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Insights

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MARITAL STATUS DISCRIMINATION, PRIVATE WHATSAPP MESSAGES AS TRIBUNAL EVIDENCE, SICKNESS ABSENCE/DISABILITY DISMISSALS AND GENERAL NEWS ROUNDUP

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SUMMARY

Our February update includes new cases on marital status discrimination, including a general refresher on direct discrimination, a case of whether private WhatsApp messages can be used in tribunal proceedings, and how to deal with employees on long-term sickness absence who also suffer from a disability. We also feature a news roundup including new law on sexual harassment, which will increase employers' duties and liabilities, the government's final position on the menopause, and news on limiting the use of NDAs.

MARITAL STATUS DISCRIMINATION – A MARRIAGE STORY

Although discrimination claims based on marital status are rare, this case provides a good illustration of the basics of discrimination law, and how tribunals can sometimes overlook those basics when a case seems straightforward. It also shows the difficulties of an apparently bitter marriage break-up.

The claimant commenced employment as a bookkeeper with her employer in 2005. She went on to marry Jonathan Bacon, the (then) Managing Director (MD) of and majority shareholder in her employer. In 2008 she herself became a director and shareholder. In 2012 Mr Graham Ellis, the second respondent, joined the employer. He replaced Mr Bacon as MD in 2017.

In August 2017 the claimant informed her husband, Mr Bacon, that she wished to separate. The separation led to acrimonious divorce proceedings. Unfortunately, Mr Bacon used his power and position at the employer, acting through Mr Ellis, to make the claimant's life as an employee difficult to the point of impossible. Examples included false allegations of theft reported to the police, placing a tracker in the claimant's car, removing the claimant as a director, completely disregarding a grievance lodged by the claimant, withholding dividends payable to the claimant and, ultimately, suspending and dismissing her. It was probably the case that even the insolvency of the employer,

the original first respondent in the case, was engineered to frustrate the claimant's claims. However, as Mr Ellis remained as second respondent, the claims continued against him personally.

The claimant brought claims at the tribunal which included, unsurprisingly, a claim that she had been treated less favourably because of her marital status. After hearing the facts, the tribunal was firmly on the side of the claimant and held that she had been discriminated against because she was married to Mr Bacon. Specifically, it was found by the tribunal that:

- Mr Ellis sided unreasonably with Mr Bacon as MD in relation to the divorce – Mr Ellis was compliant in removing the claimant as a director, not paying her dividends, reporting her to the police and suspending/dismissing her on spurious grounds; and
- these actions involved less favourable treatment by Mr Ellis against the claimant because of her marital status as wife to Mr Bacon.

The tribunal's findings in themselves were all true - the claimant was treated poorly and discriminated against because she was married to Mr Bacon. However, the issue was whether the tribunal had applied the correct legal test. Being married is a protected characteristic, but being married to/in a relationship with Mr Bacon is not. What the tribunal should have done, in applying the correct test, was to compare the treatment the claimant received as Mr Bacon's wife, to the treatment she would have received had she been in the same or a similar situation - a close, intimate relationship with Mr Bacon in the process of an acrimonious break-up, *but where they were not married*. This is a more difficult test.

Mr Ellis appealed to the EAT on the ground that the tribunal had not applied the proper discrimination law test as set out above.

The EAT went back to basics and looked at section 13(1) of the Equality Act 2010 (EqA), which sets out the basic law of direct discrimination. It states that a person, "A", discriminates against another person, "B", if, because of a protected characteristic, "A" treats "B" less favourably than "A" treats or would treat others. In this case "A" is Mr Ellis/the employer, "B" is the claimant and the protected characteristic is the claimant being married. The question, applying the correct test, is whether Mr Ellis treated the claimant less favourably because she was married, as opposed to because she was married to Mr Bacon. The discrimination had to be connected specifically with the fact of being married and marital status, not the relationship/break-up with Mr Bacon.

