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EMPLOYMENT LAW BULLETIN

CASE LAW REVIEW 2021

Welcome to our Employment Case Law Review of 2021

Last year saw a flurry of important and long-awaited employment law decisions in the Supreme Court. The lower courts also provided some very useful guidance on key areas of law and best practice for those managing staff.

In our Case Law Review for 2021, we bring together ten of the most interesting and important cases from the past 12 months. These include key legal developments on the National Minimum Wage and sleep-ins, worker status, collective bargaining, and belief-based discrimination.

If you missed our recent Employment Brunch Briefing discussing some of these key cases from 2021 and changes to key employment legislation, you can access the recording through the link below.

Looking forward to the Spring, I hope you can join me and our guest speaker Ibrahim Hasan of Act Now Training for our next virtual **Employment Brunch Briefing on 1 February 2022**, an informative data protection law update for employers. **Please click on the link below to book your free place**.

Wrigleys' employment team wish all our readers a very happy and healthy New Year!

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

Forthcoming webinars:

Employment Brunch Briefing

Data protection update for employers

1 February 2022 | 10:00 - 11:15

Guest Speaker: Ibrahim Hasan, solicitor and director of Act Now Training Limited

Click here for more information or to book

Employment Brunch Briefing

To be confirmed

5 April 2022 | 10:00 - 11:15

Speaker: Alacoque Marvin, solicitor at Wrigleys Solicitors

Click here for more information or to book

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

Contents

Supreme Court rules that sleep-in hours should not be counted for National Minimum Wage purposes

Article published on 26 April 2021

Workers who are permitted to sleep during the shift are not performing "time work" or "salaried hours work"

The long-awaited decision of the Supreme Court on the question of sleep-in shifts has now been issued. It confirms the decision of the Court of Appeal in 2018 that employers do not have to include all of the hours of a sleep-in shift when calculating whether workers are being paid the National Minimum Wage or National Living Wage (NMW).

The NMW rules on sleep-in shifts

The starting point is that a worker is entitled to be paid the NMW, taking into account time when they are actually working, or when they are available and required to be available at or near a place of work for the purposes of working.

But there are exceptions to this rule. A worker who is "available" for work rather than working will not have the time taken into account if they are at home or provided with facilities to sleep during that time. In that case, only time when the worker is "awake for the purposes of working" will be counted, in other words when they are actually required to respond to a call or intervene to assist a client.

Case details: ***Tomlinson-Blake v Royal Mencap Society***

Mrs Tomlinson-Blake was employed by Mencap as a care worker supporting two people with learning disabilities living in the community. As well as her day shifts, she took some sleep-in shifts, for which she was paid a fixed allowance. She had her own bedroom in the house and was permitted to sleep during the night.

The employment contract required Mrs Tomlinson-Blake to remain in the house and to intervene to support the clients when necessary during the night. This happened only rarely (six times in 16 months). She received additional pay for time spent assisting her clients during these shifts.

Mrs Tomlinson-Blake brought a claim alleging that she had not been paid the NMW when taking into account time spent on sleep-in shifts. An employment tribunal upheld her claim, following previous case law in finding that she was actually working throughout each sleep-in shift and not merely available for work. This was on the basis that Mencap had regulatory and contractual obligations for a care worker to be in the house at all times and that Mrs Tomlinson-Blake was obliged to remain in the house and to listen out in case she was required to intervene. In other words, it was part of her work simply to be there. The EAT agreed.

The Court of Appeal did not agree. In what was an unexpected judgment at the time, Lord Justice Underhill held that Mrs Tomlinson-Blake was "available for work" during her sleep-in shift, rather than actually working. Therefore only the time when she was required to be awake for the purposes of working counted for NMW purposes.

Lord Justice Underhill stated that an arrangement where "the essence of the arrangement is that the worker is expected to sleep" falls squarely under the exception set out in the NMW Regulations, that is when a worker is available to work but provided with facilities to sleep. He did not agree with the EAT that Mrs Tomlinson-Blake was actually working simply by being present on the premises.

The Supreme Court decision

The Supreme Court has now agreed with the Court of Appeal that sleep-in hours do not have to be counted, either in the case of "time work" (where workers are paid by reference to the number of hours they work) or "salaried hours work" (where workers are paid a set salary per annum). If the worker is *permitted* to sleep during those hours, they will not be counted when calculating whether the NMW is being paid. Only time during which the worker is awake for the purposes of working (responding to calls for assistance) must be counted.

Lady Arden noted that the Low Pay Commission's (LPC) 1998 recommendations, which were taken into account by the Court of Appeal, could be presumed to have been implemented in the NMW Regulations 1999. This was because the Government was bound to implement them unless it provided reasons to Parliament for not doing so, which it did not do. The LPC recommendations were that workers who were required to be on-call and sleep on their employer's premises (such as those working in residential homes) should not have the sleep-in hours counted for NMW purposes and that employers should agree an allowance for such work. Lady Arden comments in her judgment that the LPC "did not contemplate that a person in the position of a sleeper-in could be said to be actually working if he was permitted to sleep".

