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REDUNDANCY AND ALTERNATIVE EMPLOYMENT, DISABILITY, OFFENSIVE LANGUAGE, AND A NEWS ROUNDUP

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SUMMARY

Our employment law update for June covers a redundancy case highlighting the importance of considering alternative employment, and a case where an employee attempted to justify highly offensive messages by reference to his disability. We also have a general news round-up, including a new ONS study on hybrid working, the EHRC questioned on its interim update and forthcoming employer guidance on "For Women Scotland" and recommendations on overhauling/improving parental and paternity leave.

REDUNDANCY AND ALTERNATIVE EMPLOYMENT – PROCEDURAL FAILINGS FATAL

The claimant was employed by a large chain of car dealerships for seven years, and had around 30 years' experience in selling cars. Whilst employed by the respondent he decided to move into a teaching/training role at the respondent's training academy.

Unfortunately, by mid-2020 the Covid pandemic had taken its toll on car dealerships, and by September 2020 there was a redundancy situation in the respondent's training academy. The claimant was selected for redundancy.

The respondent dealt with the substantive redundancy issues successfully. The claimant accepted that there was a genuine redundancy situation and accepted that the selection process had been implemented fairly.

However, both the tribunal and the EAT concurred that the respondent had failed in attempting to mitigate the effects of the claimant's redundancy by its lack of consideration of the issue of

alternative employment. Those failings were serious, and both the tribunal and the EAT pointed to the following:

- **Lack of support** - rather than actively helping the claimant to try and find alternative roles within the respondent, he was referred to HR, who simply said he could apply for positions advertised on the respondent's job vacancies website. This was heavily criticised by the EAT because (a) no active guidance was provided or suggestions made by the respondent and (b) the claimant was treated no differently to external candidates;

- **Access to website** – even if the claimant had searched for alternative roles on the respondent's website, he could not access it. A week after being given notice of termination, the claimant was required to return his company laptop and, as a result, he could no longer access internal emails and the company intranet;

- **Suitable vacancies ignored** - during the claimant's seven-week notice period, there were multiple alternative sales positions available within the respondent's group. The claimant had over 30 years' experience in car sales and a proven track record (including successfully managing a distributorship) yet the respondent made no effort actively to consider him for any of these roles; and

- **Blocking of applications** – possibly most damaging, an email sent by the respondent's HR department stated that, because the claimant had not been successful in an initial interview, he should not be considered for any other sales roles within the respondent's group. The rationale behind this was the claimant's apparent lack of motivation – it was noted by the respondent that the initial alternative role involved a commute of just over one hour each way, and the claimant had apparently given the impression that he was seeking alternative employment just for the sake of "remaining employed".

It also transpired that, during the claimant's notice period, he applied for at least two roles which to which external candidates were appointed, without the claimant being interviewed. Despite the respondent's management being aware of the claimant's applications, no action was taken or intervention made by management.

The tribunal judge was clearly unimpressed, stating in the judgment that:

- "*..chronology clearly shows the failure of the respondent to meet its obligation to [the claimant]. There was no support, there was delay in dealing with his applications [and an external candidate] was appointed…at the same time [the claimant] was dismissed* "; and

- "*…the human resources department, which should have been supporting [the claimant] in a search for an alternative to dismissal, instead [said] that they would not give him **any** sales role **anywhere**. This is to a man who had spent 35 years selling cars, or training people how to do so. It is hard to imagine anything less helpful*."

The EAT, dismissing the respondent's appeal, confirmed the legal principles around alternative employment, in particular the following:

ALWAYS CONSIDER ALTERNATIVE EMPLOYMENT

Employers should satisfy themselves that no alternative employment is available before dismissing the employee. The EAT supported the tribunal's finding that the respondent in this case did nothing in respect of alternative employment.

ACTIVE SUPPORT

The EAT emphasised that consideration of alternative employment is a matter that must be carried out actively and by taking positive steps. It is not sufficient simply to refer an employee to a general company job website, particularly one which the employee cannot access. The employer must provide active consideration and support and intervene where necessary (for example, when applying for a role which external candidates are also applying for), it is not sufficient for the employer to take a back seat.

