BCLP. Client Intelligent

Insights

UK HR TWO MINUTE MONTHLY: FEBRUARY 2024

CAN A JOB APPLICANT BRING A WHISTLEBLOWING CLAIM, WHO PAYS UP WHEN A CLAIMANT WINS AT THE TRIBUNAL, AND A GENERAL NEWS ROUNDUP

Feb 28, 2024

SUMMARY

Our February update includes a case on the issue of whether job applicants can bring whistleblowing claims, and a case on who pays what compensation to a successful claimant. We also feature a news round-up looking at what employment law might look like under a Labour government, and new EHRC Guidance relating to menopause in the workplace.

CAN A JOB APPLICANT BE A WHISTLEBLOWER?

An individual can bring a claim for suffering a detriment because of making protected disclosures, better known as “whistleblowing”. However, whistleblowing legislation only protects certain types of individuals, including but not limited to employees, workers and applicants for certain roles in the NHS. But outside the special category of certain NHS roles, are job applicants generally protected in relation to whistleblowing, whether they are applying for a job as an employee or a worker?

The claimant was an external job applicant who had two job interviews at the respondent. She was unsuccessful in both. The claimant made a number of allegations against the respondent’s interview panel. The respondent conducted an investigation into the claimant’s allegations and found no evidence of wrongdoing. No right of appeal was provided. The claimant alleged she had been refused the job because of whistleblowing, and the respondent’s failure to allow her a right of appeal was a detriment imposed because of her whistleblowing. However, to bring her claim, she had to be an employee or a worker under the Employment Rights Act 1996 (ERA).

The claimant accepted that, as an external applicant, she was not an employee or worker - the wording of the ERA does not allow for external job applicants to be employees or workers. The claimant argued that this lack of protection **in itself** was a breach of Article 14 of the European Convention on Human Rights (ECHR). Article 14 provides a right for ECHR rights to be enjoyed without discrimination, including discrimination due to occupational/employment status. The

claimant claimed that, contrary to the ECHR, she had been denied whistleblowing protection because of her employment status, or lack of it, and she relied on the 2019 case of *Gilham –v- Ministry of Justice* in which it was held judicial office holders (such as judges) were entitled to bring whistleblowing detriment claims.

On appeal to the Employment Appeal Tribunal (EAT), the claimant's appeal was dismissed. The EAT found that being an external job applicant was not analogous to being an existing employee or worker, or to a existing judicial office holder, as in *Gilham*. The EAT also considered the position of internal applicants who, the EAT said, do not derive whistleblowing rights from the status of the job they are applying for, but rather from their existing job, which would include an employment/worker relationship.

WHY THIS MATTERS?

The case confirms that, although external job applicants are protected against discrimination, they are not currently protected against detriments due to whistleblowing, save for special groups who are specifically protected (e.g. in the NHS). It is also a reminder to ensure that recruitment processes are documented to avoid allegations of wrongdoing.

Sullivan v Isle of Wight Council

THE WINNER TAKES IT ALL (SUBJECT TO DEDUCTIONS) BUT WHO PAYS IT ALL?

The claimant brought successful claims against both his employer and a named individual second respondent for unfair dismissal, disability discrimination, and failure to provide written particulars of employment.

The respondents together were ordered to pay the sum of £41,446.82 as compensation for both unfair dismissal and discrimination. The tribunal suggested the two respondents were jointly and severally liable to pay the compensation awarded.

The employer's appealed this decision on remedy, and three key issues arose:

- The tribunal had not made a reduction for contributory fault. This was because it had already made a 75% reduction in compensation on the basis that the claimant was highly likely to have been dismissed anyway for a non-discriminatory reason relating to his conduct. In other words, if the discrimination were taken out of the equation, there was a 75% chance that the claimant would have been dismissed in any event. The employer argued that this failure by the tribunal, on top of the 75% reduction, to make a *further* deduction for contributory fault was wrong in law. The EAT disagreed - if a tribunal makes two deductions based on the claimant's

conduct, which is what the respondent was requesting, there is a risk of double-counting/over-deducting, for the same reason. The EAT held that the tribunal had applied the law properly;

- The claimant gained new employment after termination but was dismissed not long afterwards. The tribunal permitted compensation for a period beyond the loss of the claimant's new employment. The respondent argued that the claimant's new employment broke the chain of causation and as a result it could not be responsible for losses after the new employment had terminated. Again the EAT disagreed. The 1988 case of *Dench v Flynn & Partners* established that losses can in fact continue after the loss of a new job gained after termination, where attributing these losses to the respondent was just and equitable. The judgment emphasised that principles of justice and equity are overarching features of any assessment of discrimination compensation. On the facts, the EAT held that, when the claimant found a short spell of new employment at a lower rate of pay but lost that employment through no fault of his own, loss of earnings attributable to the respondent can continue. The chain of causation had not been broken; and
- When in a discrimination claim there are losses attributable to more than one respondent (such as an employer and an individual second respondent), the respondents will be jointly and severally liable for any compensation awarded. However, the judgment makes clear that, as far as unfair dismissal is concerned, there is no provision for individual liability, so compensation can only be recovered against the employer. Accordingly, the EAT held that any award against the second respondent for unfair dismissal could not stand. The EAT held the same applied to an award for failure to provide written particulars.

