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Insights

EMPLOYMENT RIGHTS BILL, WHISTLEBLOWING, AND SEX-BASED DISCRIMINATION

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SUMMARY

This week we summarise three very recent developments in employment law, one involving the Employment Rights Bill (ERB) and two new cases.

THE ERB – NEW GOVERNMENT FACTSHEETS

Perhaps realising that a 155 page Bill, with 102 pages of notes and a lengthy "Next Steps" document might be tricky for busy practitioners to absorb on the train home, the government has published a set of ten short factsheets on various areas of the Bill.

These are actually very helpful. All but one are 1-3 pages long and focus on what many will see as the areas of most interest. The factsheet on removing the qualifying period for unfair dismissal gives a better explanation than the notes. It also introduces the concept of a statutory probationary period.

Labour still seems to believe that the preferred length of probationary periods is 9 months, but this might change (up or down) with consultation. A statutory probation period is new, but it does give the provision some teeth, and along with the factsheet explanation about dismissal during statutory probation, it does seem to be taking shape.

The only longer factsheet is on trade unions, but at 13 pages that's still a train ride, rather than a day with cold towels.

WHISTLEBLOWING BEFORE EMPLOYMENT STARTS

In a recent EAT case (*MacLennan v British Psychological Society*) the claimant alleged he was removed from the role of President-Elect of a charity because of making protected disclosures

before taking up the role.

The EAT, as well as finding that disclosures made prior to employment could qualify as protected disclosures, also explored the idea of extending whistleblowing protection to individuals who are not employees or workers.

At the tribunal, it was held the claimant was not a worker, as there was no contract with the respondent. There was therefore no whistleblowing claim.

However, the tribunal went on to consider whether the claimant could claim protection for whistleblowing under the wider scope of the European Convention on Human Rights (ECHR).

It has previously been established that, under the ECHR, persons of "other" status, including individuals who are neither employees nor workers but who work in roles "analogous" to employees/workers, should have whistleblowing protection unless not having protection was justified.

The tribunal accepted that ECHR rights were engaged but held the claimant did not have ECHR whistleblowing protection because (a) his "status" was not analogous to an employee or worker and (b) the role of President-Elect of a charity was not an "other" status under the ECHR. The claimant appealed.

The EAT allowed the appeal. It held the tribunal had focused too narrowly on the voluntary (unpaid) nature of the role when concluding that a President-Elect was not analogous to a worker. The EAT identified other factors pointing towards worker status, including the role's responsibilities, the likelihood of dealing with wrongdoing, along with the overall importance of making protected disclosures, and the risk of retaliation.

So in summary:

- The EAT confirmed the tribunal's decision that workers are protected from detriment by their employer for disclosures made before employment/engagement begins.
- On the ECHR "status" issue the case was remitted back to the tribunal to reconsider the claimant's eligibility for whistleblowing protection. The EAT made it clear that there is a strong argument that being a President-Elect and/or President of a charity is akin to an occupational status.

Watch this space.

"BALD" IS SEX SPECIFIC INSULT

The EAT upheld a decision that calling someone a "bald ****" amounted to sex-related harassment.

The claimant worked for the respondent for 24 years before being dismissed in May 2021. This followed two heated arguments with a factory supervisor over the maintenance of equipment. On both occasions the factory supervisor had called the claimant a “bald ****.”

The comments were personally offensive to the claimant, and it was held that the factory supervisor made the remarks with a view to hurting the claimant by commenting on his appearance. Calling the claimant a bald ****, was unwanted conduct, a violation of the claimant’s dignity, and created an intimidating environment for the claimant. The insult was made for these purposes and related to the claimant’s sex.

The tribunal found for the claimant – the conduct was sex-based harassment.

The respondent appealed. It based its appeal on the fact that “bald” was not a sex-based term. Women can also be bald, and sex-related harassment can only apply to matters that are entirely specific to being male or female. Baldness is not exclusive to men. The respondent argued that, although baldness is more common in men, women could choose to be bald or might be bald because of a medical condition. Accordingly, baldness was not a sex-based characteristic.

The EAT disagreed. The idea that sex-related harassment must be both inherent to the gender in question and rooted in the gender in question was not supported by any authority.

The EAT pointed to the tribunal’s comments that men are more likely to be bald and more likely to be on the receiving end of remarks about it. The respondent’s argument that the condition in question had to be (effectively) exclusive to one sex or the other was rejected.

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM

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