Lady Arden made clear that: "If the employer has given the worker the hours in question as time to sleep and the only requirement on the worker is to respond to emergency calls, the worker's time in those hours is not included in the NMW calculation for time work unless the worker actually answers an emergency call. In that event the time he spends answering the call is included…It follows that, however many times the sleep-in worker is (contrary to expectation) woken to answer emergency calls, the whole of his shift is not included for NMW purposes. Only the period for which he is actually awake for the purposes of working is included."

Comment

This decision has been long-awaited and brings to an end a period of uncertainty and the risk of claims for very large pay-outs for historic arrears relating to sleep-ins, particularly for care sector employers.

Of course, many such employers changed the way sleep-ins were paid to comply with previous case law decisions, amended HMRC guidance and the HMRC Social Care Compliance Scheme which followed those decisions.

Mencap, in its response to the judgment published on its website, has called for care workers to be paid more, stated its intention to continue paying top ups for sleep-in shifts, and for local authorities to fund these in their contracts.

Employers using sleep-in arrangements may now seek to change the way they are paid to reflect the decision of the Supreme Court. The pay structure for workers sleeping-in will depend on the wording of the contract in each case and will not simply change because of this ruling. Any changes to contractual arrangements must be agreed with the employee, or, where relevant, through collective agreement with trade unions. Employers seeking to impose such changes without employee agreement should be aware of the risks of unfair dismissal and unlawful deduction from wages claims which could follow. Having a sound and well-evidenced business reason for the change, which is clearly communicated to employees and their representatives and meaningfully consulted on, will reduce the risks and assist employers in defending claims if they are brought. It will not be enough to cite the Supreme Court's decision in this case as the reason for the change.

Supreme Court confirms that Uber drivers are workers after denying appeal

Article published on 26 February 2021

Decision brings long-running case on key aspects of workers status to an end.

Almost since it started operating in the UK, the Uber taxi-hailing app has drawn questions about the employment status of the drivers who provide their services via the app. Uber has always maintained that it is merely a technology platform designed to connect self-employed drivers to customers. However, questions have arisen as to the accuracy of this position given how the drivers operate and are controlled by Uber when engaged to provide their services via the app.

Worker status continues to be a very fact-specific area of employment case law. Recent cases have examined contractual relationships from delivery services to referees and professional athletes. The three categories of relationship are independent contractor, worker and employee – see our article covering the distinctions on these roles (available from our website news page here) for more information.

Employers may wittingly or unwittingly mislabel a worker as a self-employed contractor. In turn, individuals may argue that they are in fact workers because worker status brings rights to paid holiday, rest breaks, and the National Minimum Wage, amongst other things. An employee has additional rights, for example in relation to unfair dismissal.

Case: ***Uber BV and others v Aslam and others***

In the case of Uber, a group of drivers brought claims in the employment tribunal arguing that they were engaged by Uber as workers whilst they provided taxi services via the Uber app. To benefit from the associated rights, the drivers would need to establish that they were workers for the purpose of the Employment Rights Act 1996 (ERA), the Working Time Regulations 1998 (WTR) and the National Minimum Wage Act 1998 (NMWA). Uber argued that drivers engaged via the app did not meet the definition of a worker within the meaning of the ERA and equivalent provisions in the WTR and NMWA. Uber's argument was that the drivers entered the contract in business for themselves and could not be workers.

However, when the case came before an employment tribunal, it determined that when it looked past the contractual relationship at the reality of the relationship between the drivers and Uber, the drivers were not self-employed. Pointing to numerous factors, including that Uber controlled the drivers' levels of pay, communication with customers, and whether or not they could continue to operate under the app, the tribunal concluded that the relationship was that of a worker and employer and that the individual driver's claims should be allowed to proceed.

The EAT and Court of Appeal both denied Uber's appeals before Uber finally appealed to the Supreme Court.

The Supreme Court unanimously dismissed the appeal and therefore upheld the decision that Uber drivers are workers for the purposes of ERA, WTR and NMWA. In its decision, the court pointed out that it was critical to understand the rights being asserted by the claimants in this case were not contractual rights, but rights created by legislation. Therefore, the court upheld the employment tribunal's approach which was to determine whether or not the drivers were workers within the statutory interpretation rather than to determine their relationship via the contractual documents in place between the drivers and Uber.

Going further, the court noted that when interpreting statutory provisions, the requirement was to give effect to the purpose of the legislation, which is ultimately to protect individuals who have

little or no say over their pay and working conditions because they are subordinate to an employer exercising control over their work and are therefore vulnerable to abuse.

