug 09, 2021

SUMMARY

Our August 2021 update considers recent developments in employment law, including a significant case on section 100(e) automatically unfair dismissals during the COVID-19 lockdown, and cases on disability discrimination and constructive dismissal. We also outline other points of note, including developments relating to revised banking remuneration guidelines and the Government's response to its consultation on sexual harassment in the workplace.

COVID-19- AUTOMATIC UNFAIR DISMISSAL FOR EMPLOYEE WHO REMAINED IN ITALY DURING OUTBREAK

A Tribunal has found, in the case of Montanaro v Lansafe Limited, that an employee who had travelled from the UK to Italy for the purposes of holiday and stayed in Italy during the Italian national lockdown in March 2020, was automatically unfairly dismissed.

Under section 100(e) of the Employment Rights Act 1996, an employee will be automatically unfairly dismissed if the principal reason for the dismissal is that the employee, in circumstances of danger which the employee reasonably believed to be serious and imminent, took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

The claimant travelled to Italy for the purpose of his sister's wedding, but found himself subject to the Italian national lockdown and a requirement to self-isolate for 14 days if he should return to the UK. Upon notifying the respondent of the circumstances, the respondent told the claimant to wait for instructions but subsequently sent a letter to the claimant in London purporting to terminate his employment for failing to follow company instructions and taking leave without permission. This

was followed by his final payslip and P45 by email. The claimant brought a claim under section 100(e) for automatic unfair dismissal.

On consideration of the claimant's claim, the Tribunal found that there were circumstances of danger given the pandemic along with a risk of serious illness and/or death. The claimant reasonably believed the danger was serious and imminent. The Tribunal felt that the claimant had taken appropriate steps and communicated the danger to the respondent, explaining the reason for his absence and asking for guidance about returning to work, including asking for assistance with documentation required for returning to London if that was desired by the respondent. He had also kept his mobile and laptop on so that he could be available for work and he communicated with the respondent's client directly because he had not heard from the respondent after the first request to wait for instructions.

The Tribunal rejected both the respondent's argument that the claimant did not have permission to take leave and that this lack of permission was the reason for the dismissal. The Tribunal noted the employee had requested the holiday by email in accordance with procedures he had used previously and whilst there may have been a misunderstanding about that procedure, the claimant genuinely believed he had permission to take the leave. The Tribunal held that the claimant had been dismissed because he had proposed to work remotely from Italy given the legitimate issues and concerns caused by the pandemic, and that the employer's actions amounted to an automatically unfair dismissal under section 100(e).

WHY THIS MATTERS

Whilst unusual in its circumstances given the unprecedented events that took place, this case serves as a useful reminder of the (sometimes overlooked/underestimated) stringent health and safety protections in place for employees. Given the recent move into stage 4 of the UK Government's roadmap and the slow progression back into the workplace, employers will need to be mindful of potential pitfalls. Employers can mitigate the risks by ensuring that they comply with all relevant health and safety guidance, and putting into place policies consistent with that guidance. Employers should also ensure they consider and if necessary consult about any concerns put forward by employees regarding health and safety matters.

Montanaro v Lansafe Limited

TRIBUNAL ERRED IN LAW BY FAILING TO CONSIDER CHALLENGE TO JUSTIFICATION DEFENCE

In the case of Brightman v TIAA Limited, the EAT has found that a tribunal erred in law by failing properly to scrutinise a challenge to the defence of objective justification in respect of discrimination arising from a disability claim.

The claimant was disabled, which was accepted by the respondent. The claimant was dismissed by the respondent by reason of capability and brought claims for unfair dismissal and discrimination arising from disability, but was unsuccessful at the tribunal.

On appeal, the EAT found that the tribunal had allowed the respondent to introduce medical evidence which post-dated the dismissal and which was irrelevant to the claimant's claims. The EAT considered that the tribunal had taken into account this irrelevant evidence in deciding whether the dismissal was fair, taking into account the irrelevant post dismissal medical evidence essentially to "*fill the gap*" in the evidence available at the time of the claimant's dismissal and appeal. The EAT also found that the tribunal had unfairly criticised the claimant for not obtaining her own medical evidence for the liability hearing. The EAT noted that at the time of the claimant's dismissal, she had been attending work and was optimistic about her prognosis, and the respondent had relied on old medical evidence when making the decision to dismiss.

With specific reference to her claim for discrimination arising from disability, the EAT noted that the tribunal had identified the claimant's absence record as the "*something arising*" from disability so the issue was whether the dismissal was a proportionate means of achieving a legitimate aim. The respondent's legitimate aim, as stated in their skeleton argument, was that it *"needs to run an efficient business and protect other employees from being required to take on additional work to cover for other employee's absences. There were particular problems in this case caused by the unpredictable nature of the claimant's absence".* The EAT noted that the alleged unpredictable nature of the absence was not referred to or considered by the tribunal, stating that whilst tribunals are not expected to refer to every disputed fact or argument, in this case the tribunal had failed properly to scrutinise the justification defence and that this was an error of law.

The EAT therefore remitted the matter to a new employment tribunal for rehearing.

WHY THIS MATTERS

This case underlines the importance of tribunals considering evidence fully when it comes to objective justification defences. The respondent had specifically referred to the claimant's "*unpredictable*" absences as part of its legitimate aim objectification and this was key to the respondent's case. This vital part of the respondent's case had not even been considered by the tribunal.

