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Insights

UK HR TWO-MINUTE MONTHLY: APRIL 2023

RELIGIOUS BELIEF DISCRIMINATION, NEURODIVERSE EMPLOYEES AND DISABILITY, UNLESS ORDERS AGAINST CLAIMANTS IN PERSON, AND GENERAL NEWS ROUNDUP

Apr 26, 2023

SUMMARY

Our April update includes cases on religious belief discrimination in the education sector, with a school chaplain preaching to pupils his views on same-sex marriage, a case considering whether the potentially disruptive conduct of a neurodiverse employee was a consequence of a disability, and an EAT decision on whether an employment judge was justified in making an “unless” Order striking out the entire claim of a claimant in person. We also feature a news roundup, including the importance of flexibility to staff retention, a new review of the UK employment whistleblowing regime, and the progress of employment-related private members bills as they come ever closer to becoming law.

TRIBUNAL FINDS THAT SCHOOL CHAPLAIN WAS NOT DISCRIMINATED AGAINST

The claimant, a school chaplain, delivered a sermon to pupils in which he told them they did not have to accept “the ideas and ideologies of LGBT activists” where they conflict with Christian values, and that they should remember that religious belief is just as protected by law as sexual orientation. Whilst the claimant caveated his sermon with a generalised need for respect and “love thy neighbour”, the pupils received the fundamental message that, in essence, it was wrong to be LGBTQ+ and religious belief allowed them to discriminate. This was borne out in the subsequent complaints received by the school. This led to the claimant’s dismissal. He was later reinstated on appeal and the sanction downgraded to a final written warning. However, on reinstatement, he was subject to various management instructions to prevent repeat behaviour.

The claimant was then (amongst other staff) made redundant approximately a year later as part of a restructuring/cost saving exercise. The claimant alleged that his redundancy had been “artificially

orchestrated" and brought claims of religious discrimination, harassment and unfair dismissal against the school.

The tribunal held that:

- the school's treatment of the claimant did not relate to his religious beliefs. It accepted the school's evidence that it had no issue with the claimant's beliefs or his right to manifest them. Rather it was the manner in which he expressed his beliefs and the subsequent impact that caused an issue. It was because of the time, the place, and to whom he expressed his beliefs, and the manner in which he expressed them, which were objectionable and caused his dismissal. The subsequent management instructions that were imposed on him on his reinstatement were also made because of the objectionable manifestation of his beliefs;
- the claimant's right to manifest his beliefs in the manner he did, did not outweigh the school's duty to safeguard its pupils from harm or potential harm;
- the balancing exercise under the Equality Act 2010 (EqA) involved a consideration of whether a less intrusive measure could have been taken by the school. Here, the school had already tried a less intrusive measure by trying to educate and inform the claimant about the potential harm of delivering anti-LGBT sermons, but he subsequently repeated the behaviour;
- the matters complained of by the claimant were not therefore because he held his beliefs or because he manifested them;
- the claimant's dismissal by reason of redundancy was genuine and not artificially orchestrated to get rid of him and the school had acted reasonably in dismissing him through redundancy.

WHY THIS MATTERS

This is one of a number of current cases which examine the line between treatment that is due to a protected belief and the manifestation of that belief in circumstances which may impact on the protected rights of others. While cases such as *Forstater v CGD Europe and other* and *Bailey v Stonewall Equality Limited and others* have found in favour of the claimants and suggest that it may be difficult for employers to take action on these issues, this case is an example of a tribunal finding a way to differentiate between the ability to express beliefs even if others find them offensive, as opposed to circumstances where expressing beliefs goes further than can be tolerated.

In this case, the fact that the conduct was directed towards children and the claimant's apparent failure to understand the respondent's safeguarding concerns appear to have played a fundamental part in the tribunal's decision. However, with further cases on similar issues, including the appeal in *Higgs v Farmor's School* coming up, this is an area which remains complex for employers to navigate.

