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Insights

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RELIGIOUS BELIEF DISMISSALS, LITIGANTS IN PERSON NOT PENALISED FOR TECHNICAL/LEGAL MISTAKES, UNCONSCIOUS RACE DISCRIMINATION, AND GENERAL NEWS ROUNDUP

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SUMMARY

Our July update includes cases on the dismissal of a devout Christian dismissed for gross misconduct for social media criticism of pro-LGBTQ+ teaching at schools, allowances that tribunals should make to litigants in person for technical/legal errors, and a case involving potential unconscious race discrimination. We also feature a news update on new flexible working legislation, the effect of social class and nepotism on work experience and proposed limitations to new sexual harassment legislation.

WAS IT DISCRIMINATORY TO DISMISS A DEVOUT CHRISTIAN FOR CRITICISING PRO-LGBTQ+TEACHING AT SCHOOLS?

Tribunals continue trying to resolve issues around the expression of religious and philosophical beliefs.

In this most recent case the claimant, a religious Christian working in a secondary school, was dismissed for gross misconduct after the school received complaints about her social media posts about relationship education in primary schools. In particular, she expressed concern about children being taught liberal, pro-LBGTQ+ views towards same-sex marriage and trans issues, with gender being expressed as a matter of personal choice.

The claimant brought claims based on her dismissal being an act of direct discrimination because of religion or belief and/or harassment relating to her religious belief – a protected characteristic under the Equality Act 2010 (EqA).

The tribunal found that the claimant's dismissal was not because of her religious belief (or its expression) but because the respondent reasonably considered that her social media comments

were both homophobic and transphobic. The claimant appealed.

The EAT upheld the claimant's appeal, finding the tribunal had not applied the correct legal test. It held that individual human rights always come first. The expression of an individual's religion or belief can only be interfered with if such interference has a solid legal basis, is necessary in a democratic society, and is proportionate. In other words, a high bar.

The long line of cases in this area demonstrates that there is always a balancing act between the rights of an individual to express beliefs, and the legitimate interests of others. In this case, the EAT held that the tribunal did not consider whether the decision to dismiss the claimant for gross misconduct was a proportionate response to the expression of her beliefs. The EAT remitted the case back to the tribunal for the proper tests to be applied and set out some helpful guidelines:

- The right to express views relating to belief is an essential right, irrespective as to whether the belief in question is popular, and even if its expression may offend;
- This right, however, is qualified. An expression of belief will be protected, but not where the law permits the limitation or restriction of such expression to protect the rights and freedoms of others;
- Whether such a limitation or restriction is objectively justified will always be context-specific. The relationship of employment will be relevant, but different considerations will inevitably arise;
- The tribunal must consider (a) whether the employer's objective is sufficiently important to justify the limitation in question, (b) whether the limitation is rationally connected to the objective, (c) whether a less intrusive/severe limitation could be imposed, and (d) whether the limitation on the rights of the employee outweighs the importance of the objective;
- In answering the questions above, the employer should have regard to
  - the tone and content of the expression (for example its level of offensiveness);
  - the employee's understanding of the likely audience;
  - the extent and nature of any intrusion into the rights of others, and any impact on the employer's ability to run its business;
  - whether the views might be seen as representing the views of the employer (as opposed to being the personal views of the individual), and whether any ambiguity presents a reputational risk;
  - whether there is a potential power imbalance between the parties; and
  - whether there is a potential impact on vulnerable service users/clients of the employer.

WHY THIS MATTERS

The essence of the EAT's decision was that the tribunal, rather than objectively applying the legal tests, considered the claimant's posts in light of the respondent's view that they were homophobic and transphobic. Also, the tribunal had not considered the proportionality of the response, in particular whether (as opposed to a gross misconduct dismissal) a less severe penalty/option might have been explored.

These issues will continue to present employers with difficult decisions, having to balance competing protected characteristics. Given that compensation for discrimination is uncapped (albeit based on income), the stakes will often be high and decisions on how to address competing interests rarely straightforward.

Higgs-v- Farmor's School

TRIBUNALS SHOULD MAKE ALLOWANCES FOR LITIGANTS IN PERSON MAKING PROCEDURAL/LEGAL ERRORS

After 28 years of employment, the claimant was dismissed from her role as a Senior Administrator. This followed a long-term sickness absence, culminating in a final meeting in May 2019. The claimant received a letter stating she would be dismissed due to her inability to carry out her job as a result of ill-health.

Following her dismissal the claimant, as a litigant in person, brought claims for direct discrimination and harassment because of disability and age under the EqA. In her claim form, she set out a summary of some of the factual events regarding her claims. She described feeling bullied by a colleague, feeling anxious about work, her experience of panic attacks, and being signed off work as a result. The claimant brought a second claim of unfair dismissal.