The court emphasised several aspects of the employment tribunal's findings which justified the conclusion that the claimants were working for Uber:

1. Where a ride is booked through the app, it is Uber that sets the fare and drivers are not permitted to charge more – it was therefore Uber who dictated how much drivers were paid for the work they do;
2. The contract terms on which drivers performed their services are imposed by Uber and drivers have no say in them - this did not indicate that the drivers were in business for themselves as otherwise they would be able to negotiate terms;
3. When a driver had logged into the app, the driver's choice about whether to accept jobs was controlled by Uber. The court and tribunal had highlighted one way that this was done was via monitoring the driver's rate of acceptance and cancellation of jobs and imposing what was, in effect, a penalty if too many trip requests were declined or cancelled;
4. Uber exercises significant control over the way in which drivers deliver their services, such as by the use of a rating system that may lead to warnings and even termination of the driver. In effect, this gave Uber rights to impose disciplinary sanctions on the drivers; and
5. Uber restricted communications between passengers and the driver to the absolute minimum required to perform a particular ride and took steps to prevent drivers from establishing any relationship with a passenger which could exist beyond an individual ride. This further undermined opportunities for drivers to operate as an independent business and the argument that the driver entered into a separate contract with each passenger.

The court noted that drivers were therefore in a position of subordination and depended on the app and Uber to the extent that they had little or no ability to improve their economic position through professional or entrepreneurial skills. In practice, this meant the only way they could increase their earnings was by working longer hours while constantly meeting all of the various measures Uber put in place to review their performance.

Another key decision from the court was that it upheld the tribunal's conclusion that drivers were working for Uber for all of the time in which they were actually logged into the Uber app within the territory in which the driver was licenced to operate and that they were ready and willing to accept jobs. This constituted "working time" for the purpose of the WTR and "unmeasured work" for the purpose of the National Minimum Wage.

Comment

The decision of the Supreme Court to deny Uber's appeal has settled one of the longest-running and possibly most consequential employment law cases of modern times. Several key principles used to determine worker status have now been clarified by the Supreme Court which may prove useful to workers and employers alike in assessing their employment relationships.

Of primary importance is the clear assertion that the first obligation on courts and tribunals in cases such as these is to consider the employment status of an individual within the meaning of legislation based on the actual working relationship between the parties. Although the written contractual terms set out between the parties remain important, courts and tribunals have significant discretion to ignore or disapply terms and conditions stated in contractual documents if they find that these do not represent the reality of the working relationship or the intentions of the parties.

Although the decision of the court in this case carries significance, it has ultimately underlined the widely understood point that worker status cases will ultimately turn on the facts of their case. This has already been well established, even within seemingly similar industries where individuals have been found to be independent contractors or workers within parcel and food delivery courier

services.

As for the impact on Uber, the company has claimed that the decision only impacts on a small group of drivers it engaged prior to 2016, which may yet be disputed by drivers who joined the platform since.

Employers should exhaust collective bargaining procedures before making direct offers to workers

Article published on 22 November 2021

Supreme Court confirms that offers which would temporarily take a term of employment out of collective bargaining procedures can be unlawful.

Until fairly recently, most employers and many employment lawyers were unaware of the risks of claims when making direct offers to members of a recognised trade union. The case of *Kostal UK Ltd v Dunkley and others* has however brought the little-known section 145B of the Trade Union and Labour relations (Consolidation) Act 1992 (TULRCA) squarely into the limelight.

We covered the Court of Appeal judgment in this case in our article from June 2019: Can employers change terms and conditions by making offers directly to workers and avoiding trade union negotiations? (available on our website). The Supreme Court has now found in favour of the claimants, allowing their appeal against the Court of Appeal decision. This decision highlights once again the significant risks for employers who seek to by-pass collective bargaining procedures.

When will a direct offer be unlawful?

Section 145B makes unlawful any direct offer by an employer to a member of a trade union which is recognised or seeking to be recognised where:

a) the effect of the offer, if accepted, would be that the workers' terms, or some of those terms, will not or will no longer be determined by collective agreement (this is known as the "prohibited result"); *and*

b) the employer's sole or main purpose in making the offer is to achieve the prohibited result.

What are the penalties for making an unlawful offer?

Awards for unlawful offers under section 145B TULRCA are very significant and are increased each year. Since April this year, claimants can be awarded £4,341 for each separate unlawful offer. This is a fixed penalty and there is no mechanism for an employment tribunal to reduce this award.

Following the original decision of the employment tribunal in Kostal, the employer's liability was reported to be in the region of £400,000.

One-off or forever more?

A key question which arose as this case went through various stages of appeal was whether the prohibited result occurs where an offer, if accepted, only temporarily takes a term out of the collective bargaining procedure. Or was it confined to situations where the offer, if accepted, would take the term of employment out of collective bargaining procedures completely, so that it would not be included in future bargaining rounds.

