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Insights

NEURODIVERGENCE, DISCRIMINATION COMPARATORS, PRIVILEGED DOCUMENTS IN THE WRONG HANDS, AND A NEWS ROUND-UP

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SUMMARY

Our employment law update for July covers cases about legal principles tribunals must consider when analysing the 'substantial adverse impact' in disability claims, the difficulties in selecting discrimination comparators, and what to do when a party to tribunal litigation receives privileged documents. We also have a general news round-up covering the latest developments in the Employment Rights Bill (including NDAs), a new development in the regulation of post-termination non-competes, and a survey on hybrid working.

TRIBUNAL DID NOT PROPERLY ADDRESS NEURODIVERGENCE IN DISABILITY RECRUITMENT CLAIM

The EAT upheld an appeal against a finding that the claimant was not disabled under the Equality Act 2010 (EqA).

The claimant, who had diagnoses of Autism Spectrum Disorder (ASD) and Attention Deficit Hyperactivity Disorder (ADHD), applied for a role at the respondent but was unsuccessful. He brought a claim for disability discrimination in relation to how the respondent handled his application.

At a preliminary hearing, the tribunal held that the claimant was not disabled under the EqA as there was no substantial impact on his normal day-to-day activities. The claimant appealed arguing that the decision was perverse in light of the contents of a Consultant Psychiatrist's report, that the tribunal had failed to recognise or accept that difficulties amounted to substantial adverse effects on his ability to carry out normal day-to day activities, and by focusing on what the claimant could do, rather than what he could not do or could do only with significant difficulty.

The EAT found as follows:

- Other than the bare fact of the diagnoses of autism and ADHD, the Consultant Psychiatrist's report did not contain uncontroverted findings of fact or medical evidence that the tribunal was bound to accept, but rather was an account of what the claimant, his mother and sister had told the Consultant. This account did not become incontrovertible simply because it had been recounted to the Consultant. While the tribunal needed to take account of the report, it was reasonable in this case to focus on the evidence in the claimant's impact assessment and it was not for the tribunal to select material from the report to supplement this.

- The tribunal had erred in law in failing to recognise or consider that the claimant's difficulties forming friendships and his inability to use public transport when crowded had a substantial adverse effect. The errors arose as the tribunal had failed to keep in mind the following three legal principles: (i) the comparison required by statute is between the claimant's abilities as they are with the impairment and as they would hypothetically be without the impairment; (ii) that it suffices if the claimant experiences a substantial adverse effect on his ability to carry out just one day-to-day activity; and (iii) it is not permissible to weigh up a claimant's ability to carry out one day-to-day activity against another in order to arrive at an overall assessment of ability to carry out day-to-day activities generally.

- The tribunal focused too much on what the claimant could do rather than what he could not do, or could only do with significant difficulty, to conclude that the difficulties were not substantial. The EAT found that the tribunal erred when focusing on the claimant's successes in examinations against his claimed difficulties "*rather than considering the impact those difficulties actually had*" and had also erred when weighing what the claimant could do in terms of social communication and interaction and using uncrowded public transport against the claimed difficulties to conclude that the difficulties were not substantial.

- In an "obiter" comment, the EAT stated it would be wrong for a tribunal to proceed on the basis that the fact of diagnosis was irrelevant to the question of 'substantial adverse effect'. The diagnoses of autism or ADHD is evidence not just of an impairment, but of its impact. The EAT observed that when determining the question of 'substantial adverse effect', a tribunal will need to engage with a clinician's view that has judged a claimant's difficulties in respect of social interaction and communication to be significant enough to merit a diagnosis of autism.

The case has been remitted to a different tribunal to determine the question of disability.

WHY THIS MATTERS

Diagnoses of ASD and/or ADHD do not necessarily mean that a claimant will succeed in establishing they have a disability under the EqA - autism and ADHD manifest in different ways in different people. It is open to a tribunal to conclude that an impact assessment lacks detail, or

medical evidence relies heavily on a claimant's self-report or that a claimant is unconvincing to conclude that the impairment is not a disability. However, tribunals need to engage with the evidence before them and should be guided by the three legal principles referred to above when determining the substantial adverse effect of an impairment.