The EAT referred to the 2012 case of *Hawkins –v- Atex Group Limited*, a case with similar facts. In *Hawkins*, it was held that the appropriate comparator in a case such as this is someone in a relationship akin to marriage but not actually married. So if the claimant had been in a relationship akin to marriage with Mr Bacon and that relationship had ended acrimoniously, would she have been treated in the same way as she was as Mr Bacon's wife?

The EAT held as follows:

- the issue is whether Mr Ellis treated the claimant less favourably because she was married, not because she was married to a particular person;
- the question is not whether she was badly treated because she was married to a particular person; and
- the relevant comparison to make where the discrimination occurs because the individual is both married and married to a particular person, is whether the individual would have been treated just as badly had they been in the same kind of close, intimate relationship with the same person (and in this case going through an acrimonious break-up) but not married. The detrimental treatment has to be connected with the protected characteristic, namely marriage, as opposed to the relationship.

In possibly over-simplified terms, would the claimant have been treated the same way had she been Mr Bacon's girlfriend rather than his wife

The EAT was very sympathetic to the claimant, acknowledging that she had been very badly treated, but also acknowledging that the law must be applied correctly.

WHY THIS MATTERS

It is a reminder that direct discrimination is always an exercise in comparison. Discrimination requires less favourable treatment because of a protected characteristic, and there has to be a comparison to a person who does not have that characteristic. Less favourable treatment in itself, no matter how poor, is not enough. That is why pure bullying/poor treatment unconnected with a protected characteristic can be a difficult freestanding claim to bring.

It is also a reminder never to forget the basics.

Ellis –v- Bacon and Another

CAN PRIVATE WHATSAPP MESSAGES BE USED IN TRIBUNAL PROCEEDINGS?

This was in fact a High Court case relating to an action for misuse of personal information (MPI) brought by a claimant in tribunal proceedings against a respondent in the same proceedings. The claimant alleged that the respondent had misused her personal information by using in evidence at the tribunal around 18,000 private WhatsApp (WA) messages. The personal WA messages in question were messages between the claimant and her then boyfriend (now husband), and the claimant and her female friend. There was no doubt that the messages were personal, as explained below. The question was the extent to which the respondent acted properly in disclosing this information in the way it did, and using it as evidence to defend itself from the claimant's claims.

Rather than opposing disclosure of the personal messages at the tribunal (and bear in mind the messages effectively lost her the case) the claimant reserved her position at the tribunal and brought a separate High Court claim for MPI.

Most reports on this case focus on the High Court's findings against the respondent's various counterclaims and other applications, which were not favourable. However, this article focuses specifically on the High Court's practical guidance as to what an employer/respondent should do in situations where it comes across personal/private messages, including on work devices, and which are also relevant to defending tribunal proceedings.

The background is as follows:

- The claimant was a solicitor. She was dismissed after about eleven months' service for allegedly falsifying a timesheet;
- As a result of her dismissal, the claimant brought multiple claims at the employment tribunal, including a sexual harassment claim listing 79 separate allegations of quite serious sexual harassment, against a partner in the firm with whom the claimant worked closely;
- The claimant lost her claims at the tribunal, in particular the sexual harassment claim. She lost almost entirely because of the disclosure and use in evidence of the 18,000 WA messages referred to above;
- The WA messages were very detrimental to and fatally undermined the claimant's case. In brief they seemed to show that the alleged acts of harassment were either not entirely true or that they tended to show a course of behaviour in which the claimant was complicit – making the argument that the conduct was not unwanted by the claimant. There was also evidence that the claimant was planning some form of harassment claim as a tactic at an early stage;
- The WA messages were disclosed by the respondent at the tribunal, but how did it get them? The claimant alleged the respondent had unlawfully hacked into her laptop using her mobile phone's QR code. The respondent said this was not the case. It said it obtained the personal messages legitimately by examining the client's work laptop after her departure and finding some of the messages – the remainder were received by post from an anonymous source. The respondent's explanation, on the face of it possibly suspicious, was seemingly accepted;
- The puzzling part of the background is that the claimant did not try to exclude the WA messages from evidence at the tribunal. She did not contest the WA evidence, which probably lost her the case, but sued the respondent separately at the High Court for MPI. This is a difficult decision to understand bearing in mind the evidential power of the messages, but the claimant no doubt had her reasons;

- From an employment law perspective the interesting issue is what the High Court said the respondent should have done with the WA messages, even if they found them legitimately as claimed.