There were inconsistencies in the legal/procedural documents. In the List of Issues, the claimant identified her disability as a mobility issue following hip replacements, and set out claims for direct discrimination, harassment and discrimination arising from a physical disability. However, the List of Issues did not refer to a mental impairment or any claim of a discriminatory dismissal arising from a mental impairment. This was not queried by the (legally represented) respondent. In her witness statement however, the claimant **did** describe such a claim, setting out the deterioration of her mental health, and stating that this amounted to a disability, implying this was the cause of her dismissal.

The tribunal, relying almost entirely on the List of Issues, dismissed the claimant's claims of unfair dismissal, age and disability discrimination, also holding that it had been fair for the respondent to

dismiss the claimant. It concluded the respondent had taken steps to clarify the reasons for the claimant's continued absence, had taken steps correctly to establish the medical position by referring her to occupational health, and had sought her views on the likelihood of a return to work in the foreseeable future and on any adjustments which might assist.

The claimant appealed on two main grounds:

1. The tribunal had failed to identify/consider the claimant's dismissal as an act of disability discrimination. Whilst the claimant had failed to express this precisely in her claim form or in the List of Issues (although not in her witness statement), this was an error made as a result of being a litigant in person; and

2. The tribunal had failed to consider the respondent's alleged discriminatory treatment of the claimant on the basis of her **mental impairment** in determining whether she had been unfairly dismissed.

The EAT upheld the claimant's appeal. A List of Issues is not a pleading and not determinative. The EAT held it should have been clear to the tribunal and respondent from the documents available that there was a claim relating to the claimant's mental health issues and dismissal. The claimant had stated clearly that her anxiety, work-related stress and panic attacks had caused her to be signed off on long-term sick leave. The EAT found that the claimant's witness statement, which stated that her mental health amounted to a disability, should have been an obvious indication to the tribunal and the respondent of a claim of unfair dismissal related to a disability.

The EAT concluded that, following the overriding objective, which places a duty on to the parties to assist the tribunal to deal with cases fairly and justly, the respondent should have indicated to the tribunal that the claimant's claim was wider than stated in the List of Issues. The EAT stressed it did not expect litigants in person to draw fine legal distinctions between legal matters and procedural documents. To ensure that the correct legal claims and issues are identified, the tribunal should ask a litigant in person to explain the substance and factual basis of their claims and then, through discussion, identify what the legal issues are. Whilst this process is time-consuming, the EAT emphasised that this is the correct approach when dealing with litigants in person.

WHY THIS MATTERS

This case illustrates the procedural and legal latitude given by tribunals to litigants in person. For legally represented respondents it also emphasises the sensitivities/dangers of defending cases against litigants in person.

It is finally a reminder that a List of Issues, whilst still a key document, is not a pleading and is not determinative in deciding potential issues in a dispute.

Moustache v Chelsea and Westminster NHS Foundation Trust

WAS UNCONSCIOUS RACE DISCRIMINATION TAKEN INTO ACCOUNT BY THE TRIBUNAL?

Although the phrase “unconscious discrimination” is used in this summary, the judgment itself refers to “subconscious discrimination”. As the two terms appear to mean much the same, and as “unconscious discrimination” seems to be used far more often, that term is used here.

The claimant, who commenced employment in 2019, was a Grade 7 civil servant working in the Global Strategy Directorate. She was initially employed as Head of Latin America and the Caribbean.

The facts of the case are complex but, by the EAT appeal stage, it boiled down to the claimant alleging that the respondent, particularly two of its managers, directly discriminated against her on grounds of her Indian origin. The alleged discrimination had taken place when those managers had carried out an appraisal, dealt with a grievance, and separately assessed her as being unsuitable for an alternative role with more management responsibility.

The tribunal dismissed the claims, fundamentally because the respondent, through evidence, established sustainable non-discriminatory reasons for its actions. The claimant appealed on the basis that the tribunal had failed to consider the impact of unconscious discrimination, both in its considerations and written judgment.

The claimant used a quote from a previous 1999 case to define unconscious discrimination, which is quite helpful:

“…..the question of [un]conscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s race. After careful and thorough investigation of a claim, members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn.”

This is generally helpful in identifying unconscious discrimination, but the important part of the definition for this case is the final part, where it says that findings of fact are required to infer unconscious discrimination. There has to be evidence to support it.

The EAT provided helpful guidelines:

- Any proper consideration of direct discrimination by a tribunal will include a consideration of unconscious discrimination, which is part and parcel of the rationale behind a respondent's/individual's conduct and decisions. In this case there was no question that the tribunal had considered it, even if it was not expressly stated in the written judgment. It follows that it is not necessary in written judgments to refer separately to unconscious discrimination;
- The extent to which unconscious discrimination needs to be considered depends on the circumstances. There may be cases in which the risk is higher, for example where stereotypical assumptions are made. Conversely, where there is clear evidence that conduct/decisions is/are non-discriminatory, the extent to which unconscious discrimination needs to be considered and referred to is reduced;
- As the respondent in this case accepted there was no racial stereotyping, the tribunal would have to find evidence in the respondent's reasoning for its decisions to infer unconscious discrimination - in this case there was nothing in the evidence to infer this.