For example, could it be unlawful for an employer to offer individual workers a 5% pay rise to avoid this year's collective pay negotiations, when it was clear that future bargaining rounds would

include collective agreements on pay? Or would the offer only be potentially unlawful if acceptance meant pay levels would not be decided by collective bargaining in future rounds?

The Supreme Court decision

The Supreme Court has now determined this question in its recent judgment: *Kostal UK Ltd v Dunkley and others*.

Offer entailing a temporary removal of term from collective agreement can be unlawful

The Supreme Court has clarified that offers can be unlawful even where the effect of acceptance would only be a temporary removal of the term from collective bargaining. There is no need for the offer to involve workers giving up the right to have the term or terms determined by collective agreement in future.

Prohibited result occurs if there is a real possibility that the term would otherwise have been determined by collective agreement

Giving the leading judgment, Lord Leggatt concluded that offers made directly to a worker will lead to the prohibited result where "had such offers not been made, there was a real possibility that the terms in question would have been determined by collective agreement." In other words, a tribunal must consider whether the term in question "might well" have been decided by collective agreement if it were not for the direct offer.

Going further, Lord Leggatt made clear that where there is an agreed collective bargaining procedure in place for deciding the term in question, and this procedure has not been complied with, it must ordinarily be assumed that the term would have otherwise been determined by collective agreement and the prohibited result would have occurred.

Collective bargaining procedures should be exhausted

Lord Leggatt highlighted that there is nothing to prevent an employer from making an offer directly to its workers if the employer has exhausted the agreed collective bargaining procedure. In that case, it cannot be said that there was a real possibility that the matter would have otherwise been determined by collective agreement.

In the *Kostal* case, the employer made direct offers to workers during the collective bargaining process and before the final stage of that procedure (which involved reference to Acas for conciliation). It was clear in this case that the agreed procedure had not been exhausted before the offers were made.

Key considerations for employers

What is an "offer" under Section 145B?

Lord Leggatt also made clear that the content of the offer is not relevant to consideration of whether acceptance of the offers would lead to the prohibited result.

Quite misleadingly, section 145B TULRCA is headed "Inducements relating to collective bargaining". However, there is no need for the offer to be an inducement, in the sense of an attractive offer designed to lure workers away from union representation and collective bargaining. An offer of terms which are less generous than those currently in place could be found to be an unlawful offer if acceptance of it would lead to the prohibited result.

Employers who are seeking to agree less favourable terms and conditions with their workforce, where there is an agreed procedure to negotiate terms with a recognised trade union, should

therefore be aware of the risk of section 145B claims and take legal advice before making direct offers to their staff.

Has the collective bargaining procedure been exhausted?

This case highlights the importance of following any agreed procedural steps in the collective bargaining process. It is of course possible that talks may stall and the two sides may reach an impasse. However, the procedural agreement may well provide for this situation, for example by including a referral to Acas or another external body. In that case, the procedure should be followed through.

If the procedure has been followed in full, and a failure to agree under the procedure has been declared, employers will be in a better position to show that any subsequent direct offers to the workforce were not unlawful.

The employer's sole or main purpose in making the offer

The question of whether acceptance of the offers would lead to the prohibited result is only the first of the two key stages in establishing whether an offer was unlawful or not. The second step is that the employer's sole or main purpose in making the offers was to achieve that result (in short to avoid the term being determined by collective agreement).

Although not a key element of the *Kostal* appeal, it is likely that an employer's defence of claims under section 145B will focus on evidencing that their sole or main purpose in making the offers was not to achieve the prohibited result, but to achieve some other purpose.

The minority judgment of the Supreme Court gave its view that the sole or main purpose of an employer will not be to achieve the prohibited result where it has a genuine business purpose in making the offers.

In order to minimise the risks of claims, employers should ensure that they are very clear about the genuine business reasons (unrelated to collective bargaining) which lie behind their decision to make direct offers to workers when the terms would otherwise be decided through collective agreement.

If employers make direct offers to staff before exhausting the collective bargaining procedure, it may assist them to have evidence of the time critical nature of the genuine business reason for making those offers. However, there continues to be a risk that a tribunal would find that the principal reason for such offers was to avoid collective bargaining.

Because of the significant potential awards and the costs of defending claims, we strongly recommend that employers seek legal advice if they are considering making offers to members of a recognised union outside collective bargaining procedures.

Reputational and safeguarding risks were "some other substantial reason" for teacher's dismissal

Article published on 23 July 2021

Decision that a teacher was unfairly dismissed when they were not prosecuted for criminal charges is overturned.

In September 2020 we posted an article about the Scottish EAT's decision that a teacher had been unfairly dismissed when he was not prosecuted for possession of indecent child images on a laptop taken from his home.

Our original article is available on our website, for further background - (*Teacher was unfairly dismissed after decision not to prosecute for criminal charges*).