The High Court's findings on the last point were helpful generally, but from a practical perspective not to the claimant. The findings were as follows:

1. It could not seriously be contested (said the High Court) that the claimant did not have a reasonable expectation of privacy in the WA messages. The respondent argued that privacy, as such, was lost because (a) the messages were found on the claimant's work laptop and (b) the rest were received in the post. However, on (a) the High Court noted there was no explanation offered by the respondent as to why the quality of privacy was lost just because the private WA messages were downloaded/stored on a work laptop, and (b) privacy in the messages was not lost because they were received anonymously in the post. The finding at (a) is important because it illustrates that private/personal messages retain their quality of privacy even if they are stored/downloaded on a work device.

2. What the respondent should have done, given the obvious privacy of the messages, was to notify the claimant and return the messages to her. The High Court said that, even where the claimant is suing the respondent at the time the messages are found, they should be returned. The High Court said that, even though proceedings were ongoing, private information remains private and retention of private communications creates a legitimate claim for MPI. UK law discourages the kind of actions taken by the respondent. The correct course of action would have been to return the material to the claimant or her solicitors who would then have their own disclosure obligations in respect of the documents.

3. The High Court did not say that the private information could/should not be used as evidence in tribunal proceedings. If they were relevant, they could/should be used as evidence, despite their private nature. The WA messages, or at least a very small percentage of them, were relevant to the proceedings and were legitimate evidence to be used. However, the obligation to disclose the relevant WA messages fell on the claimant, and it was the claimant's obligation to disclose, not the respondent's.

4. The High Court, as a side issue, also questioned the anonymity order given to the parties, which was a matter they said should go back to the tribunal. Arguably, it is a bit late for this to have a great deal of relevance, although possibly now more for the claimant than the respondent.

The important guidance is for employers who come across WA or other private messages on a work computer/laptop/tablet/phone or other device, even in circumstances where the employee is suing the employer. The key to what should be done lies in the nature of the messages. In this case, the messages were clearly private, and at times intimate. They included details and intimate details of

the claimant's private life and sex life, but they also included very important rebuttal evidence regarding the allegations being made by the claimant.

If the correspondence is private then (a) it does not lose its quality of privacy by being on a work device and (b) it should be returned to the employee or the employee's solicitors. Respondents should not disclose in proceedings a claimant's private messages, or retain such messages, no matter how they came to the respondent's attention. It is admittedly a difficult judgment call to decide whether or not messages are sufficiently private, and employers should probably err on the side of caution. Employers would also be best advised to ensure that any claimant who is sent private messages, in whole or in part for the purposes of disclosure in proceedings, **actually discloses them** in accordance with the claimant's normal disclosure obligations.

The messages might be private, but privacy is no bar to disclosure, and no bar to being used as evidence.

The respondent did not conduct itself properly. It should have recognised the private/personal quality of the messages and should have disclosed them to the claimant, or to the claimant's solicitor. The High Court believed the messages, or a very small proportion of them, were relevant as evidence in the tribunal case but, in simple terms, they were not the respondent's to disclose. They should have been sent to the claimant or the claimant's solicitors, and the disclosure obligations would have fallen on either/both of them.

There was also criticism of the respondent's conduct in disclosing circa 18,000 WA messages, some of a deeply personal nature, when only around 40 of those messages were relevant to the proceedings.