EMPLOYEE'S DISRUPTIVE CONDUCT NOT RELATED TO DISABILITY

The claimant was employed by the respondent as a registration officer from July 2014. He was neurodiverse, having dyslexia, symptoms of asperger's syndrome and partial hearing loss. This meant the claimant encountered difficulties with interactions with colleagues in the workplace. The respondent was aware that the claimant was dyslexic when he was recruited.

Between 2015 and 2017, the claimant was examined by an occupational health adviser, a psychologist and a psychiatrist several times. They reported that the claimant had a tendency to alter his speech in situations of stress, anxiety and conflict. In particular, it was reported that, when under stress, the claimant tended to raise his voice, use inappropriate speech and tone, and adopt aggressive mannerisms.

A number of incidents occurred throughout the claimant's employment which caused his colleagues to complain that he was loud and disruptive. In particular, the claimant had two difficult interactions with a more senior colleague, Ms Patel, in 2015 and 2016. These arose as a result of the claimant challenging instructions given by Ms Patel. The tribunal referred to these interactions as the claimant's "meltdowns". Ms Patel complained that the claimant was "rude, disrespectful and wholly inappropriate, with aggressive gestures and body language that was wholly out of place". She also reported being in tears following these interactions.

Following this, further difficulties between the claimant and his colleagues were reported, and the claimant was given a written warning in January 2017 for failing to follow instructions. The claimant had another confrontation with Ms Patel in early 2017, which led to a further referral to occupational health. In May 2017, Ms Patel carried out the claimant's annual appraisal, during which he was told that some of his work had improved, but that some aspects of his work were not meeting acceptable standards.

The claimant's behaviour led to him receiving a warning that he could face dismissal, following his giving incorrect information to a candidate which, he was warned, could amount to serious misconduct. By this point, the claimant had already received a written warning.

The claimant raised a grievance in July 2017 in relation to the disciplinary charges, the warning issued to him and his appraisal by Ms Patel. The grievance proceedings were lengthy and lasted into 2018. The claimant left the respondent in 2019 and brought a claim under section 15 of the Equality Act 2010 (EqA), alleging that the respondent had discriminated against him by treating him less favourably for behaviour that had arisen as a result of/in relation to his disabilities.

The tribunal examined the claimant's behaviour. The respondent said it had asked the claimant not to stand up at his desk to speak to his colleagues in the workplace because he had a loud voice and

his colleagues found it disruptive. The tribunal found that standing up at work was not something that had arisen as a consequence of the claimant's disability - it was a habit and was not covered or explained in the medical reports submitted to the tribunal.

The tribunal also considered that one of the claimant's "meltdowns", which followed Ms Patel approaching the claimant in a seemingly confrontational manner, occurred because the claimant had a short temper and resented being told what to do, rather than because he was dyslexic or aspergic.

The tribunal also found that no detriment had been suffered by the claimant in respect of his appraisal by Ms Patel, when she said that his performance had been lacking. The tribunal generally found that the claimant's disability was not the cause of the issues raised by the claimant relating to employment.

The claimant appealed to the EAT on the basis that the tribunal did not consider whether his disability could have been a contributory factor to/cause of his conduct, without necessarily being the sole or predominant cause of it.

The EAT referred to the relevant legal principles and said that, when considering the issue of whether discrimination arising from disability has occurred, the tribunal must ask itself the following questions:

1. What are the identified disabilities?
2. What are their effects?
3. What less favourable treatment is alleged and proven?
4. Was that less favourable treatment "because of" the disabilities, or the effect(s) of the disabilities?

The EAT criticised the tribunal for being binary in its thinking and only considering the immediate triggers of the claimant's behaviour. The tribunal failed, at any point, to consider that something (in this case, the claimant's meltdowns and seemingly aggressive behaviour) could be matters where the claimant' disability had been only a contributory factor. The EAT emphasised that the claimant's disability need not be the predominant or sole cause of the "something" that arose from it, just a contributory factor.