REASONABLENESS ASSESSMENT

The "fairness" test under section 98(4) of the Employment Rights Act 1996 considers whether the employer acted reasonably in all the circumstances. The respondent in this case was a large organisation with significant resources but took virtually no positive steps to support the claimant in finding alternative work.

THE RANGE OF REASONABLE RESPONSES

Employers are not required to create jobs and can never guarantee alternative employment. However, they must act reasonably. The tribunal held that no reasonable employer would have adopted the respondent's hands-off approach.

Finally, the respondent applied for a *Polkey* reduction in compensation arguing that, although there may have been procedural shortcomings in the process, if they had got everything procedurally right, the end result would have been the same. However, the employment judge considered that, if the respondent had carried out its responsibilities correctly, the claimant would have secured alternative employment. Accordingly, there was no *Polkey* reduction.

WHY THIS MATTERS

The case is a reminder that all aspects of a redundancy process are important, both substantive and procedural. The failings on the part of the respondent, particularly in blocking job applications, showed a serious failure to consider alternative employment. The result was a finding of unfair dismissal for procedural reasons and, for a procedurally unfair dismissal, a relatively high award

with no *Polkey* reduction. The case also sets out useful guidelines for the steps to be taken when considering alternative employment.

Hendy Group Limited -v- Kennedy

VERY OFFENSIVE MESSAGES – JUSTIFIED BY DISABILITY?

A claim arose following the claimant's dismissal for sending inappropriate and highly offensive messages on the employer's Slack messaging platform. The claimant alleged that his comments were indirectly caused by his disability.

The facts were straightforward. The claimant, a software developer, raised three grievances, including concerns about reasonable adjustments to accommodate his disabilities. All three grievances were dismissed. During the grievance process, the claimant disclosed Slack conversations he had with colleagues, which contained inappropriate and highly offensive language, including multiple threats of violence and swearing.

Following this disclosure by the claimant, the respondent initiated disciplinary action. The claimant did not attend the disciplinary hearing, but submitted written information, which referred to the impact of ADHD and autism on his behaviour. The individual dealing with the disciplinary meeting requested further details from the claimant as well as his occupational psychologist's report, but the claimant refused to provide these and did not engage further.

The respondent dismissed the claimant without notice for posting the offensive messages. The claimant appealed unsuccessfully, following which he brought employment claims for unfair dismissal and disability discrimination.

Although the tribunal accepted that some of the offensive messages might have arisen from the claimant's disabilities, the same could not be said for certain other messages. The tribunal held that, overall, the claimant's dismissal was justified as a proportionate means of achieving the respondent's legitimate aims which were:

- preventing the use of threatening language about managers and colleagues;
- preventing harassment and other behaviour that leads to a hostile environment; and
- preventing threats of violence against colleagues.

The claimant appealed on the following grounds:

1. The tribunal should have considered whether the offensive comments arose directly from his disability, as opposed to from his frustration at the respondent's attempts at reasonable adjustments. The claimant argued his disability was the direct reason for the messaging – due to his disability he had suffered an "*involuntary loss of control of emotion*" and did "…..*not*

understand social rules". In other words he did not understand the social nuances of messages of this nature being so offensive to others; and

2. The tribunal did not consider sufficiently whether the dismissal was a proportionate means of achieving a legitimate aim. In particular, the claimant alleged the tribunal did not consider whether disciplinary options short of dismissal (such as a final written warning) would have reduced the discriminatory impact on the claimant.

On the first ground, the EAT held that the claimant did not allege at any point a **direct** link between his offensive language and his disability. He had alleged an **indirect** link but at no point in the claimant's pleadings, witness statement, written closing submissions, or application for reconsideration did he ever submit there was a direct link. Even if he had, there was minimal evidence to support it, including a lack of medical evidence.

In addition -which really damaged the claimant's case -he had edited/toned down his offensive comments on Slack during the grievance process, and it was held that, by doing this, the claimant showed he was in fact aware of the offensive nature of the comments and that the messages might be seen as misconduct by the respondent. He seemed to have a full grasp of the social rules he claimed not to understand. Accordingly ground 1 of the appeal was not upheld.

