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Insights

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DISCRIMINATION AGAINST A TRANSGENDER EMPLOYEE, DUTY TO MAKE FURTHER ENQUIRIES ABOUT DISABLED JOB APPLICANTS, A "NON-CONTRACTUAL" SHARE INCENTIVE SCHEME TRANSFERRING UNDER TUPE, AND A GENERAL NEWS ROUNDUP.

Sep 28, 2023

SUMMARY

Our September update includes cases on whether a transgender employee was discriminated against for being subject to a "gender specific" insult, the extent to which employers should enquire about employees' disabilities in the recruitment process, and if a share incentive scheme not referred to in the employment contract could transfer under TUPE. We also feature a news update on new ICO guidelines for employers processing health data, the most helpful adjustments employers can make for employees experiencing menstruation or going through the menopause, and a report on the increasingly high level of sickness absence.

TRANS WOMAN DISCRIMINATED AGAINST WITH "EXCLUSIVELY MALE" INSULT

The claimant, a trans woman, was an agency worker engaged as a bus driver by the respondent from November 2020 until 16 January 2021. The claimant alleged she was treated less favourably by the respondent during this period on the basis of her protected characteristic of gender reassignment/transgender status in relation to three incidents:

- On 9 January 2021, another bus driver allegedly and deliberately drove a bus millimetres from the claimant while she was walking across the respondent's bus yard (the "Near Miss Incident");
- On 13 January 2021, the claimant was called a w****r by another bus driver while she was at the claimant's allocation desk (the "Insult Incident"); and
- The termination of her engagement with the respondent on 15 January 2021.

The claimant asserted that the respondent was vicariously liable for the acts of its bus drivers in relation to both the Near Miss Incident and the Insult Incident because these incidents happened in the course of their employment. Under s109(4) of the Equality Act 2010 (EqA), an employer can avoid vicarious liability if it can show it took "all reasonable steps" to prevent its employee(s) from committing discriminatory acts. The respondent's position was that the Insult Incident had not occurred, but that even if it had, it was not vicariously liable because, in accordance with s109(4), it had taken all reasonable steps to prevent the Insult Incident from occurring.

The tribunal unanimously dismissed the claimant's first and third complaints.

In relation to the claimant's second complaint (the Insult Incident), there were two competing witness accounts. The claimant said another driver called her a w****r and that Shakieb Soz, the respondent's Allocation Supervisor, was present when this occurred. Mr Soz's evidence was that he did not hear any such exchange between the claimant and the driver and that when he asked the driver concerned about it, the driver denied having spoken to the claimant.

The tribunal noted that there were numerous inconsistencies regarding the claimant's position on the Insult Incident, both as to what was said and whether there was a physical assault involved. The tribunal also noted that, as there were many drivers in the workplace, it was not unreasonable that the witness, Mr Soz, could not recall who the driver in question was.

By a majority, the tribunal found that the claimant, on the balance of probabilities, had not proven that the Insult Incident occurred. Accordingly, the allegation was dismissed. However, in reaching this conclusion, the tribunal accepted that, if the term w****r **had been** said to the claimant, this would have been sufficient to establish a prima facie case of gender reassignment/transgender discrimination. The tribunal's experience was that the relevant insult applied only to men, and that there were equivalent but different swearwords that were specifically used in common parlance to insult women. Therefore, contrary to the respondent's argument, the term was not gender neutral.

Despite the tribunal finding that the claimant failed to meet the burden of proof in relation to each of the three incidents complained of, the tribunal decided to consider whether the respondent would have been able to rely on the defence in s109(4). Although the respondent had taken a number of steps, the tribunal listed several additional steps that could have been taken. The tribunal considered that these additional steps were not unreasonable for the respondent to have taken, considering the relatively limited time, trouble and expense they might be expected to involve, measured against the marked positive impact that might be anticipated from taking them.

WHY THIS MATTERS

The issue that has attracted attention is the Insult Incident, but this was a question of fact very specific to this case, and tribunals are unlikely to agonise over the gender specificity of insults.

However, although the case is not binding on future tribunals, the tribunal's list of additional "reasonable steps" provides useful practical guidance for employers and practitioners as to the types of steps it can sensibly take to both reduce the risk of future gender reassignment/transgender discrimination claims and defend any that arise. The tribunal's list includes keeping policies relevant to discrimination up-to-date, establishing employee representative groups such as an LGBTQ+ group, delivering staff training and workshops that educate employees on the value of inclusive communications, and raising awareness of equal opportunities generally, but especially transgender awareness.

Fischer v London United Busways Limited

DUTY TO MAKE FURTHER ENQUIRIES REGARDING DISABLED JOB APPLICANT

The claimant, who has dyspraxia, was originally employed by the respondent in 2017 in its Birmingham office. The claimant was then dismissed after a short period for unsatisfactory performance and brought a disability discrimination claim. The claim was settled without admission of liability.