In summary, the EAT's decision relied on three key factors:

- there had been procedural unfairness because the grounds of dismissal (reputational risk) were not set out in the letter inviting the teacher to the disciplinary hearing;
- in the EAT's view, the decision to dismiss was on the grounds of misconduct and the employer had failed to establish that it was more likely than not (i.e. more than 50% likely) that the teacher had downloaded the images (the teacher denied this and other parties had access to the computer); and
- the employer, the local authority, relied on potential reputational damage as the reason for dismissal, but had not assessed whether reputational risk was likely to have happened or to happen in the future on the balance of probabilities.

The decision was appealed to the Inner House of the Court of Session ('CoS') in Scotland (equivalent to the Court of Appeal in England and Wales).

Case: *L v K [2021]*

The CoS drew attention to the approach taken by the original tribunal. The teacher had brought a claim for unfair dismissal. Accordingly the tribunal had to address a two stage test; first whether the dismissal was for a potentially fair reason and, if so, secondly, whether the reason for the dismissal fell within the band of reasonable responses open to the local authority and was fair in all the circumstances.

The tribunal had been satisfied that the local authority had grounds to dismiss for 'some other substantial reason' ('SOSR'), and that this stated reason was genuine and substantial and therefore potentially fair. The tribunal then considered if dismissal for SOSR was within the band of reasonable responses open to the local authority given the facts. The tribunal concluded that it was, despite the teacher not being prosecuted, because he had not been exonerated and as such there was an unacceptable risk to children if he continued to work for the local authority. This also created a risk of reputational damage and a breakdown in trust and confidence in the teacher by the local authority.

Procedurally, the tribunal considered that these issues and the risk of dismissal had been clearly set out in the letter inviting the teacher to a disciplinary hearing. Reputational risk had been referred to in the investigation report which was available to the teacher before the disciplinary hearing took place although it had not been included as a specific allegation.

Reviewing the EAT's decision, the CoS highlighted that the EAT had erroneously based its decision on the concept that the teacher was dismissed for conduct/ misconduct when the tribunal had made clear the teacher was dismissed for SOSR. Dismissal for SOSR did not include nor require a belief that the teacher was responsible for, or involved in procuring, the images found on their computer.

The CoS confirmed that the tribunal applied the right test when it considered the dismissal for SOSR to be within the band of reasonable responses. Whilst other employers may not have dismissed this teacher in these circumstances, that did not mean the decision did not fall within the band of reasonable responses. The CoS pointed out that the EAT could only address errors of law and not fact. As the right law had been applied by the original tribunal it was irrelevant that the EAT came to a different conclusion.

Addressing the lack of mention of reputational risk and loss of trust and confidence in the disciplinary invitation letter, the CoS considered the tribunal was right to say that the contents of the letter to the teacher made clear the basis of the action being taken against him and that he may

be dismissed. The final reason for dismissal was based on the elements identified in the letter and highlighted in the report provided to the teacher in advance of the disciplinary hearing.

Finally, the CoS concluded that there was ample evidence that supported the local authority's concern over reputational risk given the employer's duty to safeguard children in its care and the nature of the criminal proceedings, even if these did not result in a prosecution. The CoS commented that reputational risk in these circumstances was "self-evident and hardly required detailed elaboration, not least since it was ancillary to the child protection considerations".

For all of these reasons the CoS upheld the local authority's appeal and ordered that the tribunal's original decision to dismiss the unfair dismissal claim be restored.

Comment

Ultimately, the CoS upheld the original tribunal's decision because the tribunal was best placed to determine the facts and had not misapplied the relevant legal tests. Although the original tribunal stressed that the decision was very difficult for the local authority, it was entitled to find that the decision to dismiss was one of a number of reasonable responses open to it in these specific circumstances, even if other employers would not have dismissed the teacher.

This case will again highlight to employers that among the key factors to achieving a fair dismissal are making the concerns, issues and consequences of disciplinary matters clear. It is best practice to ensure that the specific allegations and potential grounds for dismissal are clearly set out in a disciplinary invite letter so as to avoid the types of arguments the local authority saw in this case.

In addition, we would caution that employers not rely on reputational risk being 'self-evident' by a tribunal as it was in this case – each situation should be considered on the specific evidence and a conclusion should be drawn from this as to whether reputational risk is more likely than not to occur.

Claimant's "gender critical" belief is protected under the Equality Act

Article published on 30 June 2021

But EAT makes clear that misgendering may constitute discrimination or harassment.

Trans people are protected by the Equality Act. That at least is not in debate. There is however a fiercely-fought battle being waged on a perceived clash of the rights of trans and non-binary people and the rights of women. Society is moving in some areas towards the removal of distinctions based on sex assigned at birth and accepting that people who identify as a different gender or no fixed gender should be afforded rights, services, and equal treatment on the basis of self-identification. This has sparked concerns for those campaigning for the rights and protections of women that these changes undermine hard won protections and the integrity of "safe spaces" for women and girls.