As a final point, the claimant's argument that unconscious discrimination should have been expressly covered by the tribunal because she was a litigant in person was rejected.

WHY THIS MATTERS

Especially where unconscious bias/discrimination is now very much part of inclusion and diversity, it is important to have legal authority on how it is assessed by tribunals.

The EAT seems to be saying that:

- Where the conduct of a respondent, for example in a redundancy selection process, is untainted by any evidence of discrimination, unconscious bias is unlikely to be inferred but nonetheless will always be part and parcel of the tribunal's consideration;
- Where evidence of non-discriminatory reasoning/conduct is less clear, or even ambiguous, the risk of unconscious discrimination is higher and tribunals should be alert to this, particularly where some form of stereotyping may be present.

The message also seems to be that a respondent's best defence to discrimination claims is clear evidence of non-discriminatory decision making.

NEWS ROUNDUP

NEW FLEXIBLE WORKING LEGISLATION RECEIVES ROYAL ASSENT

The Employment Relations (Flexible Working) Act 2023 received Royal Assent on 20 July. It will not come into force until the Secretary of State implements the provisions of the Act through statutory

instruments, and the various provisions may not come into force at the same time.

There are several changes to the current regime. These include provisions that state:

- Employees will now be able to make two flexible working requests in any 12 month period;
- Requests have to be dealt with by employers within 2 months of receipt of a request if no extension is agreed;
- Employers are not able to refuse a request until they have 'consulted' with the employee, although there is no clear statutory requirements as to what 'consultation' needs to include; and
- Employees will no longer, in their flexible working applications, have to explain what effect agreeing to the request would have and how any such effect might be dealt with.

However, although the Act makes changes, there are some anticipated areas it does not cover, including:

- Flexible working will not be a 'Day 1 right'. Employees will still need 26 week's service. The Government has indicated that it might in the future create "Day 1" flexible working rights through secondary legislation – although none has appeared as yet. The issue is not covered in the wording of the Act;
- It does not require employers to offer a right of appeal if a flexible working request is rejected. Although the offer of a right of appeal is recommended in the ACAS Code of Practice on Flexible Working, this is not a requirement under the Act. This may present a clash between best practice (the ACAS Code is a reference point for tribunals) and the letter of the Act; and
- There is no requirement that employee consultation needs to be substantive or cover the options available. There is no minimum standard of consultation.

Essentially the Act tweaks the current flexible working regime, rather than fundamentally changing it.

SOCIAL CLASS AND NEPOTISM MAJOR FACTORS IN OBTAINING WORK EXPERIENCE

A survey of 2,000 young people undertaken by a leading accountancy firm suggests that social class and nepotism play a major role in ability to access work experience.

The survey revealed that young people from low socio-economic backgrounds were less likely to have gained work experience (40%) compared to young people on average across all socio-economic groups (47%). 71% of respondents considered it to be easier to get into certain professions, such as law, medicine and accountancy, if they had a parent who worked in a similar

profession. Of those who obtained work experience, 45% had been arranged by a family member or friend, while 30% had been arranged via school.

It has been suggested that these practices are excluding talented individuals and that businesses could play an active role in changing this. For example, they could offer young people who do not have family connections and/or financial advantage the opportunity to gain work experience.

Last year the same firm published an analysis in which it considered the career paths of over 16,500 partners and employees over a five-year period. This analysis suggested that class and socio-economic background have a greater impact on career progression than any other diversity characteristic.

HOUSE OF LORDS POTENTIALLY DILUTES OBLIGATIONS TO PROTECT EMPLOYEES FROM SEXUAL HARASSMENT

The Worker Protection (Amendment of Equality Act 2010) Bill, which essentially extends protection against sexual harassment, has potentially been reduced in scope.

The House of Lords has proposed and agreed amendments to two controversial provisions, including:

- Removing clause 1 of the Bill, which makes employers liable for the harassment of employees by third parties; and
- Amend clause 2 of the Bill so that employers will be required to take "reasonable steps", rather than "all reasonable steps", to protect employees from sexual harassment.

These proposals reflect apparent concerns that clause 1 (third party harassment) might jeopardise “free speech” and increase regulatory burdens on employers. Its removal would mean that the position under the Equality Act 2010 would remain as it has been since the removal of third-party harassment protections in 2013.

The changes from “all reasonable steps” to “reasonable steps” is said not to be a reduction of protection offered by the Bill, but the creation of a different test. However, the removal of the word “all” would seem to suggest that it could only be a lesser test.

These proposed changed are not final and any assumptions about the final wording of the bill should be treated with caution until it becomes law.

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