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EMPLOYMENT LAW BULLETIN

AUGUST 2021

Welcome to the Wrigleys Employment Law Bulletin, August 2021.

This month we cover some of the most interesting and useful employment tribunal and Employment Appeal Tribunal judgments published in the last few weeks.

We report on the EAT decision in ***Aleem v E-Act Academy Trust Limited***, which considered whether it was a reasonable adjustment to pay a disabled teacher at her former rate of pay on a permanent basis when she moved to a cover supervisor role.

In ***Fallahi v TWI Limited***, the EAT provided helpful insight into when a tribunal can, as part of its assessment of the fairness of a dismissal, examine the fairness of a warning issued in the lead up to dismissal.

Although employment tribunal cases set no legal precedent, we also report on two recently decided first instance cases. Set in the world of TV crime dramas, the very interesting case of ***Kinlay v Bronte Film and Television Ltd*** looked at whether a direct pregnancy discrimination claim could be defended on the basis of an occupational requirement not to be pregnant. And in the topical case of ***Mhindurwa -v- Lovingangels Care Limited***, the tribunal had to decide whether an employee was fairly dismissed as redundant when furlough (and claiming under the Coronavirus Job Retention Scheme) was not properly considered as an alternative.

I hope you can join us for our next free virtual Employment Brunch Briefing which takes place on Tuesday 5 October. We will be discussing what employers need to know if they are bringing in policies which restrict what employees can do on the basis of Covid vaccination status. It would be great to see you there! Please click on the link below for more information.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

Forthcoming webinars:

Employment Brunch Briefing

Can we make decisions about staff based on vaccination status?

5 October 2021 | 10:00 - 11:15

Speakers: *Alacoque Marvin and Michael Crowther, solicitors at Wrigleys Solicitors*

Click here for more information or to book

SAVE THE DATE

Wrigleys' 30th Annual Charity Governance Seminar

14 October 2021 | 09:30 - 16:30

Keynote speaker: *Debra Allcock-Tyler, chief executive at Directory of Social Change*

Speakers: *Various speakers from Wrigleys Solicitors*

Click here for more information or to book

If you would like to catch up on previous webinars, please follow this link.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

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Is permanent pay protection a reasonable adjustment?

Article published on 12 August 2021

EAT decision adds to established principles on the reasonableness of paying for a role no longer being performed.

The duty to make reasonable adjustments is unique to the protected characteristic of disability and, where it applies, an employer must treat the disabled person more favourably than others in an effort to reduce or remove the disadvantage faced by that individual.

The duty to make adjustments can arise if an employer knows, or ought reasonably to know, of an employee's disability and that person is placed at a substantial disadvantage by an employer's provision, criterion or practice, a physical feature of the employer's premises or where it caused by an employer's failure to provide an aid.

What is a 'reasonable' adjustment will depend on the individual circumstances, but broadly the factors considered are the extent to which the adjustment reduces the disadvantage, how practicable the adjustment is, what the costs, financial or otherwise, of the adjustment are and what resources the employer has to implement them. This principle is applied to practically all working arrangements, and case law has considered the extent of the duty in the context of pay.

In *Nottinghamshire County Council v Meikle [2004]* a disabled employee was absent from work due to the employer's failure to make reasonable adjustments. The employer failed to extend the employee's sick pay provision when this was exhausted, which the Court of Appeal held was a reasonable adjustment that the employer failed to carry out.

The *Meikle* case is contrasted by *O'Hanlon v Commissioners for HM Revenue & Customs [2007]*. A disabled employee exhausted their sick pay entitlement and claimed they had been put at a disadvantage by the employer's sick pay rules, as sick pay was not extended to accommodate them. In this case, the Court of Appeal upheld the EAT's decision that it would be rare for it to be a reasonable adjustment to give more generous sick pay entitlements to disabled employees in comparison to employees who were not disabled, commenting that the duty to make reasonable adjustments is not to treat disabled employees as 'objects of charity' – particularly where this may act as a disincentive to returning to work. The distinction from *Meikle* was that the extended period of sick leave in that case was due to the employer's failure to make the reasonable adjustments required, and so the duty to extend sick pay provisions itself became a reasonable adjustment.

O'Hanlon was followed by *G4S Cash Solutions (UK) ltd v Powell [2015]*, in which the EAT upheld a tribunal's decision that the employer should have protected the pay of a disabled employee assigned to a less skilled role. A distinguishing factor in this decision was that the employer had not made clear that the employee's pay would reduce as a result of the change in role.

