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Insights

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LONG COVID AND DISABILITY, TIME EXTENSIONS FOR DISCRIMINATION CLAIMS, ANOTHER CASE ON PHILOSOPHICAL BELIEF, AND GENERAL NEWS ROUND-UP

Oct 19, 2022

SUMMARY

Our October update includes new case law on Long Covid/disability discrimination, confirmation of limits on the scope of protected philosophical beliefs, and a tricky case on extending discrimination time limits. It also includes a news round-up on Tribunal statistics, new ACAS guidance on suspension, and proposed legislation revoking retained EU law, which includes the Working Time Regulations and TUPE.

LONG-COVID AND DISABILITY – A MATTER OF TIMING

This is the second of the first two cases involving Long Covid and disability discrimination. It was a preliminary rather than a full hearing, deciding only the issue of disability.

In summary, both the Tribunal and the EAT held that the claimant was not disabled within the meaning of section 6(1) of the Equality Act 2010 (EqA) because, on the date the act of discrimination took place, which was the claimant's dismissal on 27 July 2021, the claimant was suffering from Covid-19, not Long Covid, and only the latter is a disability.

The claimant was employed by the respondent from December 2019 until her dismissal on 27 July 2021. She tested positive for Covid-19 around 11 July 2021 and self-isolated until around 20 July 2021. After contracting Covid-19 and before her dismissal, the claimant suffered fatigue, shortness of breath, headaches, and brain fog. Additionally, she had problems sleeping and struggled with activities such as shopping and driving. The Tribunal accepted that the claimant's symptoms were sufficient to support a diagnosis of Long Covid in September 2021 – but critically not on 27 July 2021.

The Tribunal held that (a) the claimant's disability status at the date of her dismissal could not be determined with the benefit of hindsight and (b) the respondent could not reasonably have been

expected to anticipate a future diagnosis of Long Covid. Further, under external guidelines agreed to be relied on at the hearing, the claimant could not formally be diagnosed with Long Covid until at least 12 weeks after she tested positive for Covid-19. At the date of her dismissal, she had had Covid-19 for approximately 2.5 weeks and from a medical perspective simply could not have had Long Covid.

The medical timing was that on 26 July the claimant contacted her GP. On 27 July she was dismissed. On 2, 8 and 22 August the claimant was deemed unfit for work because of Covid-19. She was not formally diagnosed with Long Covid until 12 September - this was critical because the parties agreed to use, as medical guidance, the National Institute for Health and Care Excellence (NICE) guidelines. The guidelines say that Post Covid-19 syndrome (AKA Long Covid) can only be diagnosed after 12 weeks of a positive test for Covid-19.

The claimant claimed that on the date of her dismissal, the respondent would have foreseen and anticipated that she would develop Long Covid and accordingly her dismissal was motivated by Long Covid – she did not have it yet, but on her argument and based partly on her symptoms it was pretty clear she would. Her dismissal she claimed was an act of direct disability discrimination.

The respondent argued, correctly, that disability status had to be assessed at the time of the discriminatory act (the claimant's dismissal). Her disability status also had to be assessed on the medical evidence available on that date, which was a diagnosis of Covid-19, not Long Covid. The respondent could not have the benefit of hindsight and it was irrelevant that the claimant went on to develop Long Covid in September, after her dismissal. The respondent also argued that, based on accepted national statistics, the majority of people who contract Covid-19 do not go on to develop Long Covid. It could not be argued that the respondent would have reasonably expected the claimant to develop Long Covid.

The EAT's decision was ultimately pragmatic. It held that, at the time of her dismissal, the claimant had an impairment, Covid-19, which had a substantial adverse effect on her normal day-to-day activities.

However, the impairment was not long-term, At the time of her dismissal the substantial adverse effect of the impairment had lasted only about 2.5 weeks and at that point, she did not (and medically could not) have Long Covid.

WHY IS THIS IMPORTANT?

This case shows that the issue of whether Long Covid qualifies as a disability is determined mostly by timing. It was accepted in the June 2022 case of *Burke –v- Turning Point Scotland* that Long Covid is a disability but it was held in this case that Long Covid could not be legitimately diagnosed (and there could be no disability) until at least 12 weeks after the individual had tested positive for Covid-19. So any act/detriment that occurred before the expiry of the 12 week period could not be

discriminatory. This is an odd situation, particularly in a case such as this where the claimant's symptoms remained the same throughout.