The EAT now finds itself at the centre of this debate with its recent decision that a "gender critical" belief is protected under the Equality Act. The belief in question is, briefly put, that sex is immutable from the point of conception, that trans women are men and trans men are women.

Not all beliefs are protected under the Equality Act. A religious or philosophical belief is protected only if: it is genuinely held; it is a belief rather than an opinion or viewpoint; it relates to a weighty and substantial aspect of human life and behaviour; it is cogent, serious, cohesive, and important; it is worthy of respect in a democratic society; it is not incompatible with human dignity; and it does not conflict with the fundamental rights of others. A lack of belief can also be a protected

characteristic.

In recent years, the courts have been asked to consider the boundaries of this protection, particularly where there is an argument that a belief conflicts with the protected belief or fundamental rights of others. For further detail on such cases, please see the following articles which are available on our website:

- Bakery did not discriminate when refusing to bake a cake bearing a slogan in support of gay marriage
- Doctor who refused to use pronoun chosen by transgender patients was not discriminated against
- Ethical veganism is a philosophical belief subject to protection under the Equality Act 2010

Case details: ***Forstater v CGD Europe and others***

Maya Forstater was a researcher for and visiting fellow of CGD Europe, the European arm of the Center for Global Development, a US think tank. Ms Forstater has a significant social media presence and regularly tweets on issues connected to women's and trans rights, for example voicing her view that people should not be able to change their legal sex under the Gender Recognition Act 2004 (GRA) on the basis of self-identification and that she should not be compelled to refer to a trans woman as a woman. She worked under a series of consultancy agreements for CGD over a three year period, after which her contract was not renewed.

She brought discrimination claims against CGD, arguing that her contract had not been renewed and she had been discriminated against as a prospective job applicant of CGD on the basis of her belief / lack of belief and sex. A preliminary hearing was held to determine whether her "gender critical" belief was protected under the Equality Act. At first instance, an employment tribunal decided that her belief was not protected because it was not worthy of respect in a democratic society, was incompatible with human dignity, and conflicted with the fundamental rights of others. Our report of this decision can be found on our website: Employment tribunal: a philosophical belief that men and women cannot change their sex is not protected.

Ms Forstater appealed and the EAT has overturned that earlier tribunal decision. The EAT decided that the tribunal was wrong to consider whether the claimant's belief was valid (for example whether it was supported by current scientific thinking) and clarified that tribunals should not assess whether a particular belief has merit when deciding whether it is protected. The EAT also held that the tribunal was wrong to decide that her belief was not protected because of its "absolutist" nature, commenting that protections extend to rigidly held religious or philosophical beliefs.

The EAT noted that it had to interpret the Equality Act in line with the Human Rights Act and Article 17 of the European Convention on Human Rights when deciding whether a belief is worthy of respect in a democratic society. Article 17 prohibits the abuse of human rights law to engage in any activity aimed at the destruction of the rights and freedoms of others. The EAT noted that courts dealing with the fundamental rights of freedom of thought, conscience and religion, and freedom of expression must first assess whether the claimant falls outside the scope of protection because of Article 17.

In deciding that Ms Forstater's belief was protected, the EAT stated that it is "only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection."

The EAT stated that the claimant's belief was widely shared in society and did not seek to destroy

the rights of trans people. It also commented that under the common law, sex is treated as immutable and fixed at birth, despite the fact that people can legally change their sex by statute under the GRA.

What does this mean for employers?

Notably, the appeal judge included the following section in his judgment to clarify what this judgment does NOT mean for employers and individual rights.

a) This judgment does not mean that the EAT has expressed any view on the merits of either side of the transgender debate and nothing in it should be regarded as so doing.

b) This judgment does not mean that those with gender-critical beliefs can 'misgender' trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment that apply to everyone else. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of the Equality Act will be for a tribunal to determine in a given case.

c) This judgment does not mean that trans persons do not have the protections against discrimination and harassment conferred by the Equality Act. They do. Although the protected characteristic of gender reassignment under s.7, Equality Act would be likely to apply only to a proportion of trans persons, there are other protected characteristics that could potentially be relied upon in the face of such conduct.

*d) This judgment does not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would continue to be liable (subject to any defence under s.109(4), Equality Act) for acts of harassment and discrimination against trans persons committed in the course of employmen*t.

The claimant's case has been remitted to a fresh employment tribunal to decide whether the claimant was discriminated against or harassed on the grounds on her belief. One key question for the tribunal will be whether the employer acted as it did because of Ms Forstater's belief or whether it had other reasons for not renewing her contract. This is likely to include an examination of whether CGD was motivated by the belief itself or consequences of the manifestation of that belief, including the potential damage to CGD's reputation because of the tone of the claimant's contributions to this public debate and their effect on others.