Stedman -v- Haven Leisure Limited

FLAWS IN SELECTING COMPARATORS IN RACE DISCRIMINATION CLAIM

The EAT upheld an appeal against the tribunal's determination that there was no race discrimination in a recruitment process.

The claimant, who described himself in his claim as being of African-Caribbean descent, applied for the role of Assistant Business Development Manager at Public Health England (PHE). PHE adopted a two-stage recruitment process which was (a) an initial sift (the stage 1 sift) and (b) an interview (the stage 2 interview). PHE determined that the candidates' performance at the stage 2 interview would be the sole basis for the recruitment decision.

The claimant passed the stage 1 sift. At the stage 2 interview he scored the second highest of four candidates and was not appointed to the role. The successful candidate (Candidate B) was white.

The claimant brought a claim of direct race discrimination alleging that Candidate B did not have sufficient qualifications and experience to pass the stage 1 sift; and at the stage 2 interview, PHE should have compared each candidate's interview answers against the others, rather than using a "scoring matrix". The tribunal rejected the claim.

The tribunal held that Candidate B was not a suitable comparator because there were too many differences in material circumstances between the claimant and Candidate B in terms of their CVs, their experience and their interview performance. The tribunal used a hypothetical comparator instead and concluded that a hypothetical comparator, who unlike Candidate B would be a similarly qualified and performing white candidate, would not have been appointed to the role because PHE's decision was based on evidence which was elicited during the recruitment process and as a result of proper application of PHE's processes. It was determined that there was no evidence of any conscious or sub-conscious consideration of racial characteristics.

The claimant appealed the tribunal's decision to treat the stage 1 sift separately to the stage 2 interview. He asserted that the tribunal should have considered the recruitment process as a whole, not divided into two parts.

The EAT upheld the claimant's appeal finding that:

- While it was acceptable for the two recruitment stages (the stage 1 sift and the stage 2 interview) to be treated as separate processes, race discrimination could still be established where Candidate B, who did not have the qualifications and/or experience to pass the stage 1 sift, was favoured because of their race at the stage 1 sift, and who, without that unlawful favourable treatment, would not have been successful at the stage 1 sift.
- The tribunal's analysis of Candidate B as a comparator was irrational and inconsistent with the tribunal's own acceptance that it was appropriate to treat the two recruitment stages as separate. The alleged "material differences" would not have been taken into account at the stage 2 interview which was treated by PHE as a "clean sheet", so could not be material differences to the extent that Candidate B could not be a valid comparator. The tribunal, putting aside the qualifications and experience, should have analysed whether Candidate B was an actual or evidential comparator and, if so, it was relevant to compare how the claimant scored as against the scoring matrix when compared with how Candidate B scored.
- There was a lack of proper analysis when the tribunal considered the hypothetical comparator which was based on there being, "*nothing … which leads us to draw an inference of discrimination*". There had not been a proper analysis of comparators, real, evidential or hypothetical.

The case was remitted to a different tribunal for full redetermination

WHY THIS MATTERS

This case is a reminder of the complexities of comparators in discrimination law, which essentially is a claim based on a comparison. In this case, the obvious comparator was Candidate B, being the person who was ultimately successful in the application. The tribunal had used a hypothetical comparator to the disadvantage of the claimant.

It is noteworthy that this is the second of two cases this month on discrimination in recruitment.

Jones –v- Secretary of State for Health and Social Care

WHAT TO DO (AND BEFORE WHICH COURT) WHEN ONE PARTY TO TRIBUNAL LITIGATION RECEIVES PRIVILEGED DOCUMENTS

The claimant is a solicitor and was Chief Legal Officer at the respondent. She was dismissed by reason of redundancy and brought a tribunal claim arguing that the redundancy was a sham and her dismissal was an act of retaliation for making protected disclosures.

The respondent denied the claim and sought a partial strike out. However, in a twist of events, the claimant's husband received in the post confidential and potentially privileged documents (the "Documents"). These included emails between the respondent and its solicitors concerning the

claimant's dismissal. The claimant's husband read the Documents and started to share the "gist" with the claimant who stopped him.