This case is also unusual from a more practical angle. Notably, no proper reason is given for the claimant's dismissal. With less than two years' qualifying service and having no claim for unfair dismissal, it could be argued that the claimant may have been dismissed quickly to avoid a disability claim. The respondent may have had in mind the 12-week "NICE" deadline and the Burke case, where the claimant's employment continued for months during his difficulties with Covid-19 and his eventual diagnosis with Long Covid. If Burke, like the claimant in this case, had been dismissed just over two weeks after testing positive for Covid-19, his claim for disability might have failed.

Watch this space.

Quinn –v- Sense Scotland

SUPPORTING A FOOTBALL CLUB DOES NOT AMOUNT TO A "PHILOSOPHICAL BELIEF" WITHIN THE MEANING OF THE EQA

The claimant carried out work from January to June 2019 as a service provider through his personal services company (PSC). He claimed that his denial of further work was a result of prejudice against him because of his support for Rangers Football Club (Rangers).

The claimant brought claims for unfair dismissal and discrimination. His claim for unfair dismissal failed based on his employment status - he used a PSC and only "employees" can bring claims for unfair dismissal. In respect of his discrimination claim, the claimant argued that his passionate support for Rangers amounted to a "philosophical belief" within the meaning of section 10 of the EqA. The claimant appeared to rely a good deal on a comment (not directed to the claimant) that a third party was "unusually OK for a Rangers fan".

The claimant had been a Rangers supporter for around 42 years. He never missed a match and spent most of his income after paying basic house and car bills on attendance at games, both home and away (although his attendance at away games was more sporadic), and watching them on television. He argued there was a shared belief or cohesion between around 1.4 million Rangers supporters. This included support for the monarch and the UK union. The claimant described supporting Rangers as a "way of life" and that supporting Rangers was as important to him as it was (for example) for Christians to go to Church. It was an integral part of his life and lifestyle.

The Tribunal found that the claimant's philosophical belief did not pass the relevant legal tests to amount to a protected characteristic under the EqA. The criteria established in the 2010 case of *Nicholson v Grainger* are the accepted benchmark as to whether a philosophical belief qualifies for protection under the EqA. The five "Grainger criteria" are as follows:

- the belief must be genuinely held;
- it must be a belief and not an opinion or viewpoint based on the present state of information available;
- it must be a belief as to a weighty and substantial aspect of human life and behaviour;
- it must attain a certain level of cogency, seriousness, cohesion, and importance; and
- it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

Whilst the Tribunal found that the claimant's belief satisfied the first criteria in that it was genuinely held, it found the remaining criteria were not satisfied. The EqA does not define "philosophical belief" but the Tribunal noted the explanatory notes to the EqA state that support for a football club is not capable of being a philosophical belief. A distinction was drawn between the definition of "belief", being an acceptance that something exists or is true, and "support", being "actively interested in and concerned for the success of something". The Tribunal compared the Claimant's support for Rangers to support for a political party, which case law had already determined as falling short of the *Grainger* criteria.

The Tribunal also considered the "Everyone – Anyone Rangers Charter" which emphasised that anyone can become a supporter of the club. Therefore, the views expressed by the claimant regarding loyalty to the Queen and being a unionist as prerequisites of being a Rangers supporter were not necessarily the case. The only common factor was that supporters wanted the club to do well. The claimant's belief, therefore, lacked the required level of cogency, cohesion, and importance.

WHY THIS MATTERS

The issue of what amounts to a philosophical belief is difficult. The "Grainger criteria" provide a relatively high bar, but beliefs such as support for Scottish independence and the ability of a spiritualist medium to contact the dead have both been held to be protected philosophical beliefs.

This case is perhaps a reminder the envelope can only be pushed so far, and support for a football club (or political party), no matter how passionate and time-consuming, will not satisfy the relevant legal test.

Finally, the case is a reminder that after 12 years, the Grainger criteria are still determinative.

Mr E McClung –v- Doosan Babock & Others

IS A STRONG CLAIM MORE LIKELY TO HAVE STATUTORY TIME-LIMITS EXTENDED (AND VICE VERSA)?

The claimant was a litigant in person. In May 2019, she gave notice of resignation and subsequently brought Tribunal proceedings for direct race discrimination and/or harassment. Both the ET1 and ET3 gave the effective date of termination as 11 August 2019 and, on the face of it, the claimant's claims were all out of time. The claimant made a further application, also out of time, to amend and add a further discrimination claim.

At a preliminary hearing in September 2019, the Tribunal considered whether the time limit should be extended for presenting the discrimination claims. As discrimination claims, the legal test for extending time, including allowing the amendment, was whether it would be just and equitable to extend time under section 123(1) of the EqA.

The Tribunal did not allow an extension of time.