Subsequently, in August 2018, the claimant applied for a very similar (see below) role with the same respondent, but in London rather than Birmingham. The application process required setting up an account with a username and password, and then completing a form online.

The claimant emailed the respondent's HR department confirming he wished to apply for the role and attached a copy of his CV (which included information about his disability). The claimant requested that he make his job application orally by telephone, rather than online, because of his disability.

The senior HR manager emailed the claimant on several occasions, explaining that the application had to be made online, but asking him to let her know which aspects of the form he was finding difficult to complete. The claimant repeated that he would prefer to make an oral application and did not respond to the HR manager's written question about what parts of the form he was struggling with. Neither the claimant nor the HR manager telephoned each other to discuss matters.

The claimant's job application was unsuccessful.

He brought a disability discrimination claim at the tribunal arguing, amongst other, things that the respondent had failed to make reasonable adjustments at the recruitment stage under the EqA.

The tribunal upheld the claimant's claim, finding that the respondent had failed to make reasonable adjustments. The respondent had applied a provision, criterion or practice (PCP) by requiring candidates to create an account by providing a username and password to access the online

application form. That PCP put the claimant at a substantial disadvantage, as he was too anxious because of his dyspraxia to create a username and password to access the online form.

The tribunal held that, although the respondent did not have actual knowledge of the disadvantage to the claimant, because he did not provide specific detail as to why completion of the online form was problematic, it did find that the respondent had **constructive knowledge**. The tribunal held the law requires an employer to make reasonable inquiries to understand the disadvantage suffered by a disabled individual so that reasonable adjustments can be made. In this case, given the nature of the claimant's disability, it was not reasonable to expect the claimant to explain his difficulties solely by email and the respondent should have taken the step of telephoning the claimant so that he could explain his difficulties orally.

The respondent appealed to the EAT. It argued, amongst other things, that the tribunal had erred by finding that the respondent had constructive knowledge of the claimant's disability and the disadvantage suffered by the claimant. The EAT dismissed this ground of appeal. The tribunal had been entitled to conclude that an employer acting reasonably, faced with a dyspraxic individual asking for an adjustment to avoid filling in an online form and who failed to respond to a question in writing, would have telephoned that individual for more information. The respondent would then have had actual knowledge of the claimant's particular difficulties with the online application process and would have been able to make, or at least attempt to make, reasonable adjustments.

However, the respondent was successful on an important and separate ground of appeal. The respondent maintained that the claimant's job application was not genuine - the role he applied for was the same as the previous role from which he had been dismissed a year earlier. It was the same role, the same team and the same line manager. Why would the claimant make a genuine application for a job from which he had been dismissed by reason of poor performance a year before?

This part of the claim was remitted to a different tribunal to decide whether or not his application was a genuine one. If not, and bearing in mind this was a claim for discrimination at the recruitment stage, his claim could not succeed.

WHY THIS MATTERS

The case illustrates that when an employer knows, or ought reasonably to know, that a job applicant is disabled and that they are likely to be placed at a substantial disadvantage by a PCP, it is best practice to be proactive and thorough (in this case by telephoning the individual) to understand the effects that the disability has on them and taking steps to alleviate the disadvantage.

AECOM Limited v Mallon

EMPLOYEE'S RIGHTS UNDER SHARE INCENTIVE SCHEME "CONNECTED WITH" EMPLOYMENT AND TRANSFER UNDER TUPE

The Court of Session in Scotland held that a share incentive plan (SIP) entered into by an employee separately from his contract of employment was sufficiently "connected with" his employment to transfer under TUPE. Even though the employee's right to participate in the SIP was not contained in his contract of employment, it arose "in connection with" his employment contract. The respondent (the transferee employer) therefore had to provide a SIP that was substantially equivalent to the SIP operated by the claimant's former employer.

The claimant was originally employed by another energy company, and had joined its SIP in 2018, entering into a tripartite agreement with his previous employer and the SIP plan trustees. When the claimant's employment transferred from the original employer to the respondent under TUPE, the respondent indicated it would not provide an equivalent SIP and offered the claimant a one-off compensatory payment, which the claimant rejected. He argued that his right to participate in the SIP had transferred to the respondent under TUPE, and the respondent had to provide an equivalent SIP scheme.

The employment tribunal and EAT upheld the claimant's claim. The respondent appealed to the Court of Session, Scotland's equivalent to the Court of Appeal. The Court of Session examined the legal principles:

- Where TUPE applies, all the transferor employer's "*rights, powers, duties and liabilities* ***under or in connection with***" any contract of employment transfers to the transferee. In this case, it had to be decided whether an employee's right to participate in the SIP transferred under TUPE.

- The respondent's argument was based around the earlier case of *Chapman v CPS Computer Group*. *Chapman* was authority that, where a share option scheme (similar to a SIP) is separate from the contract of employment, rights under the scheme do not transfer under TUPE. However, the Court of Session noted that *Chapman* only interpreted a very specific rule in the share option scheme and had not considered TUPE. In particular, Chapman did not address whether rights under the relevant share option scheme were in fact (and in law) "*connected with*" the contract of employment and as such were capable of transferring under TUPE.

