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Insights

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DISCRIMINATION FOR PHILOSOPHICAL BELIEF, EXTENSIVE ANONYMITY ORDERS, DISMISSALS FOR POLITICAL VIEWS AND GENERAL NEWS ROUND-UP

Sep 13, 2022

SUMMARY

Our September update includes new case law on the controversial area of gender-critical/trans beliefs, a far-reaching anonymity order made by the EAT, dismissals for political beliefs/activities and a news roundup on ACAS early conciliation figures, neo-natal care, and more news on the menopause.

WAS REACTION TO BARRISTER'S GENDER-CRITICAL VIEWS DISCRIMINATORY?

In a case that attracted a good deal of publicity, a barrister sued her chambers, Garden Court Chambers, the Chamber's service company Garden Court Chambers Limited (together "**GCC**"), and the diversity organisation Stonewall.

The actions against GCC were based almost entirely on discrimination due to the claimant's gender-critical philosophical beliefs. The claimant said she had suffered detriments from GCC because of direct discrimination, victimisation and (based on sexual orientation rather than philosophical belief) indirect discrimination. The claims against Stonewall were based on section 111 of the Equality Act 2010 ("**EqA**"). The allegation was that Stonewall instructed, caused or induced GCC to breach the EqA in the manner alleged, or at least it attempted to do so. Section 111 is the section relied on to join additional respondents to discrimination claims.

The case is factually (and legally) complex but is rooted in an acrimonious dispute between the claimant and GCC about the claimant holding and expressing gender-critical views. Since an EAT decision last year, gender-critical views have been held to be a philosophical belief protected by the EqA. The dispute escalated substantially when certain members of GCC fostered links with Stonewall which, since 2015/16, has been very focused on the rights and the inclusion of trans and non-binary individuals and holds opposing views to those of the claimant.

In November 2018 GCC signed up to Stonewall's "Diversity Champions Scheme", with Stonewall's logo appearing on GCC marketing materials and an announcement that Stonewall would have close links with GCC. On 14 December 2018, the claimant sent an email to all GCC members making it abundantly clear that she was opposed to any formal association with Stonewall and set out her negative views about Stonewall, its activities and its position.

During 2019 the dispute heightened. The claimant frequently made her gender-critical views clear on twitter and on 22 October 2019 the claimant tweeted about the launch of the "LGB Alliance", an expressly gender- critical organisation. In her tweet celebrating the LGB Alliance, the claimant said that "….*gender extremism is about to meet its match*". By "gender extremism", the claimant was referring to the views of Stonewall and several members of GCC relating to trans women. The claimant went on give an interview with the "Sunday Times" which appeared under the headline "*Lesbian barrister: my bosses bowed to transgender 'hate mob*'".

The trans community and Stonewall's responses were equally uncompromising. GCC found itself the subject of numerous complaints about the claimant, including one from Stonewall. Kirrin Medcalf, Head of Trans Inclusion at Stonewall, complained that GCC was associating with a barrister actively campaigning for a reduction in trans rights and specifically targeting Stonewall staff with transphobic abuse on a public platform.

GCC tried to deal with matters. They considered whether (a) to respond to the complaints and (b) to investigate the complaints. GCC decided to respond by tweeting an agreed wording to those who had complained. This tweet included the words "*We are investigating concerns raised about [the claimant's] comments in line with our complaints/BSB policies*". The reference to "BSB" is to the Bar Standards Board - it is a serious matter to allege that a barrister is in breach of the rules and core principles of the BSB. This tweet was viewed by the claimant as GCC validating the complaints made against her (as she was being "investigated" by GCC), as well as escalating those complaints to the BSB. To make things worse it was re-tweeted and made very public.

In summary, an internal investigation was carried out in consultation with an external QC. The investigation was flawed, in particular without an important response document from the claimant being included. GCC finalised its report in December 2019 and found that the conduct of the claimant was "likely" to breach BSB guidelines. The claimant ultimately brought proceedings against GCC and Stonewall and lodged Data Subject Access Requests.