The claimant was not happy. As well as appealing to the EAT, the claimant applied to the Tribunal for a reconsideration of its decision. The basis of the reconsideration application was that the claimant did not appreciate that the merits of her claims would be examined as part of the application to extend time and, as a result, she had not prepared properly for the application, including presenting evidence. The Tribunal rejected the claimant's application. It was held the claimant had had sufficient opportunity to explain matters at the original hearing, and that the concern regarding an examination of merits, which was that there was no discernible link between the respondent's conduct and the claimant's race, could be assessed on the documents already available. The Tribunal also noted that the claimant did not lodge any further evidence as part of her reconsideration application.

The claimant's appeal to the EAT was slightly different in that it was based around the point that, in the claimant's view, the Tribunal's consideration of the merits of her claims and refusing a time extension was broadly equivalent to striking-out her claims based on them having no reasonable prospects of success. The claimant argued that no consideration had been given as to whether her claims reached the strike-out threshold and, based on the strike-out analogy, the claimant (especially as a litigant in person) should have had more advance notice and should have been "warned" that the merits of her claims would be by far the predominant consideration in the Tribunal's decision not to extend time.

The EAT considered the Tribunal's decision, and the surrounding case law, extensively. It noted overall that section 123(1) EqA gives the Tribunal a very wide discretion as to what is and what is not considered in relation to a "just and equitable" extension. There was no pre-determined list or set criteria, the Tribunal could consider whatever it believed to be relevant.

The Tribunal had certainly regarded the merits of the claims as the main factor. In particular, it had taken into account its view that it could find no link between the conduct of the respondent and the claimant's race. The Tribunal had summarised the gist of the claimant's substantive allegations as being "serious bullying treatment" by a former colleague. However, it had noted that a case for

harassment based on race, or any form of race discrimination, was not made out on the facts/evidence available. The Tribunal had noted that the claimant's letter of resignation made no reference to race and that a claim of post-employment harassment also seemed to have no link to race.

As well as issues around the merits, the claimant said she did not present her claim in time because she was "burnt out" and in poor mental health, but she did not seek medical advice and no medical evidence was presented at the hearing.

Essentially the claimant's point was that her claims had essentially been struck-out, and in any strike-out application the claimant must have the opportunity to present all the evidence and facts available.

The EAT considered in particular the point that the refusal to extend time was akin to a strike-out. However, it did not accept the two were the same. The rules applying to strike-out do not form part of section 123(1) EqA and the two tests are distinct and different. The EAT emphasised that it was entirely valid for a Tribunal to take account of the merits in an extension application, provided it did so with appropriate care and identified sound reasons or features that supported its assessment based on the information and material before it. The EAT's view was that the Tribunal had sufficient evidence to assess the merits, and that it had the discretion under section 123(1) EqA to treat that as the major factor in refusing the extension.

The EAT took the view that the claimant had sufficient notice, particularly as the decision had been the subject of an application for reconsideration, where no further evidence had been provided. The claimant had not identified or pointed out any further evidence showing a link between the respondent's conduct and the claimant's race.

It was also held that in any extension application based on the "just and equitable" test, the Tribunal had to carry out a balancing act between the prejudice to the claimant and respondent of allowing an extension time and the EAT's view was that, in the circumstances of this case, the Tribunal had carried out that exercise as it should have.

The EAT dismissed the claimant's appeal. The Tribunal had correctly applied the appropriate level of discretion and legal tests in section 123(1) EqA, and the claimant had been given ample opportunity and "warning" either to provide further evidence, indicate where further evidence may be, or provide an explanation of the merits based on the evidence already available.

WHY THIS MATTERS

This is an unusual case and the EAT considered the decision very carefully. Applications for extensions of time are normally concerned with why the claimant was unable to present the claim in time, not the merits of the claim itself. However, this decision is an indication that, if an application for an extension of time is made in a discrimination case, the strength/weakness of the

case is a relevant consideration. It is permissible (depending on the circumstances) for the respondent to provide evidence regarding the case's weakness/lack of merit when opposing the application.

The case also (possibly) highlights the differences between the legal test for an extension of time in discrimination cases – namely the "just and equitable" test and the harsher "not reasonably practicable" test used in cases brought under the Employment Rights Act 1996, such as unfair dismissal. It is worth noting that the claimant also brought a claim for unfair dismissal, which was also rejected for being presented outside the statutory time limit. The claimant did not apply for a reconsideration or appeal to the EAT on this part of the decision, perhaps because she appreciated that the "not reasonably practicable" test is a higher bar and more formidable than the "just and equitable" discrimination test.