The claimant's solicitors informed the respondent's solicitors of receipt of the Documents, confirmed the Documents had not been read/reviewed by the claimant or the claimant's solicitors, and stated that they would be sealed and sent to the tribunal. The respondent claimed the Documents were privileged and requested broad undertakings from the claimant and her husband, including for return of all the respondent's documents (not just the Documents); deletion of all copies and a threat of an injunction if the claimant failed to confirm that the documents would be returned and would not be sent to the tribunal.

No undertakings were provided, and the documents were sent by the claimant's solicitors to the tribunal asking for a determination of whether privilege had been waived and the disclosure of non-privileged documents.

In the meantime, the respondent obtained a without notice injunction from the High Court, which prohibited the claimant and her husband from using or disclosing "Confidential Information" (broadly defined), or from destroying the "Relevant Documents" (also broadly defined) and required delivery up of all respondent property. The claimant and her husband applied to set aside the injunction.

The High Court set aside the injunction finding that there was no adequate basis for making the application without notice.

It held that the claimant had "*acted properly in not reading the [Documents] and in stopping her husband when he began to convey the gist of it to her*". The court also held that the claimant's solicitors acted properly in not reading the Documents and taking the position that they would not do so unless the tribunal confirmed that they could. Having said that, the High Court commented that the claimant's solicitors "*were inviting trouble*" by sending the Documents to the tribunal in contravention of clear instruction by the respondent not to do so. Instead, they could have asked the tribunal for directions first or sought a compromise with the respondent's solicitors.

The principal issue for the High Court judge was whether the Documents disclosed a prima facia case of iniquity (i.e. a deliberate attempt to conduct a sham redundancy process) and, if so, the privilege would likely be lost. If not, then there would have been a breach of confidence from which the claimant may have obtained an unfair advantage.

The real issue the High Court judge said was **where** the issue should be tried finding that the best forum is the tribunal. This was because the tribunal was already familiar with the facts and would need to adjudicate on whether there was a sham redundancy exercise; the tribunal is better placed to determine on which side of the line the Documents sit, as unlike the court, the tribunal deals with employment claims day in, day out; it is a costs-free jurisdiction - a speedy trial might put pressure on the claimant to abandon a potentially meritorious claim or settle on terms that she would not

have done to avoid costs risk exposure; and the tribunal is best placed to address the consequences if there had been a breach of confidence, including striking out parts of the claim.

With regard to the injunction itself, it was held there was no justification for a without notice application. The court doubted that any judge would have granted the injunction if it had been “on notice” and the claimant and her husband had been present.

WHY THIS MATTERS

Although this case does not involve any substantive findings, it does set out what the High Court believes parties should do in situations where one party receives privileged documents. The court was generally critical of the matter being brought before it and believed the parties could and should have co-operated to resolve the matter, particularly where the claimant and her solicitors confirmed they had not read the Documents.

It reinforces the importance of cooperation and dialogue, the need for proportionality in legal tactics, and the strict standards for without notice injunctions.

Sinclair Pharmaceuticals Ltd v Burrell

NEWS

THE EMPLOYMENT RIGHTS BILL (ERB)

The ERB has now almost completed the House of Lords stage, and the following developments are worth noting:

- **NDAs** - in a recent development, the government has amended the ERB to prohibit the use of non-disclosure agreements (NDAs) in agreements between an employee/worker and an employer involving harassment or discrimination, as defined in the EqA. Any such agreement or clause will be void. The provision covers direct discrimination, indirect discrimination and discrimination arising from disability. It does not, at present, cover a failure to make reasonable adjustments or victimisation, although this may change. All types of agreements are covered, including settlement agreements. There is scope for certain agreements to be "excepted" in future regulations. While detail is limited, the government has released an impact assessment which suggests that an NDA will be permitted if it is requested by the worker.

- There have been criticisms of a proposed blanket ban on NDAs, including:
  - it might discourage employers from resolving/settling employment disputes - confidentiality is often considered an important feature of a settlement;

- employees should have the option/right of requesting an NDA – many departing employees, even those who have been involved in harassment and/or discrimination, may want to prevent employers from disclosing details. This point is covered (at least in part) in the impact assessment; and

- employees may be more reluctant to speak up if they know that litigation is more likely, or that the matter will become "public".