The outcome was mixed:

- The claim against Stonewall was not upheld. Section 111 EqA required a formal relationship between Stonewall and GCC and the ET found that there was no such relationship. The ET found that contact between GCC and Stonewall was "minimal". There was no evidence that Stonewall initiated, facilitated or even encouraged the investigation by GCC;
- The claims of indirect discrimination failed;

- The claims of direct discrimination and victimisation based on the claimant's philosophical beliefs were upheld but in part only. The main financial allegation was that in 2019 GCC had withheld legal work from the claimant, substantially reducing her income. This was not upheld by the ET due to a lack of evidence;
- The claimant was successful only in respect of two detriments, one being GCC's "response tweet" stating that the claimant was under investigation and the other being the upholding of the internal GCC complaint, stating that the claimant was likely to be in breach of BSB standards; and
- In her victimisation claim, the claimant was successful in respect of one protected act (of five claimed), being her gender-critical tweets, the resulting detriment being the upholding of the internal complaint.

The claimant was awarded £22,000 for injury to feelings (with interest of £4,693.33). Of the £22,000 injury to feelings, £2,000 was held to be aggravated damages, awarded mostly because GCC was held to be deeply unsympathetic to the claimant at a time when she felt genuinely distressed, including by threats to her life.

WHY THIS MATTERS

From a legal perspective and despite all the publicity, the case does not really break new ground. The claimant had no difficulty establishing that her gender-critical views were a philosophical belief protected under the EqA but succeeded only on a limited number of detriments claimed. The failure of the "money" claim, being the alleged withholding of income, illustrates the difficulties of causation in discrimination claims and the failure of the claim against Stonewall illustrates the difficulties section 111 EqA presents when trying to join and successfully sue additional respondents.

The case also illustrates the acrimony in and divisiveness of gender-critical/trans issues, especially when expressed on social media. It is perhaps a warning to employers to ensure they have up to date, comprehensive and effective social media policies in place. If GCC had had such a social media policy, the outcome of the complaints/investigation (and the claims) may have been different.

Allison Bailey –v- Stonewall Equality Limited, Garden Court Chambers Limited and Others

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EAT GRANTS EXTENSIVE ANONYMITY ORDER TO PROTECT NON-PARTY

The London School of Economics and Political Science ("**LSE**"), the respondent in these proceedings, applied for an Order from the EAT to prevent the disclosure of the identity of an

individual who had not been a party to the case. The individual, "Ms D", was a former LSE employee about whom the claimant had made false and inflammatory allegations. The application for the anonymity Order was linked to legal proceedings and other activities that stretched back to alleged incidents between the claimant and Ms D in 2012.

The claimant (in these proceedings), Dr Piepenbrock, was originally employed as a teaching fellow at the LSE. In September 2012, one of his female students, "Ms D", became his graduate teaching assistant. Subsequently, both made very serious allegations against the other. Ms D made a complaint/grievance alleging sexual harassment against Dr Piepenbrock. Dr Piepenbrock then claimed, amongst other things that Ms D, in fact, had sexually harassed him and that she was a "*sociopathic liar*". He claimed that whilst they were on an academic trip to the US she had exposed herself to him and was stalking him. The tribunal did not accept these allegations.

The claimant's mental health began to deteriorate and he went on sick leave for 20 months, struggling with anxiety and depression, before he was dismissed by the LSE. The departure was acrimonious and the claimant embarked on a series of legal actions. He brought claims for unfair dismissal and discrimination (including victimisation), at the employment tribunal ("**ET**") as well as claims for personal injury at the High Court. The claimant also brought High Court proceedings for defamation and other matters in both 2019 and 2021, naming up to 14 defendants, including Ms D. The claimant made it clear he held Ms D responsible for his ill health and dismissal, and that he would not stop in his efforts to obtain redress, including identifying Ms D by name.