It remains of fundamental importance that employers take reasonable steps to prevent workplace discrimination and harassment of all kinds. This will include putting in place clear and well-communicated codes of conduct, policies, and statements of organisational values, organising induction and regular update training on equality and diversity, and taking robust action to deal with breaches of such codes and policies.

Scenarios may sometimes arise where beliefs held by an employee create conflict or offence for another person. Having clear rules on workplace and social media interactions can provide a helpful boundary between holding a belief and expressing or manifesting that belief in a way which risks harassing or discriminating against others.

Indirect discrimination: no need to prove that women as a group are subject to the "childcare disparity"

Article published on 9 July 2021

Women are still more likely to have caring responsibilities despite increase in fathers caring for children.

Statistics show that fathers are spending increasing amounts of time caring for their children and it is now more common for fathers to seek flexible working and reduced hours because of caring responsibilities. (See the latest Working Families Modern Families Index for recent trends in the split of responsibilities between mothers and fathers.) Is it therefore still true to say that women as a group are more likely to be disproportionately disadvantaged by a requirement to work at certain times, for example at weekends or unsociable hours? For employment tribunals, this is a key question when considering indirect sex discrimination claims.

In order to prove indirect discrimination, the claimant has to show that a policy, criterion or practice (PCP) which applies to everyone puts a group of people who share their protected characteristic at a particular disadvantage. The claimant also needs to show that they have personally suffered this disadvantage. Usually, a claimant will be required to present evidence to show both the group and the individual disadvantage. For example, statistics showing that autistic people perform less well in psychometric testing on recruitment.

But this is not always required. Courts and tribunals must take "judicial notice" of matters which are "notorious" or "well-established". This means that they can accept an assertion from a party without the need for evidence to be presented on it. In past cases, tribunals and courts have made clear that it is well-established and patently obvious that women as a group continue to be more likely than men to take on the burden of childcare (the "childcare disparity") and so to be disadvantaged by a requirement to undertake certain working patterns.

In a recent case, the EAT reiterated that employment tribunals should continue to take judicial notice of the childcare disparity without evidence being presented to prove it.

Case details: ***Dobson v North Cumbria Integrated Care NHS Foundation Trust***

Mrs Dobson was employed as a community nurse for a NHS Foundation Trust. Her employer sought to bring in a requirement for all community nurses to work some weekends. Mrs Dobson did not agree, making clear that she had caring responsibilities for her disabled children and could not make alternative arrangements for their care.

The NHS Foundation Trust put Mrs Dobson on notice of termination of her existing contract and offered her a new contract including the new requirement to work some weekends. Mrs Dobson did not accept the new terms and was dismissed. She brought claims for unfair dismissal and indirect sex discrimination to an employment tribunal.

Her indirect discrimination claim was brought on the basis that women in general are at a disadvantage when required to work certain working patterns because they are more likely to have childcare responsibilities; and that she was herself subject to this disadvantage.

The employment tribunal dismissed both claims. It stated that Mrs Dobson had brought no evidence to support the argument that the requirement put women at a particular disadvantage compared to men. The tribunal noted that other women in her team were able to meet the requirement.

The tribunal expressed the view that the claimant may have been disadvantaged by her responsibility for caring for her disabled children, but that this is not a protected characteristic. It commented that (unlike direct discrimination) there is no claim of indirect discrimination by association with disabled people.

Childcare disparity continues to exist despite societal changes

The EAT did not agree with the tribunal's judgment. It made clear that the tribunal should have taken judicial notice of the childcare disparity and that there was no need for evidence to be presented on this point. The appeal judge commented that "many societal norms and expectations

change over time, and what may have been apt for judicial notice some years ago may not be so now. However, that does not apply to the childcare disparity. Whilst things might have progressed somewhat in that men do now bear a greater proportion of child caring responsibilities than they did decades ago, the position is still far from equal."

The EAT made clear that female claimants can only rely on the childcare disparity to show group disadvantage where it is relevant to the PCP; some working arrangements do not put women in general at a disadvantage because of childcare. It also made clear that claimants must actually plead the childcare disparity to put the tribunal and the respondent on notice of it, even though it is a matter of judicial notice.

The case has now been remitted to the tribunal to consider whether the requirement was justified when taking into account the needs of the employer and the impact on the claimant. It must also consider again whether the dismissal was unfair: if the tribunal finds that the requirement was indirectly discriminatory, it may also find that it was unfair to dismiss because of the refusal to accept the new terms.

Can a discriminatory requirement to work at weekends or unsociable hours be justified?

In some cases, yes.

In this case, the tribunal found that the requirement to work some weekends was justified as the employer was pursuing the legitimate aim of providing a safe and efficient service and the impact of the new working arrangements on the claimant's team was proportionate to that aim. The EAT made clear that the tribunal should consider the impact on all community nurses at the trust and not only the claimant's team. However, it is possible that, even after the tribunal takes into account the childcare disparity, it will not uphold Mrs Dobson's indirect discrimination claim.