- The critical point was whether a SIP, not referred to in the contract of employment and entered into separately from the employment contract, was sufficiently "*under on in connection with*" the contract to transfer under TUPE. The Court looked at previous cases, which interpreted the phrase "*in connection with the contract*" widely, including non-contractual liabilities such as tort liability for personal injury. Rights and liabilities do not have to be contractual to transfer. In this case, the rights and obligations under the SIP were an integral part of the claimant's financial package - they were financed by deductions from the claimant's salary and for each

share purchased by salary deduction, the original employer would fund the purchase of "matching shares". The claimant would also be financially disadvantaged by the removal of the SIP.

The SIP arose "*in connection with*" the claimant's contract of employment/the employment relationship and the tribunal and EAT had been correct to find that the rights under the SIP had transferred.

WHY THIS MATTERS

This case highlights the wide interpretation of the TUPE phrase "under or in connection with the contract", and illustrates that non-contractual liabilities, especially those that are an integral part of the employee's employment relationship with the employer, are likely to be included.

It also highlights the importance of proper due diligence in any transaction to identify which rights and liabilities are capable of transferring, including any that are not contained in employment contracts. A transferee employer will have to review the terms of relevant schemes to decide whether it must provide them post-transfer and if so in what form.

Ponticelli Limited –v- Gallagher

NEWS ROUNDUP

ICO PUBLISHES GUIDANCE FOR EMPLOYERS REGARDING PROCESSING HEALTH DATA

On 31 August 2023, the ICO published detailed guidance for employers on processing health data. The aim is to help employers comply with their obligations under the UK GDPR and Data Protection Act 2018 (DPA 2018).

The first part of the guidance explains how the UK GDPR and Data Protection Act 2018 (DPA 2018) applies to employers and provides them with guidance through the essentials of:

- Complying with stricter statutory requirements for processing special category data;
- Providing employees with information about the employer's processing of their data;
- Performing a data protection impact assessment before processing any health data; and
- Data minimisation and security.

The second part of the guidance focuses on how data protection law applies to specific instances, such as sickness absence records, occupational health, conducting drug and alcohol testing, and how to approach sharing employee health data. The ICO confirms the legal requirements the

employer must comply with for each and sets out recommended good practice that it expects should be adopted by the employer.

Finally, there is a set of checklists to give employers a quick guide to help run through their data protection considerations whenever they need to process workers' health information.

SURVEY REVEALS MOST HELPFUL ADJUSTMENTS FOR SYMPTOMS OF MENSTRUATION AND MENOPAUSE

A recent survey of 2,000 employees revealed the most helpful adjustments for managing issues connected to menstruation and/or menopause at work.

Of the individuals surveyed, 35% said that work was affected by menopausal symptoms. A higher percentage of 53% said they experienced workplace difficulties with menstruation. The symptoms most commonly experienced were mood fluctuations, reduced concentration and motivation, fatigue, and pain.

The most helpful features for managing symptoms, which are unavailable in most offices, are a place to lie down, a hot bath and shower, and a dark or dimly lit space.

The most popular adjustments included:

- Fresh air;
- Comfortable desk seating;
- Natural light;
- A private room to go to when not feeling well (specifically for menopause and menstruation);
- Temperature-controlled spaces; and
- More focus rooms with less distractions.

It might be sensible for employers to provide rooms and medication for women experiencing difficulties with menstruation and menopause.

For more information, read our previous insight "Menstruation in the workplace"

SICKNESS ABSENCE RATES AT HIGH LEVELS

UK employees have been absent for 7.8 days on average over the past year, two days more than the pre-pandemic sickness absence rate of 5.8 days.

New survey findings from the CIPD and Simplyhealth indicate that workplace stress is a significant factor in respect of both short and long-term sickness absence. Over 76% of survey respondents reported stress-related absence in their organisation in the past year. Heavy workloads remain the most common cause of stress-related absence (67%), followed by management style (37%).

Further analysis revealed that the top cause of short-term sickness absence is minor illness (94%, which is not surprising) and mental health (39%). Long-term absence is also a feature of mental health (63%), but also includes acute medical conditions, such as stroke or cancer (51%).

The survey also provided some interesting information:

- Lack of sleep is blamed for 11% of sickness absence;
- Over a third (37%) of organisations reported Covid-19 as still being a significant cause of short-term absence;
- Organisations try to address health and wellbeing issues overall. Most (69%) offer company sick leave for all employees, while 82% provide an employee assistance programme (EAP);
- The research found, as in previous years, that average absence levels were considerably higher in the public sector (10.6 days per employee);

Smaller organisations tended to have lower sickness absence rates than larger ones, with 5.0 days per employee recorded for employers with 50 or fewer staff, and 13.3 days for organisations with 5,000 or more people.

This article was written with Trainee Solicitor Rhea Ava Patel.

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