It is possible that the final draft bill may be more nuanced but if this provision is brought into force, which currently seems likely, it will have a significant effect on the drafting of settlement agreements, and may have an effect on the nature and scope of settling employment disputes.

- **Day one rights** – in a very recent development, the House of Lords voted against abolishing qualifying periods for unfair dismissal claims in favour of a qualifying period of six months (as opposed to the two-year qualifying period we have now). The House of Commons may ask the Lords to back down, bearing in mind that day one unfair dismissal rights were a cornerstone of its proposed reforms, but this will not be certain until the final version of the ERB is published later this year.

- **Implementation timetable** – the government has published a timetable for bringing into force various parts of the ERB. It looks as though the ERB will receive Royal Assent before the end of 2025, but the timetable for bringing it into force contains some surprises. There is a full timetable online, but selected highlights include:

  - April 2026 - the collective redundancy protective award (for failing to consult) will be doubled from a maximum of 90 days' pay to 180 days' pay; paternity leave and unpaid parental leave will become a day one right; additional whistleblowing protections will come into force; and, with regard to statutory sick pay, the lower earnings limit and waiting period will be removed;

  - October 2026 - harassment of employees by third parties, including clients, customers, and the general public, will create an actionable claim under the EqA; employment tribunal time limits/limitation periods will increase from three to six months for all claims; employers will be required to take "all reasonable steps" to prevent sexual harassment of employees, increasing the force of the preventative duty; and fire and rehire, as defined and qualified in the ERB, will become unlawful; and

  - 2027 (no month given) - day one protection from unfair dismissal will come into force (although see above the amendment put forward by the House of Lord); enhanced rights for pregnant workers will come into force; proposed changes to the collective redundancy consultation threshold numbers will come into force; a power will be introduced to enable

regulations to be made specifying steps that are to be regarded as "reasonable" to determine whether an employer has taken all reasonable steps to prevent sexual harassment; day one right to bereavement leave introduced; and the use of zero hours contracts will be modified/prohibited.

Under this timetable, some of the more contentious provisions will not be brought into force until (possibly) late 2027, which is well over two years away.

NON-COMPETE CLAUSES

The government has recently announced that it will publish a new consultation on the use of non-compete clauses in UK employment contracts and consider options for reform. In May 2023, the previous government stated it would limit the length of post-termination non-compete clauses to three months in a bid to boost competition and innovation and to give employees greater freedom to change jobs.

Although the 2023 discussions were not progressed, they seem to have been brought back to life. During a debate on the ERB about the use of AI, minister Baroness Jones confirmed that the government will be consulting on options for reform of non-compete clauses in employment contracts in "*due course*".

Baroness Jones referred to the "*extensive research and analysis in recent years looking at the prevalence of non-compete clauses in the UK*" and government research from 2023 which found that "*non-compete clauses were widely used across the labour market…with a typical duration of around six months"*. While non-competes are more common in higher-paid jobs, they are also used in lower-paid jobs. It was said that non-competes can "*adversely impact both the worker affected, through limiting their ability to move between jobs, and the wider economy, due to the impacts on competition*".

This update comes out of the blue. It was never part of the government's plan for the ERB and arose out of a discussion on freedom of movement in the AI market. However, a push for de-regulation may see limitations on non-competes as part of this. The 2023 proposals limiting all post-termination non-competes to three months may now take a higher profile.

Watch this space.

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 Great Britain, there are significant regional and socio-economic variations.

28% of working adults now engage in hybrid working of some form, an increase since the days before the pandemic. However, the disparities referred to are based on several factors, including education, income, disability, age, part-time status and geography. Those most likely to be hybrid workers are managers, directors and senior officials, those in professional occupations and those with childcare responsibilities.

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 (41% compared with 4%);
- 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.

None of this is breaking news. The ONS data to an extent reinforces/confirms the general consensus that hybrid working remains concentrated in white collar, well-paid “laptop jobs”, such as professional, scientific, and technical roles – jobs that usually 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.

This article was written with trainee solicitor Natasha Glen.

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