The reality is that it would possibly have been unlikely for the claimant voluntarily to disclose personal WA messages, so in this case the respondent was lucky, particularly bearing in mind the impact the (relevant) messages had on the claimant's case. The respondent might end up having to pay damages in an MPI claim, but it seems the result of the tribunal will stand, notwithstanding the respondent's conduct in disclosing the WA messages.

WHY THIS MATTERS

At a time when WA messaging and other forms of private messaging are pretty universal, this is very helpful guidance on what employers should do when faced with discovery of private messages on work devices, including when they might be critical evidence in ongoing proceedings. Under the High Court's judgment, the relevant private messages should still have been disclosed and used in evidence, but disclosed by the claimant or the claimant's solicitors.

In practice this kind of situation is unlikely to arise. First, because individuals tend to keep private messages on private devices, particularly perhaps when they are detrimental to legal proceedings, and secondly because it is arguable that most claimants would have contested the introduction into

evidence of private messages at the tribunal stage, particularly when they were so critical to the claimant's case and there was a possible question mark over the manner in which the evidence was obtained by the respondent.

However, at least employers have High Court guidance as to what to do when this happens. One interesting point is whether the evidence would have come to light if the WA messages had never been downloaded/stored on a work device and were entirely private to the claimant. Would they ever have seen the light of day and, perhaps more relevantly, would a claimant believe that such messages were genuinely disclosable?

FKJ –v- RVT and Others

EMPLOYEE DISMISSED FAIRLY FOR DISABILITY RELATED ABSENCES

The EAT has upheld a tribunal's finding that an employee was fairly dismissed for reasons arising from his disability. The respondent was also able to show that, although the dismissal was related to the claimant's disability, it was justified in that it was a proportionate means of achieving a legitimate aim.

As with most cases involving prolonged sickness absence, the background to the dismissal needs to be set out. This case had an added complication, in that the claimant was eligible for payments under the Civil Service Compensation Scheme (CSCS). In this case a CSCS compensation payment was made, but reductions applied to the compensation payment were alleged in themselves to be discriminatory.

The background is as follows. The claimant suffered from anxiety and depression. He was signed off work in 2013, and again in 2016/2017, returning on a phased basis in March 2017. His high levels of absence led to the claimant receiving in April 2017 a "first improvement warning". Adjustments were put in place to accommodate his condition. However, despite these actions, the claimant continued to have substantial periods of sickness absence, often unrelated to anxiety and depression, and this culminated in him receiving (in his absence) a final written warning.

In June 2018, the respondent effectively reached the end of the line. It informed the claimant that, if the respondent reached the point where it could no longer sustain his high levels of sickness absence, action would be taken, and this might include dismissal. In August 2018 the claimant met with his line manager who explained that, bearing in mind the situation, meetings would take place regularly each month to see if the respondent could support his level of absence.

The claimant never returned to work. The respondent continued to consider alternative options such as ill-health retirement, but the claimant became more and more difficult to contact and was ultimately dismissed on 28 December 2018, months later. The claimant appealed but the decision to dismiss was upheld.

This situation might be familiar - it illustrates the difficulties of dealing with employees who suffer from a disability or disabilities but who also have long periods of sickness absence which are difficult for the employer to sustain. It often places employers in the difficult position of either (a) continuing to deal with or (b) ultimately dismissing, an employee who refuses to return or attempt to return to work, and who ultimately refuses even to communicate with the employer. Dismissal carries a high level of legal exposure but the employer cannot realistically sustain the employee's continued sickness absence. In such cases, even if the employer acts in good faith and takes every possible step to help and encourage a return to work, if it eventually dismisses the employee because all efforts are unsuccessful, they may well find themselves at the wrong end of a tribunal claim, just like here.