This case also serves as another reminder of the importance of treading carefully with capability dismissals, particularly in cases of recurrent prolonged absences. Employers must take care to ensure they have done everything possible before deciding to dismiss in cases of disability related absence, including considering all reasonable adjustments and alternative roles.

Finally, this case highlights the significance of obtaining up-to-date medical evidence when any disciplinary steps are considered, particularly when dismissal is under consideration.

Brightman v TIAA Limited

CONSTRUCTIVE DISMISSAL CAN AMOUNT TO ACT OF UNLAWFUL HARASSMENT

In the case of Driscoll (nee Cobbing) –v- V & P Global Ltd and another, the EAT has held that a constructive dismissal can amount to an act of unlawful harassment, and in so doing concluded that the previous ruling in the case of Timothy James Consulting Ltd -v- Wilton was "*manifestly wrong*".

The claimant was employed by the respondent from 2 April 2019 for four months and claimed in an employment tribunal that she had been subjected to harassment related to sex, race or disability by way of comments which ultimately resulted in her constructive dismissal. The tribunal held that constructive dismissal could not be an act of harassment under the Equality Act 2010, in line with the ruling in Timothy James Consulting Ltd -v- Wilton.

On appeal, the EAT ruled that Wilton was inconsistent with EU law and so was "*manifestly wrong*". The EAT noted that each of the EU Directives relating to Equal Treatment and Race Equality "*proscribes harassment on the grounds to which it refers, including in relation to dismissals*." In addition, it noted that the CJEU/ECJ has long held that the term dismissal is to be "*widely construed*", and therefore there was no basis on which constructive dismissal should be excluded. The EAT held that the relevant domestic laws should be construed purposively to conform with all relevant directives, and therefore must be construed to proscribe harassment in the form of dismissal, including a constructive dismissal. Essentially the EAT held that a constructive dismissal should be treated, for the purposes of harassment, in just the same way as any other form of dismissal by the employer. As such, Wilton was wrongly decided.

The EAT therefore held that the claim of harassment in the form of constructive dismissal should be reinstated and determined by the tribunal.

WHY THIS MATTERS

This case serves as a good example of where the EAT may change a finding from a previous decision, specifically in the event that an earlier decision was "*manifestly wrong*". Given that prior to the introduction of discrimination legislation in 2005, constructive dismissal claims could be brought on the basis of harassment, the case of Wilton had always been much disputed, and this new decision serves to clarify and correct that error.

Driscoll (nee Cobbing) –v- V & P Global Ltd and another

ROUND-UP OF OTHER DEVELOPMENTS

LETTER SIGNED FOR MANDATORY ETHNIC PAY GAP REPORTING

The Confederation of British Industry (CBI), the Trades Union Congress (TUC) and the Equality and Human Rights Commission (EHRC) have sent a letter to Cabinet Office Minister Michael Gove calling for mandatory ethnic pay gap reporting and requesting a clear timetable for its implementation. The letter argues that such mandatory reporting would draw attention to differences in pay and aid transparency regarding the lack of minority representation in senior positions.

EBA REPORT ON REVISED REMUNERATION GUIDELINES

On 2 July 2021 the European Banking Authority ("EBA") published the final report on its guidelines on sound remuneration policies. The guidelines take into account amendments introduced by the Capital Requirements Directive V ("CRD V") requiring remuneration policies to be gender neutral.

Over the next two years, the EBA will follow up with a report on how institutions apply the gender-neutral remuneration policies.

ROADMAP- STEP 4

On 19 July 2021, England moved into step 4 of the roadmap. This removes the majority of the legal restrictions in place and means an end to social distancing and work from home guidance. However, certain protections will remain in place including testing and self-isolation requirements.

COVID-19- VACCINATION GUIDANCE

The UK government has published new guidance for employers to help them support their staff and promote the vaccination programme. This includes directing people to trusted sources of information on vaccination, posting articles on communications and encouraging senior staff to share their experiences of vaccination.

RESPONSE TO SEXUAL HARASSMENT IN THE WORKPLACE CONSULTATION

On 21 July 2021, the government published its long awaited response to the consultation on sexual harassment in the workplace, delayed by the pandemic. The consultation ran from February-October 2019 and was in two parts, a technical consultation regarding the legal framework and a public questionnaire to invite views and experiences.

The key outcomes of the consultation are as follows:

- The government will introduce a new duty for employers to prevent sexual harassment in the workplace "*as soon as*" parliamentary time allows;
- The Equality and Human Rights Commission (EHRC) will draw up a statutory code of practice to provide guidance to employers;

- There will be a mechanism for "*strategic enforcement*" by the EHRC, which will include binding agreements with employers who do not fulfil the new duty referred to above;
- The government will introduce workplace protections against third party harassment when parliamentary time allows;
- The government will not extend protections to pure "volunteers", although it believes that "interns", even if unpaid, will be protected as "workers"; and
- The government will look at extending the time limit for claims under the Equality Act 2010.

There has been criticism of the consultation response because of the lack of any specific timescales but it remains to be seen when the recommendations will be implemented.

BCLP has assembled a COVID-19 Employment & Labor taskforce to assist clients with employment law issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com

RELATED CAPABILITIES

- Employment & Labor

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