However, the EAT held that, notwithstanding the shortcomings of the tribunal's judgment, there still had to be a link between the claimant's disability and the "something"/conduct leading to the less favourable treatment. The EAT found that the tribunal had not made an error of law in this regard. It had been entitled to find that the claimant's conduct did not arise as a consequence of his disabilities within the meaning of the EqA. The appeal was dismissed.

The EAT acknowledged that a disability may be only a contributory factor in an individual's behaviour but, on the facts, this was not so in this case.

WHY THIS MATTERS

This case serves as a reminder that successful disability discrimination claims, including those involving discrimination arising from a disability, do not require an employee's disability to be the sole of even predominant cause of the relevant conduct, but the disability must play more than a trivial part in causing something which leads to the individual being treated less favourably. In this case the link between the conduct of the claimant and his disabilities was not sufficient for this to be established even as a contributory factor.

McQueen -v- General Optical Council

UNLESS ORDERS AND NO SHOW CLAIMANTS

The claimant was dismissed in June 2020 and brought claims against the respondent, including unfair dismissal, race, pregnancy/maternity and sex discrimination, a redundancy payment and unlawful deductions from pay. The claimant represented herself. The respondent complained that the claimant's claim was "*inadequately particularised…in part*" and requested further particulars. No further particulars were provided.

There was a case management preliminary hearing (CMH) in March 2021. The claimant did not attend and gave no good reason. The employment judge was unimpressed, commenting on her failure to attend as follows - *"…the waste of time and money…is obvious and inexcusable. The purpose of the [CMH] [is] to clarify the dispute and agree practical steps to bring it to an effective hearing".*

At the CMH the tribunal made orders for further particulars for parts of the claimant's claims. The pregnancy/maternity claim specifically was viewed by the tribunal as being out of time and having little prospect of success. The claimant had returned from her last bout of maternity leave in early 2018 but was dismissed in June 2020, over two years later. As a result of this, along with the claimant not being present to explain matters, the employment judge at the CMH made a deposit order against the claimant. No deposit was paid and no further particulars were received.

A further CMH was held in October 2021 and the claimant again did not attend. The respondent, noting that no progress had been made in preparing for the hearing, expressed concern that the final hearing, scheduled for March 2022, was in jeopardy. The claimant had shown no interest in progressing the case. The Orders made at the March 2021 CMH had been ignored, the claimant has taken no action and the claimant had failed to turn up to hearings twice. The employment judge made an "unless" Order stating that:

"Unless no later than 29 October 2021 the claimant complies in full with… the Order made on 31 March 2021, [her] entire claim will [be] struck out without further intervention by the tribunal"

By 17 November the claimant had still not complied with the "unless" Order, and her entire claim was struck out. There was a third CMH in December 2021, which the claimant again did not attend. The employment judge confirmed his refusal to set aside the "unless" Order and made an award of costs against the claimant for £3,975.

The claimant appealed to the EAT against the making of the "unless" and deposit Orders. In relation to the "unless" Order, the claimant argued that there was an error of law in ordering that her entire claim be struck out when the further particulars ordered in March 2021 related only to discrimination claims. She alleged it was disproportionate for the tribunal to have made an "unless" Order in relation to her entire claim. The deposit Order appeal was on thinner grounds, the claimant arguing that the tribunal had misunderstood her pleaded case and had failed to seek further particulars from the claimant as what her pleaded claim meant.

The EAT held as follows on each Order:

The "unless" Order

The EAT dismissed the appeal and upheld the "unless" Order for the following reasons:

- the unfair dismissal and redundancy pay claims were closely linked to the race discrimination claim, for which further particulars had been ordered. They were not standalone claims - the unfair dismissal claim relied on a discriminatory reason for dismissal and the redundancy claim was a contractual redundancy payment denied to the claimant because of race. The employment judge had not overlooked any claims and had carefully considered all the facts;
- the Order had been made as part of case management, not to penalise the claimant. Its use was not disproportionate because of the circumstances – the final hearing was in jeopardy, the claimant had shown no inclination or willingness to co-operate in dealing with the issues in the case, and her total inactivity between March-October 2021 did not bode well for being fully ready for a main hearing in March 2022. The "unless" Order was proportionate because it was the only way the employment judge thought the case would progress; and
- the terms of the Order were very clear in that it clearly stated that the "entire" claim would be struck out.