As part of these tribunal proceedings, the claimant made an amendment application to include new claims, which the tribunal refused. He appealed to the EAT and simultaneously lodged various documents containing allegations against Ms D, who was not a party to or witness in the proceedings. The documents detailed the allegations and explicitly named Ms D.

Prior to the EAT hearing the anonymity application, the tribunal dismissed all the claimant's claims. The tribunal made unfavourable findings regarding the claimant. It was held that the claimant was not a reliable or credible witness and had displayed *"manipulative and dishonest behaviour*". The tribunal said the claimant had shown a "*willingness to seek to destroy [Ms D's] reputation*" – evidence in part by the fact that the claimant had vilified Ms D (by name) on a public website.

The EAT held that the LSE's application for an anonymity Order to protect Ms D's identity should be the subject of a separate hearing. This would provide the claimant with the opportunity to make oral representations, as he was strongly opposed to the Order.

The EAT said any application for an anonymity Order required a balance to be drawn between the principles of open justice under Article 6 of the European Convention of Human Rights ("**ECHR**") and the right to respect for private and family life under Article 8 of the ECHR. The claimant's opposition to the anonymity Order was framed broadly around Article 6 and the need for open justice, while the LSE's application for Ms D's anonymity was framed around Article 8, especially as

Article 8 includes the right to protection of a person's reputation. The EAT took the view, particularly based on the tribunal's unfavourable findings regarding the claimant and the claimant's actions (including the website he had operated) that he might use the documents from the appeal to "name and shame" Ms D.

The EAT held, perhaps unsurprisingly, that Ms D's Article 8 rights outweighed principles of open justice and the claimant's rights to freedom of expression under Article 10 of the ECHR. The EAT also noted that none of these rights, or any claim brought by the claimant, would be affected by Ms D's identity being protected.

The EAT granted the anonymity Order, and the Order was extensive. Ms D was granted anonymity but the EAT also restricted access to the EAT file and prohibited the disclosure or publication of Ms D's identity, along with any information that might reasonably be expected to lead to her identity being disclosed/revealed. Finally, the EAT held that the Order would be indefinite, and could only be revoked or varied by an application by a legitimate interested party, and that application would be the subject of a hearing.

WHY THIS MATTERS

This is an unusual case, both in terms of the extraordinary conduct of the claimant and the fact that Ms D has been living and working in the US since 2012. The extent of the EAT's Order is also unusual but is more than likely a result of the claimant's position regarding the "exposure" of Ms D's identity, and having such adverse findings made against him by the tribunal. The EAT seemed to believe that an extensive Order was required to protect Ms D from the claimant trying his utmost to reveal her identity. The anonymity Order also did not prejudice the claimant's legal claims. Most applications for anonymity Orders are not as clear and the balancing of interests between Articles 6, 8 and 10 can be more difficult.

This case is a useful reminder of the balancing factors the EAT must consider when granting an anonymity Order and the requirement for EAT decisions to be compatible with the ECHR pursuant to section 6 of the Human Rights Act 1998.

Piepenbrock v London School of Economics and Political Science

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EAT CONSTRUES NARROW VIEW OF THE EXCEPTION TO THE REQUIREMENT FOR TWO YEARS' QUALIFYING SERVICE IN SECTION 108(4) OF THE EMPLOYMENT RIGHTS ACT 1996 (FOR DISMISSALS WHERE THE REASON OR PRINCIPLE REASON IS, OR RELATES TO, THE EMPLOYEES' POLITICAL OPINIONS OR AFFILIATION).

Ms Jones began her employment with the Respondent, who represents housing associations in Scotland, on 29 April 2019. Ms Jones was Head of Membership and Policy and reported to its CEO.

Her contract of employment included a "Political Activity" clause. The clause did not prevent Ms Jones from belonging to a political party but it did prevent her from having a "formal role" of a political nature. Political neutrality was of fundamental importance to the Respondent.