WHY THIS MATTERS

This case highlights the differences in awarding compensation in claims brought under the Employment Rights Act 1996 (ERA) and under the Equality Act 2010 (EqA). Under the ERA, a claim can only be brought against, and an award made against, the employer. Under the EqA however it is possible to join in other respondents, who will be jointly and severally liable for any award made. In practice compensation awards tend to be paid out by employers as opposed to joined individuals, but this always depends on the facts and no assumptions should be made about individuals not being liable to pay compensation.

More unusually, it demonstrates that a claimant's employment with a new employer after termination may not necessarily break the chain of causation/losses flowing from a discriminatory dismissal. However, this was specific to the fats of the case where the new employment was at a lower rate of pay and the claimant lost that employment for reasons beyond their control, not related to their conduct or performance.

Astha Ltd and another v Grewal

NEWS ROUNDUP

EMPLOYMENT LAW UNDER A LABOUR GOVERNMENT

The 2024 version of Labour's green paper "*A New Deal for Working People*", setting our proposals for employment law if it wins the next election, was recently published.

The green paper proposes several reforms to employment law, including:

- Raising the national minimum wage to cover the cost of living, paying travel time in sectors with multiple working sites, banning unpaid internships, and raising the rate of statutory sick pay (and presumably statutory maternity pay);
- Making ethnicity pay gap reporting mandatory for employers with more than 250 staff;
- Removing any qualifying periods for employment rights, including unfair dismissal;
- Creating a single employment status of "worker" (or looking at it another way, expanding the definition of employee to include workers), with both having the same rights to sick pay, holiday pay, parental leave and unfair dismissal protection;
- Extending statutory maternity and paternity leave, reviewing shared parental leave, and introducing bereavement leave;
- Making it unlawful, except in specific circumstances, to dismiss a woman for six months after returning to work following pregnancy;
- Banning zero hours contracts and "fire and rehire" practices and introducing a new right to "switch off", including protecting workers from remote surveillance;
- Extending the time limit for bringing employment tribunal claims, removing statutory compensation caps and introducing personal liability for company directors;
- Requiring employers to maintain workplaces that are free from harassment, including harassment by third parties; and
- Strengthening collective bargaining, including establishing "fair pay agreements";

Concerns have been raised by the Institute of Directors about the costs burden on employers, which could lead to British businesses becoming uncompetitive. In their view, the proposals should not be rushed through and instead need to be carefully considered over time. The British Chamber of Commerce has raised similar concerns that any changes to legislation should be proportionate and affordable to protect jobs and the economy. By contrast, the TUC are supportive of Labour's proposals, describing the policies as "transformative".

Labour pledged to introduce employment reforms within 100 days of coming into power, so if there is a November election and depending on the results, many of these reforms (some of which could make a significant difference to HR and employment practices) could be in place in just over twelve months.

EHRC GUIDANCE ON MENOPAUSE IN THE WORKPLACE

In what seems like a bold step, the EHRC published guidance on 22 February for employers on menopause in the workplace. The guidance aims to help employers understand how best to support staff experiencing menopausal symptoms.

The guidance explains menopause and perimenopause and how the symptoms can affect staff. This includes decreased concentration, increased stress, and feeling less physically able, which can lead to staff being absent from work or even leaving.

Although the menopause/symptoms of menopause is not a protected characteristic under the EqA, the guidance summarises what are described as an employer's legal obligations under the EqA, particularly in relation to the protected characteristics of disability, age and sex, where menopause claims might/could be brought. It emphasises the risk of such claims where there is a failure to make reasonable adjustments, direct and indirect discrimination, harassment, and victimisation. It also highlights an employer's obligation to conduct a workplace risk assessment under health and safety legislation.

The guidance includes three videos. The first explains how staff experiencing menopause symptoms may be protected under the EqA, the second provides examples of adjustments to support workers and the third provides guidance on having conversations about the menopause.

In terms of specific workplace adjustments, the second video suggests that these may include:

- Changes to the physical work environment, such as room temperature and ventilation and providing rest areas;
- Promoting flexibility, such as allowing working from home, changing shift patterns, and varying start and finish times; and
- Recording menopause-related absences separately from other absences due to the potential discrimination risks of taking disciplinary action for such absences, and not using language that undermines menopause symptoms.

However, although the Guidance is helpful, employers could be said to be receiving mixed messages regarding the legal position on the menopause in that:

- The government has ruled out including the menopause as a protected characteristic under the EqA;

- The EHRC guidance is setting out what reads like employers' legal obligations towards menopausal women, when those obligations actually fall under the EqA protected characteristics of disability, age and sex; and
- There is only one 2021 EAT authority (*Rooney -v- Leicester City Council*) confirming that menopausal symptoms can be treated as a disability under the EqA. That is helpful, but any case is dependent on its facts, and *Rooney* is unlikely to be applicable to every situation involving a menopausal individual.

The EHRC may taking their cue from the *Rooney* decision, which is referred to in notes to the Guidance, and bearing all this in mind, employers should obviously err on the side of caution and comply with EHRC guidelines.

The guidance can be found on the ECHR website.

This article was written with Trainee Solicitor Rhea Ava Patel

RELATED CAPABILITIES

- Employment & Labor

MEET THE TEAM

David von Hagen

London

david.vonhagen@bclplaw.com
+44 (0) 20 3400 3576

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and

professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

© 2025 Bryan Cave Leighton Paisner LLP.