Kumari v Greater Manchester Mental Health NHS Foundation Trust

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NEWS ROUNDUP

EMPLOYMENT TRIBUNAL QUARTERLY STATISTICS SHOW INCREASE IN DISPOSALS

Employment tribunal statistics for April to June 2022 have been published. They show a decrease in claims as compared to the same period in 2020/2021.

Out of 19,000 claims received, 15,000 claims went to a full hearing. This was an increase of 114%. Of the 19,000 claims received, 7,700 were single claims such as unfair dismissal (a decrease of 20%) and 12,000 were multiple claims (a decrease of 2%).

Of the 15,000 claims heard, 6,500 were single claims (an increase of 39%) and 8,200 were multiple claims (an increase of 267%).

So overall, and during this period, there has been a clear increase in claims going to a full hearing which, correspondingly, may mean there are fewer cases settling, although confidentiality provisions always make this difficult to quantify.

NEW ACAS GUIDANCE ON SUSPENSION

On 21 September, ACAS published new guidance for employers on how to consider and handle suspensions at work, specifically during investigations. The guidance covers issues such as deciding whether to suspend, the process for suspension, supporting an employee's mental health during suspension, and pay and holiday during suspension.

ACAS notes that suspension should only be used if there is no other option, and suggests alternatives to suspension, including changing shifts or allowing working from home. If an

employee is suspended, employers should consider the mental health of the individual and any support they can offer.

The guidance also states that employers should consider matters carefully before suspending an employee. This includes only considering suspension if employers believe it is needed to protect the investigation (e.g., concerns about witnesses), the business (e.g. risk to soliciting customers), other staff and/or the person under investigation.

In line with the guidance, employers should support a suspended worker by explaining fully the reason for the suspension, keeping the reason for any suspension confidential wherever possible, and staying in regular contact throughout the suspension. Employees should be informed of their suspension in person if possible and it is good practice to allow them to be accompanied to any suspension meeting and for the suspension to be confirmed in writing.

The guidance is not legally binding but is important because, as with the ACAS guidance on disciplinary and grievance matters, Tribunals will refer to it if necessary when hearing cases that involve suspension. The Tribunal's view of a suspension may be influenced by the extent to which it complies with the new ACAS guidance.

RETAINED EU LAW (REVOCATION AND REFORM) BILL 2022-23 INTRODUCED TO HOUSE OF COMMONS (FULL UPDATE)

The Retained EU Law (Revocation and Reform) Bill 2022-23 was introduced to the House of Commons on 22 September 2022. The Bill proposes significant changes to the status and operation of retained EU law within the next 15 months, and could have a significant effect on UK employment law.

The part of the bill that has attracted perhaps the most attention is the "sunset" clause, which states that, if the government or government ministers do nothing before 31 December 2023, then certain pieces of EU law will simply fall away. This includes EU derived secondary legislation, which means UK Regulations, as opposed to acts of parliament, derived from EU legislation. This includes legislation such as TUPE and the Working Time Regulations (WTR). This sounds alarming but is highly unlikely to happen in practice - there are extension provisions to June 2026 and beyond. Also, primary legislation, such as the Equality Act 2010, is unaffected.

The Bill is complex and we will not attempt to summarise it here. However, we will briefly comment on the WTR and TUPE.

With regard to the WTR, the 48-hour working week has been referred to, but there is already an opt-out negotiated specifically by the UK and it has always been possible, and very frequent, for employees to agree to work more than the 48-hour week. The 48-hour restriction may be removed in its entirety for all employees, but in practice, this may not make as much difference as it seems. Any changes to paid holiday would probably be politically very unpopular because, although paid

holiday was not statutory before the WTR, it was normal practice in the UK beforehand. Changing paid holiday would not really be interfering with an EU import, it would be changing a UK domestic tradition.

The underlying principle of TUPE, where employees transfer to a new employer with all rights intact and protected, is very much EU derived, so theoretically this could be removed. TUPE is less high-profile than the WTR, so changes might be made without as much public focus. The TUPE principle has been part of UK employment law since 1981however, and the TUC would certainly notice any changes.

There are parts of TUPE which are unpopular with employers and businesses, and which previous governments have looked at changing. The TUPE rule (which does have exceptions), that employment contracts cannot be changed after a TUPE transfer to harmonise the terms of conditions of incoming employees with existing employees, was reviewed in 2005, but the change was not taken forward because it would have been contrary to EU law. The rule regarding changing contracts on/after a TUPE transfer is therefore a possible candidate for change.

It is still very early days and the government has given no real clues as to how it proposes to change employment law. We will be keeping everyone up to date with developments via our employment bulletins and blogs but we remain mostly in the dark about the government's intentions.

This article was co-written with Trainee Solicitor–Apprentice Ellie Serridge.

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