On the second ground, the EAT upheld the tribunal's decision.. The tribunal had applied the correct test and balancing exercise, including consideration of lesser sanctions. It had identified the respondent's legitimate aims, and the fact that the claimant's dismissal was considered proportionate to only three of those aims showed that the respondent had considered alternatives to dismissal. There was no evidence of the claimant assuring the respondent that his offensive remarks would not be repeated, which was evidence against a lesser sanction.

Essentially, the EAT upheld the tribunal's finding that, although some of the claimant's comments might have arisen from his disability, the respondent was justified in dismissing him, and that the dismissal was a proportionate means of achieving a legitimate aim.

WHY THIS MATTERS

This case sets out useful guidelines, particularly on proportionality, for cases where individuals with neurodivergent conditions (which might amount to disabilities) offend other individuals by their behaviour. This case was unusual in that:

- The messaging was highly offensive.
- The claimant's editing of those messages heavily undermined his argument that he did not understand the societal impact they might have.
- There was no evidence that the claimant would not repeat his behaviour.

NEWS ROUNDUP

ONS REPORT ON HYBRID WORKING

Recent data from the Office for National Statistics (ONS) has revealed that, while hybrid working has become increasingly common in England, there are significant regional and socio-economic variations.

28% of working adults now engage in hybrid working, which is an increase since before the pandemic. However, the disparities referred to above are based on several factors, including education level, income, disability, age, part-time status and geography.

The ONS survey breaks matters down as follows:

- workers with a "degree or equivalent qualification" are **ten times** more likely either to engage in hybrid working or to have access to hybrid work arrangements than those without such qualifications;
- higher earners are more likely to be hybrid workers, with 45% of workers earning £50,000 or more engaged in hybrid working, compared to 8% of those earning less than £20,000;
- disabled workers are less likely to engage in hybrid work, with 24% engaged in hybrid working arrangements compared to 29% of non-disabled workers. Disabled workers are also less likely to engage in hybrid working in occupations where hybrid working is common. Only a third of disabled workers engage in hybrid working in the "managers, directors and senior officials" occupation compared to nearly half of non-disabled workers;
- age is significant, with 36% of workers aged 30-49 hybrid working, compared to 19% of workers aged 16-29, and 24% aged 50-69;
- full-time employees are more likely to have hybrid work arrangements than part-time or self-employed workers; and
- geography also has an impact, with workers in less deprived areas of England more likely to have hybrid working arrangements than those in more deprived regions.

This is not breaking news. The ONS data to an extent reinforces/confirms the general consensus that hybrid working remains concentrated in “laptop jobs”, such as professional/financial services, scientific and technical roles, which often require a degree, are performed full-time and involve roles that can be performed remotely. By contrast, hybrid working is far more unusual in sectors such as hospitality, retail and construction.

EHRC QUESTIONED BY WEC – FINAL CODE OF PRACTICE TO BE PUBLISHED IN "LATE AUTUMN"

On 11 June, Baroness Falkner and John Fitzpatrick, Chair and Chief Executive respectively of the Equality and Human Rights Commission (EHRC), gave evidence to the Women and Equalities Committee (WEC). They were questioned on the interim update issued shortly after the Supreme Court's judgment in *For Women Scotland*. They were also questioned in relation to consultation on updating and finalising the EHRC's Code of Practice (the 'Code').

The EHRC advised that the interim update was not guidance in the strict sense, nor was it intended to be a comprehensive analysis of the *For Women Scotland* decision. The EHRC had to strike a difficult balance between clarity and acting quickly. The issue of toilet facilities for trans people was an ambiguous issue in the judgment. The EHRC confirmed that matters were being carefully considered in the consultation process and should be dealt with in the final Code. Trans people should never be put in a position where they have no access to appropriate facilities.

There have been around 5,000 responses to the consultation to date and the consultation closes on 30 June. Although the EHRC expects to provide the final Code to Parliament by the end of July 2025, it does not anticipate parliamentary approval until late Autumn.