On a completely separate note, and as the claimant was a civil servant, the claimant's line manager had completed an application on the part of the claimant for a Civil Service Compensation Scheme (CSCS) payment. The CSCS provides for payments of compensation for civil servants dismissed for reasons of "inefficiency", and where the relevant department believes that compensation is appropriate. The scheme allows for reductions to compensation where it is believed that the applicant's adverse behaviour is relevant (similar to contributory fault at the tribunal). The line manager at the respondent recommended a reduction of 50%, which is quite high. Following the claimant's appeal to the Civil Service Appeal Board, the reduction was lowered to 20%, as it was felt a reduction as large as 50% did not take sufficient account of the claimant's mental health.

Following his dismissal, the claimant brought tribunal claims for unfair dismissal, and his dismissal being an act of discrimination arising from his disability. The tribunal was satisfied that the dismissal was due to the claimant's absences, which arose from his disability, but they held that the dismissal was justified as a proportionate means of achieving a legitimate aim.

The legitimate aims put forward by the respondent included (a) ensuring staff were capable of showing satisfactory attendance, (b) showing a good standard of attendance in the maintenance of a fair, effective and transparent sickness management regime, (c) efficient use of resources and (d) applying policies fairly and consistently. The tribunal held these were legitimate aims and that the steps taken to implement them were appropriate and proportionate, particularly because the claimant had every opportunity to improve his attendance.

The tribunal also found the dismissal fair. The employer had carried out all possible procedural steps to deal with the claimant and, although the tribunal noted that another employer may have taken different steps, this did not make the dismissal unfair. With regard to the CSCS compensation payment however, the tribunal considered the reduction of 50% was in part because of the claimant's disability related absences, and was not justified. It represented less favourable treatment because of the claimant's disability. However, the tribunal considered the Civil Service Appeal Board's decision to reduce the reduction to 20% to be proportionate.

The claimant appealed on quite technical grounds, arguing that the tribunal had erred in accepting that the aims of (a) ensuring that staff were capable of achieving satisfactory attendance was a real business need and a legitimate aim and (b) that the aim of applying the policies consistently could not form the basis of a fair dismissal. He also argued that the tribunal should not have addressed the Civil Service Appeal Board's decision. The question they should have asked, argued the claimant, was what award the respondent would have made in the absence of discrimination. The respondent argued separately that the finding that the CSCS payment amounted to unfavourable treatment was wrong.

The EAT held the tribunal was entitled to find that there were adverse consequences of the claimant's absences and to find that there were legitimate aims which were proportionate. The tribunal had reviewed the respondent's consideration of less discriminatory options but found these were not appropriate to achieve the relevant legitimate aims.

With regard to the CSCS payment, the EAT found that, to the extent the tribunal made a finding against the Civil Service Appeal Board, this was wrong, but they did not err in concluding that a 20% reduction might be proportionate. However, and continuing with the CSCS, the EAT went on to conclude that the tribunal had erred in its assessment of the CSCS compensation payment and disability discrimination as they should have considered the following:

a. what was the relevant treatment and;

b. whether it was unfavourable.

The EAT held that the relevant treatment was the payment of the CSCS itself, which was not unfavourable treatment as in fact the claimant had, ironically, been treated more favourably because of his disability. The tribunal had erred in focusing on the method of calculating the award, as opposed to the award itself. As such, the EAT allowed the respondent's cross-appeal and found that there was no discrimination relating to the CSCS compensation payment.

WHY THIS MATTERS

This case is an example of tribunals being relatively sympathetic to employers in situations involving long-term sickness absence and disability, a situation that employers can find very difficult, time-consuming and expensive. It also carries a high level of legal exposure, as illustrated by this case reaching the EAT. It is a helpful reminder that employers are not expected to sustain an employee's sickness absence indefinitely, even when it is accepted that the employee is suffering from a disability, and that there will be times where, for a particular employer, dismissal is the only option.

Mr J McAllister v Commissioners for HM Revenue and Customs

NEWS ROUNDUP

CHANGES TO SEXUAL HARASSMENT LAW – THE AMENDED WORKER PROTECTION (AMENDMENT OF EQUALITY ACT 2010) BILL

This is an important piece of forthcoming legislation that increases the scope of and overall protection against sexual harassment under the EqA. It has been around for a while but it is now in a Private Members' Bill which has passed its first reading in the House of Lords.