On 4 October 2019, Ms Jones informed her employer that she wished to stand for Scottish Labour in the Argyll and Bute constituency at the next General Election. The Respondent's board advised Ms Jones that it did not consent to her standing as a candidate for Scottish Labour. The Claimant subsequently withdrew her candidature. In November 2019, the CEO dismissed Ms Jones. In the letter of dismissal, the Respondent gave a variety of reasons for dismissal but did not rely on Ms Jones' request for permission to stand for Scottish Labour.

Ms Jones believed that the true reason for her dismissal was that she had asked for permission to stand as a candidate for Scottish Labour in the 2019 General Election. Ms Jones did accept that she was not dismissed because she was a member of the Scottish Labour Party or because of her political opinions.

Ms Jones brought an unfair dismissal claim. Since she did not have two years' continuous service with the Respondent, she sought to rely on s.108(4) of the ERA 1996. Ms Jones also claimed that she had been discriminated against on the ground of her belief that "those with the relevant skills, ability and passion should participate in the democratic process", arguing that this was a philosophical belief pursuant to section 10 of the EqA.

The tribunal held that if Ms Jones could show that she had been dismissed because she sought to stand for election, she could rely on s.108(4) ERA 1996. The tribunal concluded that the words "relates to" in s.108(4) ERA 1996 meant that even though her political opinions and affiliation to the Scottish Labour Party had nothing directly to do with her dismissal, they were nevertheless related to her dismissal since without such opinions and affiliation she would not have sought to stand as a candidate. Her opinions and affiliation with Scottish Labour had an indirect relationship with her dismissal but this was sufficient to bring her within s.108(4) ERA 1996.

With regard to Ms Jones' discrimination claim, the tribunal accepted that Ms Jones' belief was protected under section 10 EqA because her belief satisfied the criteria stipulated in *Grainger plc v Nicholson* (the leading case in this area). The Respondent had suggested that Ms Jones' belief did not satisfy the fourth *Grainger* criteria – that the belief "must attain a certain level of cogency, seriousness, cohesion and importance". The tribunal disagreed and held that the belief could be set out in one short sentence and that Ms Jones' belief was cogent and easy to understand, was serious and important and did not lack cohesion. The tribunal also held that Ms Jones had manifested that belief by seeking to stand for election.

The Respondent appealed against both decisions to the EAT.

The EAT explained that the words "the reason for the dismissal is… the employee's political opinions…" indicate that s.108(4) is designed to provide protection to those who are dismissed

because of their political opinions or affiliation. Where an individual is dismissed in such a scenario, they are granted extended protection, even when such a dismissal occurs within the first two years of employment. However, the extended protection afforded by s.108(4) is only given if they are the reason or principal reason for dismissal. If the employee's political opinions or affiliation are subsidiary considerations they are not protected by s.108(4).

The EAT held that s.108(4) does not deal with the dismissal of employees who are dismissed because they lack neutrality or who propose to act in a way that threatens their political neutrality. The EAT's view was that neutrality is the antithesis of the issue addressed by s.108(4).

The EAT did accept that, but for Ms Jones' candidacy for Scottish Labour, she would not have been dismissed and in that sense, her dismissal was related to her opinions and affiliation. However, the scope of the words "relates to" in s.108(4) must be interpreted in light of the purpose Parliament was seeking to achieve. The EAT did not accept that the relationship between Ms Jones' dismissal and her political opinions and affiliation were sufficiently proximate to the purpose of s.108(4) to come within its scope. Ultimately, Ms Jones' political opinions and affiliation were not the reason or principal reason for dismissal. The EAT held that if Ms Jones' dismissal was because she had expressed a desire to be a political candidate and the reason for dismissal had not involved her membership of Scottish Labour or her political opinions, the only remaining possibility was that Ms Jones had been dismissed because she was not willing to keep politically neutral. This, the EAT argued, is in contrast to the terms of s.108(4). As such, s.108(4) had no application.