A recent EAT decision considered whether an employer should maintain a disabled teacher's pay when she switched to a lower-paid role.

Case: *Aleem v E-Act Academy Trust Limited [2021]*

Ms Aleem became unable to teach due to a mental ill health condition qualifying as a disability under the Equality Act 2010. She was moved to the position of cover supervisor, resulting in a decrease in her salary, with her higher teacher's salary protected for three months. The tribunal found that the Academy made clear, repeatedly, that the pay protection was a temporary measure that would only last for the probation period of the new supervisor role.

When Ms Aleem's pay subsequently reduced she brought a claim for failure to make reasonable adjustments, essentially arguing the Academy should have continued to pay her at her higher

teacher's pay level. Her claims were dismissed by the tribunal.

On appeal, the EAT upheld the tribunal's decision, noting that the Academy had paid the higher rate of pay for a limited time for clear reasons and the Academy had clearly explained to Ms Aleem that this was a temporary adjustment. This was very different to Ms Aleem's expectations that higher pay should be permanent and that it would not be reasonable for the Academy to continue to pay the higher rate.

Comment

The decision in this case followed the precedent set in *O'Hanlon* that it is rarely reasonable to expect an employer to maintain pay levels for disabled employees who no longer perform the role that the pay level relates to. However, it is worth noting that this decision was arrived at by clearly distinguishing the facts in *Meikle*, *O'Hanlon* and *Powell*, as noted above.

It is clear in this case that the Academy was assisted by ensuring it was clear with Ms Aleem about the temporary nature of the higher pay level to cover a probationary period and in all other accounts it appears the Academy did what it could to make adjustments to accommodate Ms Aleem as an employee.

Whilst the decision will no doubt be welcomed by employers, it does not mean that all employers faced with the same situation would see the same result at tribunal. Reasonable adjustments claims continue to be heavily fact-dependent and a large employer with considerable resources may be expected to further than the Academy was in this case.

Tribunal did not need 'to look behind' a final written warning to consider its fairness

Article published on 27 August 2021

EAT decision confirms that Tribunals should only do so in limited circumstances.

Assuming a potentially fair reason for dismissal can be established (for example, misconduct), a Tribunal will concern itself with whether or not an employer acted reasonably or unreasonably in treating that reason as sufficient for dismissing the employee when taking all the circumstances of the case into account.

Several factors will feed into this, including the fairness of the conduct of the employer in any procedure leading up to a dismissal. Where an employee is facing capability or misconduct, this will often involve an employer issuing warnings which ultimately lead to a final written warning before an employee is dismissed.

A recent case has highlighted the approach taken by Tribunals toward the fairness of an employer issuing a final written warning before dismissal took place.

Case: ***Fallahi v TWI Limited [2021]***

Mr Fallahi was employed as Senior Project Leader for TWI. TWI raised concerns about Mr Fallahi's performance which were initially dealt with via informal performance management and the setting of objectives and targets to be met over the following 12 months.

However, before the first deadline arrived, Mr Fallahi's manager felt there was a lack of progress and so a formal capability hearing was called, at which point a final written warning was issued. As part of the warning, a three-month review period, with objectives and targets, was set out. However, two months into this the manager felt insufficient progress had been made.

TWI and Mr Fallahi subsequently entered into settlement negotiations and Mr Fallahi stayed off work sick. No settlement was agreed and a capability meeting was held. Mr Fallahi was dismissed on capability grounds in his absence. Mr Fallahi brought an unfair dismissal claim which was dismissed by a Tribunal.

At Tribunal, Mr Fallahi argued that the dismissal was unfair due to various procedural issues but in particular that the sudden use of a final written warning was not justified. Mr Fallahi wanted to open up the circumstances surrounding the issuing of the warning and TWI's potential motives for this, but the Tribunal held that it did not have to because the issuing of the warning was procedurally and substantively appropriate.

Mr Fallahi appealed on this point, arguing that the procedural flaws meant issuing the warning was "manifestly inappropriate", a phrase drawn out of case law which considered the degree to which Tribunals must look at the motives behind issuing of warnings.

The EAT upheld the Tribunal's decision noting that the Tribunal had been entitled on the evidence to determine that the circumstances surrounding the issuing of the final written warning made the issuing of the warning fair. The EAT highlighted that concerns with Mr Fallahi's performance were long standing and TWI's capability procedure allowed it to go straight to final written warnings and that doing so was reasonable in this case.