The main features of the new legislation are as follows:

- Increased protection from third party harassment - an employer will be treated as sexually harassing an employee when a third party, such as a customer or client, harasses an employee in the course of the employee's employment and the employer has failed to take all reasonable steps to prevent that harassment from occurring.

- A more complex provision will exclude discussion of/speeches about certain kinds of subject matter as constituting unlawful harassment, although this exclusion does not apply to any form of sexual matters. Under these provisions, an employer will not have failed to take all reasonable steps to prevent harassment where the harassment involves a conversation or speech in which the claimant is not a participant, or which is not aimed specifically at the claimant, and where the conversation (or speech) contains the expression of an opinion on a political, moral, religious or social matter. This is subject to the opinion expressed not being indecent or grossly offensive, and the harassment not intentional. This would be likely to cover a conversation overheard by, but not directed at, the individual, which falls short of being indecent or grossly offensive, but which might concern comments relating to matters other than sexual harassment. Conversations regarding controversial political or religious subjects might be covered if all the conditions are satisfied.

- Possibly the most important part of the new legislation is that employers will be under a new (positive) duty to take all reasonable steps to prevent sexual harassment of their employees in the course of their employment. A breach of this duty may be enforced by the Equality and Human Rights Commission (EHRC) under its existing enforcement powers and, where a claim for sexual harassment has been brought, by an employment tribunal.

- The positive duty referred to above will be supported by an ECHR statutory code of practice (similar to the ACAS Code of Practice), which will assist employers in implementing the new measures and which will be published when the changes come into force. The code of practice will not be legally binding but it will be relevant as a guide to the employer's positive duty, and will be used as a reference document by tribunals when assessing an employer's efforts to take all reasonable steps.

- Where a tribunal upholds a claim for sexual harassment, if it finds that the employer breached the duty to take all reasonable steps and/or did not comply with the EHRC code of practice, it may order an uplift in compensation of up to 25% to reflect the employer's breach.

Employers should watch this space as, when this legislation comes into force, it will add significantly to employers' obligations to prevent sexual harassment, will introduce a new statutory code of practice, and will add an uplift on compensation if the new rules have not been followed.

THE GOVERNMENT CLARIFIES ITS LEGAL POSITION ON THE MENOPAUSE

In late January 2023, the government published its response to the Women and Equalities Committee's report, Menopause and the workplace. It has accepted in principle some of the recommendations in the report but rejected two of the key recommendations, namely the commencement of the combined discrimination provision in section 14 of the Equality Act 2010 (EqA), and possibly most relevantly, a consultation on making the menopause and its symptoms a protected characteristic under the EqA. The government has confirmed it will appoint a Menopause Employment Champion, who will drive forward work with employers on menopause workplace issues and spearhead a proposed employer-led communications campaign. However, this falls far short of making the menopause a protected characteristic.

This comes as no surprise given the government's previous confirmation that it had no plans to make the menopause or its symptoms a protected characteristic, or implement the combined discrimination provisions in the EqA.

NDAS – THE CURRENT POSITION

The Legal Services Board (LSB) published papers ahead of a meeting in late January 2023, which referred to plans for a public consultation on how to address the misuse of non-disclosure agreements (NDAs). The issue of NDAs has become more prominent in recent years, along with concerns that NDAs may be testing the limits by being used to stop wrongdoing becoming known (in particular to cover up sexual misconduct and harassment). According to the LSB, there is evidence that NDAs are being used to exploit the power imbalance between employers and employees.

It is expected that LSB members will agree to a call for evidence that will be published in March 2023, before a formal consultation takes place in the summer. A policy statement or guidance is then expected to be published in early 2024.

NDAs are a standard feature of most settlement agreements (and have been for tens of years) so any developments in this area will impact on the settlement of employment disputes in the future. Watch this space.

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

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