The deposit Order

The EAT dismissed the appeal and upheld the deposit Order. It held that the pregnancy/maternity discrimination case (as pleaded) had an obvious issue with time limits, with the alleged act(s) of discrimination taking place over two years ago prior to dismissal. At the appeal stage the claimant

tried to link the 2018 complaint with a grievance lodged in 2020, hoping perhaps to establish a "continuing act" of discrimination. This was rejected on the grounds that the grievance issue was not pleaded - the employment judge could only go on what was in front of him, and claimant was not present to explain the position. It was reasonable in all the circumstances to make the deposit Order.

WHY THIS MATTERS

This decision clarifies the law on the making of "unless" Orders and deposit Orders, particularly where there are multiple claims. It also shows that, although tribunals accommodate and give latitude to litigants in person, it is important for litigants in person to attend hearings, unless there is good reason not to attend, and comply with tribunal orders, or at least make an effort to.

The fact that the claimant had not attended two CMHs and had made no attempt to comply with tribunal Orders was a very important contributory factor in the making of the "unless" Order and it being upheld on appeal.

Rojha-v- Zinc Media Group plc

NEWS ROUNDUP

FLEXIBILITY CRITICAL TO RETAINING WORKERS

New research into "the changing world of work" has shown that more than a third of UK workers would quit their job if employers demanded a full-time return to the office. Of the six in ten employees considering changing their job this year (2023), 20% would remain in their current role if allowed to work remotely or more flexibly. Workplace flexibility is particularly important to women - 52% of those surveyed have left or are considering leaving their job due to a lack of flexibility.

However, wholly remote working is not faring so well. While many employers continue to adopt a hybrid model, in the last 10 months the number of job postings for wholly remote roles has decreased by almost 30% and now represents just 11% of all UK job postings. With 25% of job applications in February 2023 being made to remote roles, demand for such roles is outstripping supply. It seems hybrid working may be having the unusual effect of reducing the demand for wholly remote workers.

REVIEW OF WHISTLEBLOWING LAW

On 27 March 2023, the government launched a review of the current whistleblowing legal framework. The review is being led by the Department for Business and Trade and is expected to be completed by Autumn 2023. The aim is to change government policies on the development and improvement of the existing whistleblowing regime. This follows an announcement in March 2021

that a review of whistleblower protection would take place and data published by whistleblowing advice service Protect, which showed that one in four Covid-19 whistleblowers who contacted its advice line were dismissed.

The review will consider evidence from whistleblowers, key charities, employers and regulators on the effectiveness of the current legal regime in meeting its original objectives. These objectives were providing a route for workers to make disclosures, protecting those who do so and supporting wider cultural change to recognise the benefits of whistleblowing. Watch this space, as whistleblowing law in the UK could be changed before the end of the year, or in the early part of 2024.

UPDATE - PRIVATE MEMBERS BILLS WHICH WILL AFFECT EMPLOYERS

Although there has been little progress with the government's Employment Bill, there are a number of private members bills which, to an extent, are making up the difference. We covered in February the Amended Worker Protection (Amendment of Equality) Bill, which will introduce extensive new rules relating to sexual harassment. In addition:

- the Protection from Redundancy (Pregnancy and Family Leave) Bill, which provides additional protection to pregnant women and new parents from redundancy, is now through the committee stage in the House of Lords; and
- the Workers (Predictable Terms and Conditions) Bill, which proposes new provisions in the Employment Rights Act 1996 to give certain workers, agency workers and employees a new statutory right to request a predictable working pattern, went through its third reading in the House of Commons on 24 March.

Progress is slow but, along with the review of whistleblowing law referred to above and the "day-one" flexible working provisions due to be introduced later this year, we could be seeing some substantial changes to employment law within the next 12-18 months.

This article was co-written with Trainee Solicitor Meg Royston.

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