The procedural flaws Mr Fallahi had drawn on did not make the overall handling of the matter unfair, nor did it make the final decision to dismiss unfair.

Comment

The broad message from this case is that procedural flaws will not leave employers defenceless in cases of unfair dismissal and it reaffirms the point that Tribunals will not seek to look behind warnings at the employer's motives, unless the issuing of the warning itself is clearly inappropriate.

In this case, the Tribunal and EAT drew on the fact that there was considerable history to Mr Fallahi's manager's concerns about his performance and informal steps were taken to manage this before TWI issued a warning. The fact TWI jumped straight to a final warning was not inappropriate in these circumstances – the capability procedure allowed for it and Mr Fallahi had come nowhere near meeting the objectives and targets set as part of the informal process.

What will likely make a final warning, and possibly a first warning, inappropriate is where it is issued in over-reaction to a minor matter, a dip in performance or a first instance of these issues.

Actor was discriminated against when her role was recast because she would have been visibly pregnant during filming

Article published on 23 August 2021

Film company failed to defend claim on the basis that there was an occupational requirement not to be pregnant.

There are some circumstances in which employers can discriminate directly against an employee or applicant for a role on the basis of a protected characteristic. One of these is where there is an "occupational requirement" to have a particular protected characteristic. For example, an employer may decide that a role can only be carried out by a person with a particular disability, sex or race. These occupational requirements are set out in Schedule 9 of the Equality Act 2010. They apply to claims concerning decisions about recruitment, promotion, transfer, training and

dismissal.

In the case of gender reassignment and marriage / civil partnership, employers may have an occupational requirement for an employee not to be trans, or not to be married / in a civil partnership. Interestingly (when considering the case we report on below), a requirement not to be pregnant cannot be an occupational requirement.

When will an occupational requirement apply?

Employers must have very good reasons for applying an occupational requirement to successfully defend a claim. The Equality and Human Rights Commission Statutory Code of Practice makes clear that this and other exceptions to the prohibition on discrimination should generally be interpreted restrictively by courts and tribunals.

This defence can only be used when an employer can show that:

- The requirement is crucial to the role, taking into account the nature and context of the work;
- The requirement is also a proportionate means of achieving a legitimate aim (in other words it is appropriate and reasonably necessary considering the needs of the employer and the impact on the individual); and
- The person does not meet the requirement, or (except in the case of sex) the employer has reasonable grounds for not being satisfied that the individual meets it.

It is also important to note that only direct discrimination claims can be defended in this way. An occupational requirement cannot be relied upon to defend other Equality Act claims, such as indirect discrimination or harassment.

The EHRC Statutory Code of Practice gives the following examples of where an occupational requirement might apply:

"Examples of how the occupational requirement exception may be used include some jobs which require someone of a particular sex for reasons of privacy and decency or where personal services are being provided. For example, a unisex gym could rely on an occupational requirement to employ a changing room attendant of the same sex as the users of that room. Similarly, a women's refuge which lawfully provides services to women only can apply a requirement for all members of its staff to be women."

Case details: *Kinlay v Bronte Film and Television Ltd*

Ms Kinlay played the minor role of Sarah Shadlock in the first series "The Strike Series", a television detective drama based on the novels of Robert Galbraith (J K Rowling). She was expected to be cast in the second series. Her agent informed the production company in July 2019 that she was 12 weeks pregnant. Filming was to take place in Autumn 2019. The production company decided not to cast Ms Kinlay and to offer the part to a different actor.

Ms Kinlay brought a claim for direct pregnancy discrimination to an employment tribunal. The production company argued that there was an occupational requirement for the person playing the character of Sarah Shadlock not to be visibly pregnant. This was on the basis that the audience would have been confused by the character being pregnant and that this would have been contrary to the plot of the novel, which the television series closely followed. The production company argued that it was proportionate not to cast Ms Kinlay given the difficulties and costs which would have arisen in filming and post-production when attempting to conceal the pregnancy.

The employment tribunal did not agree and upheld the claim, finding that it was not reasonably necessary to apply the occupational requirement and deny the role to Ms Kinlay. The tribunal made clear that, in considering the occupational requirement defence, it had to make "a fair and detailed

analysis of the working practices and business considerations involved" rather than deciding whether the employer's decision fell within a "range of reasonable responses". It therefore took into consideration the likely impacts of concealing Ms Kinlay's pregnancy on the costs and practicalities of the filming and post-production processes and came to its own view that the decision was not justifiable.