Trans individuals were urged to respond to the consultation if they believe the interim update is inconsistent with the judgment and raises concerns about toilets/changing room facilities etc. The EHRC reported that specific sessions are being held with trans group stakeholders.

Service providers and employers are advised that, while it is important to have legally compliant policies in place, how those policies are enforced will vary. Organisations and individuals need to rely on trust, openness and honesty, with proportionality being at the heart of decision-making.

The update is encouraging, but there is no substitute for thorough and comprehensive guidance, and it appears that the full EHRC Guidance, with parliamentary approval, will not be published until October or even November 2025.

WEC PUBLISHES REPORT ON PATERNITY AND SHARED PARENTAL LEAVE (SPL)

On 10 June, the Women and Equalities Commission (WEC) published its report – "*Equality at work: Paternity and shared parental leave*" - setting out the findings of its inquiry and call for evidence.

The WEC's overall position that the SPL system is inadequate, and a full review is required. The government has committed to reviewing the SPL but has so far published very little.

The WEC identified various issues that it considers the government should review and makes recommendations the government should consider adopting. The issues and recommendations are briefly as follows:

Issues

- **Low rates of statutory pay -** The WEC considers that this the most damaging problem. Statutory pay for family leave is less than half the National Living Wage and is out of touch with the cost of living. As a result it causes financial hardship to many households.
- **Gender leave disparity** - the UK's parental leave system is far behind most comparable countries and has one of the worst statutory leave offers for fathers and other parents in the developed world. The current disparity between two weeks of statutory paternity leave and up to 52 weeks' statutory maternity leave is out of step with how most couples want to share responsibilities. Fathers are particularly poorly served, which tends to reinforce gender stereotypes about parental and domestic responsibilities;
- **Gender pay disparity** - although the government has committed to making statutory paternity leave a day-one right, this does not include a day-one right to statutory paternity pay;
- **Self-employed parents -** the exclusion of self-employed parents from the statutory system causes financial hardship and family problems;
- **SPL itself** - the WEC's 2018 review into fathers in the workplace recommended that the SPL system be replaced with an alternative to increase paid paternity level to 12 weeks. The inquiry and call for evidence found that there were some benefits to the SPL scheme, including sharing of early years' childcare, flexibility for parents, the opportunity for fathers to take more paternity leave and supporting women returning to work. The SPL system is however flawed - eligibility criteria are unnecessarily complex and difficult to understand. This deters many parents from using SPL;
- **Kinship carers** - the 2021 census showed there were around 141,000 children living with kinship carers, normally family members or friends. Kinship carers have no specific rights to paid leave and this was pushing kinship families into poverty and the benefits system; and
- **Single parent families –** are disadvantaged by the current parental leave and pay system.

Recommendations

These can be summarised as follows:

- **Extending paid paternity leave** - Statutory paternity leave should be increased to six weeks and be a day-one right;
- **Increasing statutory pay** - Statutory paternity pay should be at the same level as statutory maternity pay for the first six weeks (90% of average earnings). In the longer term, there should be a phased introduction of increases to statutory pay across the board to bring rates for all

working parents up to a substantial proportion (80% or more) of average earnings or the Real Living Wage;

- **Increase take-up of paternity leave** – provide maximum flexibility in the number of blocks that paternity leave can be taken during the first year after a baby's birth/adoption;
- **Self-employed parents** - statutory paid leave should be paid to all self-employed and non-employee working fathers and the government should introduce a Paternity Allowance equivalent to Maternity Allowance; and
- **Reform the SPL system** - access should be widened to a broader range of individuals, including the self-employed and those on lower incomes. The unnecessary complexity of the eligibility criteria should be simplified.

There are further recommendations but they tend to follow on from the issues referred to above.

Overall, this can be seen as an attempt to overhaul the system so that it reduces the financial "penalty" of parenthood, equalise maternity/paternity benefits to increase take up by fathers and encourage shared early childcare, and simplify the SPL system.

This article was written with trainee solicitor Natasha Glen.

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