The EAT also held that the Claimant's belief that "those with the relevant skills, ability and passion should participate in the democratic process" was a protected philosophical belief pursuant to section 10 EqA 2010. The EAT rejected the submission that Ms Jones' belief was too vague. The statement of her belief expressed the view that not everyone is fit for public office and that Ms Jones thought that those that should stand for office should have an appropriate combination of ability and motivation. The EAT held that a belief that persons should stand for office if democracy is to thrive is a cogent view, in that it is a reasonable belief that is supportive of and logically connected to a powerful political imperative. It is cohesive in that it fits with other aspects of Ms Jones' belief system and is capable of rational support having regard to her belief in Parliamentary democracy.

The EAT, therefore, allowed the Respondent's appeal in relation to the unfair dismissal claim but dismissed the appeal against the tribunal's finding on the discrimination claim.

WHY THIS MATTERS

This decision sheds light on the little known remit of s.108(4) of the ERA 1996, which provides an exception to the requirement that an employee needs two years' continuous service in order to bring an unfair dismissal claim, if the reason or principal reason for the employee's dismissal arises from their political opinions or affiliations. The subsection was designed to address the mischief of

dismissals arising from the content of a person's political opinions or the identity of the party with which the person is affiliated. However, the EAT construed the subsection narrowly and was unwilling to widen the scope of the exception. As such, a dismissal for breaching a general requirement to appear to be politically neutral is not a requirement that relates to someone's political opinions or affiliations pursuant to s.108(4) and so is unlikely to be enough to trigger protection.

The case also serves as a useful confirmation that a belief in participatory democracy is a protected philosophical belief.

Scottish Federation of Housing Associations and Polly Jones

NEWS ROUNDUP

ACAS REPORT SHOWS CONTINUING DECREASE IN EARLY CONCILIATION CASES

ACAS has published its Annual Report and Accounts for 2021 to 2022, which cover the year ending 31 March 2022.

The report shows an increase in early conciliation ("**EC**") cases resolved, up from 31% in 2020/21 to 36% in 2021/22. However, the number of EC notifications was down to 91,000, from 115,000 in 2020/21 and nearly 140,000 in 2019/20. Visits to the ACAS website were also down from 18.6 to 14.5 million, with 10.9 million digital advice sessions. Calls to the ACAS helpline were also down to 644,000 from 710,000 in the previous period.

510 requests for collective consultation were received during 2021/22, of which ACAS helped 94% to reach a settlement. Over 60% of collective disputes were pay related, with changes to terms and conditions and recognition agreements also being areas of dispute.

Possibly the most interesting takeaway is that over a third of cases are settled at the EC stage, showing that EC is more than a formality, it is a legitimate method of settling cases.

NEO-NATAL CARE

The government has backed a private member's bill to introduce paid leave for parents where a baby is admitted to hospital for at least 7 continuous days in the first 28 days after birth. The right to paid time off will apply from commencement of employment and provide for 12 weeks of paid leave. The timing of the bill however, along with the introduction of the new provisions, is uncertain.

WOMEN AND EQUALITIES COMMITTEE CALLS FOR MENOPAUSE TO BE A PROTECTED CHARACTERISTIC

Despite the government’s decision not to make the menopause a protected characteristic, the issue continues to gather momentum.

Last month the House of Commons Women and Equalities Committee published a report called Menopause and the workplace.

The report calls on the government to appoint a “Menopause Ambassador” to encourage good practice, produce model menopause policies and trial specific menopause leave with a large public sector employer. The policies should include, as a minimum, how to request reasonable adjustments and other support, advice on flexible working, sick leave for menopause symptoms, and provisions for education, training and a supportive culture.

The report believes it is “unsatisfactory” that women need to rely on other protected characteristics (such as disability) to bring legal claims. The report calls on the government "immediately" to allow dual discrimination claims and to consult within six months on making menopause a protected characteristic, including a duty to provide reasonable adjustments for menopausal employees. It seems very unlikely this will happen.

A Women's Health Ambassador for England has been appointed and will sit on the newly established UK Menopause Taskforce.

RELATED PRACTICE AREAS

- Employment & Labor

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