Ms Kinlay was awarded around £4,500 for financial loss and £6,000 for injury to feelings.

Can *not being pregnant* be an occupational requirement?

Surprisingly, the employment tribunal does not seem to have considered the more fundamental question of whether an employer could ever defend a direct pregnancy discrimination claim on the basis of an occupational requirement not to be pregnant.

Unlike gender reassignment and marriage / civil partnership, pregnancy is not one of the protected characteristics listed in Schedule 9 of the Equality Act where a requirement not to have the protected characteristic can be an occupational requirement.

Employers who make a detrimental decision about recruitment, promotion, transfer, training or dismissal because an individual is pregnant will not be able to defend the claim. Similarly, employers cannot defend a direct disability discrimination claim on the basis that there is an occupational requirement not to be disabled. In such cases, the employer is likely to argue instead that the reason for the decision was not the employee's pregnancy or disability, but some other lawful reason.

Applying an occupational requirement to a role

Employers should only seek to apply an occupational requirement after careful consideration of the nature and context of the particular role in question. Broad application of an occupational requirement across various different roles in an organisation is unlikely to be justifiable.

Employers should consider and document in the case of each relevant role the business reasons for the requirement, based for example on legitimate client / customer needs, including why the requirement is necessary and appropriate. It would also be helpful to document consideration of any less discriminatory ways of achieving the same aim and to explain why this alternative approach would not be feasible in the circumstances.

Employer should have considered furlough as an alternative to redundancy

Article published on 20 August 2021

Failure to consider furlough in redundancy context meant decision to dismiss was unfair.

Redundancy is one of the five grounds on which an employer may fairly terminate employment under the Employment Rights Act 1996 (the Act). However, a redundancy dismissal will only be fair if, in all the circumstances of the case, the employer acted reasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee.

This requires an employer to do more than simply state that redundancy is the reason for dismissal. The dismissal must also be fair in all the circumstances, including following a fair consultation process and exploring alternatives to redundancy.

A recent decision from the Employment Tribunal highlights how this is further complicated in the context of the coronavirus pandemic.

Case: ***Mhindurwa -v- Lovingangels Care Limited [2021]***

Mrs Mhindurwa worked for LCL as a carer and in 2018 was employed to provide live-in care for a client. In February 2020 the client was admitted to hospital and subsequently moved into a care home, meaning Mrs Mhindurwa was no longer able to provide live-in care to the client.

LCL began a redundancy process on the basis that they could no longer offer live-in care work to Mrs Mhindurwa. LCL did offer domiciliary care work, but Mrs Mhindurwa found this unacceptable because she lived too far away to where the work was located. Mrs Mhindurwa suggested she be put on furlough, but LCL refused on the basis that it had no live-in care work due to the pandemic. When LCL confirmed the redundancy, Mrs Mhindurwa appealed but this was not upheld.

Mrs Mhindurwa brought a claim for unfair dismissal, alleging that the real reason for her redundancy was a due to pay a dispute, or that LCL should have put her on furlough instead of dismissing her.

The Tribunal concluded that LCL were genuine in stating that there was no live-in care work at the time Mrs Mhindurwa was made redundant and that redundancy was the genuine reason for her dismissal. However, when considering the fairness of the dismissal, the Tribunal reflected that the furlough scheme was available and at the time the decision to dismiss Mrs Mhindurwa was made a reasonable employer would have given consideration to whether Mrs Mhindurwa's dismissal could be avoided. The Tribunal concluded that this had not been considered, or had not been properly considered, and that the appeal also failed to consider this, effectively 'rubber stamping' the original decision. The lack of a meaningful appeal process further supported the Tribunal's conclusion that the dismissal was unfair.

Mrs Mhindurwa's unfair dismissal claim was upheld.

Comment

This case serves to highlight the importance of employers considering all of the circumstances surrounding a potential decision to dismiss an employee and may serve as a warning to employers who dismissed staff in 2020 when the furlough scheme was available. However, it is important to note that the view of the Tribunal here was that furlough should have been properly considered, not that it should have been used.

Employers will be able defend unfair dismissal claims where furlough was available but not used, provided they can show there were good reasons for this and that the dismissal was fair in all the circumstances. In this case, there was an argument that furlough should have been used for a time to see whether live-in care work returned but the employer had not addressed its mind to this alternative, rendering the decision unfair. LCL further squandered the opportunity to rectify this by conducting an ineffective appeal.

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