Employers considering the imposition of working arrangements which may disadvantage a particular group should ensure that they have given careful thought to and documented the business reasons for those arrangements. These might include the needs of service users, customers and commissioners, as well as financial and operational pressures on the organisation. They should also consider the impact on employees with protected characteristics and ensure that the requirements are necessary and proportionate to the aims of the organisation, including whether there are any other less discriminatory ways to achieve the same aim.

Is there a risk of discrimination claims where disability is first raised in a post-dismissal grievance process?

Article published on 1 November 2021

Dismissal was not discriminatory because employer did not know about disability.

A key question in disability discrimination claims is often whether an employer knew or should reasonably have known about the claimant's disability at the time of the alleged unfavourable treatment. This is because employers can defend most disability discrimination claims if they can show that they did not actually know about the disability and could not be expected to have known or found out about it, for example because of the claimant's conduct, sickness absence or symptoms. An employer who does not know but should reasonably have known about the disability has so-called "constructive knowledge".

Discrimination arising from disability

Employees can bring a claim under section 15 Equality Act 2010 that they have been subjected to unfavourable treatment because of something arising in consequence of a disability. For

example, they could argue that they were dismissed because of poor performance, and the poor performance was connected to a mental health condition qualifying as a disability under the Equality Act.

For the claim to succeed, the employer must have actual or constructive knowledge of the disability at the relevant time. There is no need for the employer to know that the poor performance (for example) was connected to the disability, they only need to know about the disability itself.

Where an employee is dismissed for a reason which is later found to be connected to a disability, the question will be whether the employer had actual or constructive knowledge of the disability at the time it took the decision to dismiss.

It can often be the case that employees will argue only at the dismissal appeal stage that the reason for the dismissal was connected to a health condition. In turn, employers may argue that they did not and could not have known about the condition beforehand.

What are the risks for employers who go on to confirm a dismissal decision in these circumstances? Could this be discriminatory treatment bearing in mind the employer's new knowledge about the employee's potential disability?

A recent case has clarified how tribunals should approach this question.

Case details: ***Stott v Ralli Ltd***

Ms Stott was employed as a paralegal. Following concerns about poor performance, she was dismissed during her probationary period. She did not appeal the dismissal decision, but instead raised a formal grievance. The grievance, and a subsequent grievance appeal were not upheld. Ms Stott brought claims to an employment tribunal including a number of disability discrimination claims.

It was accepted that the claimant's anxiety and depression was a mental impairment which met the definition of disability in the Equality Act. However, the tribunal found that the employer did not and could not have known about this disability at the time of the dismissal and so dismissed the claimant's claims.

The claimant appealed to the EAT. The EAT held that the tribunal had failed to make a finding on whether the claimant's poor performance was connected to her disability. However, the claimant's other grounds of appeal failed. In particular, the EAT held that the tribunal was right to conclude that the employer did not have actual or constructive knowledge of the claimant's disability at the material time. It noted that the claimant had not appealed the dismissal itself and that she had not argued in her claim that the outcomes of her grievance or grievance appeals were in themselves discriminatory.

The EAT helpfully made clear that for the purposes of an unfair dismissal claim (which the claimant here did not have the length of service to bring) "dismissal is regarded as a process encompassing the appeal stage and outcome". But this is not the case in a discrimination claim, where each instance of alleged unfavourable treatment should be pleaded so that the tribunal can consider whether the reasons for that treatment are discriminatory. In this case, the claimant had not alleged that the post-dismissal grievance process was discriminatory and so the employer's knowledge of her disability at this stage of the process was irrelevant.

Key risks for employers

In this case the employer succeeded in defending the claim because it did not and could not have known about the disability at the time of the dismissal and the claimant specifically did not raise a discrimination complaint about the grievance process. However, it is possible that the claimant

could have succeeded in a disability discrimination claim relating to the outcome of the grievance process if the claimant had raised such a complaint. This is because the employer was found to have constructive knowledge of the disability by that stage.

For further information on a case where an employee was successful in a claim where her disability came to light at the dismissal appeal stage, see the following article from May 2019, available from our website: What should an employer do if an employee presents evidence of a disability at an appeal against their dismissal?. In this case, the EAT held that the tribunal should have considered that there was a complaint that the dismissal appeal itself was discriminatory.

Minimising the risk of disability discrimination claims

Employers who find out about a possible disability following dismissal (whether in a dismissal appeal or grievance process) are best advised to carry out a reasonable investigation into the employee's condition as part of that process. This might include asking the claimant to provide medical evidence from their GP or consultant, reviewing medical information already held by the organisation, or questioning the decision-maker as to the reason for dismissal. This evidence should be taken into consideration in the post-dismissal appeal or grievance process, in order to decide whether the reason for dismissal arose from or was influenced by a disability.

If employers do know or should have known about the disability, they can still defend section 15 Equality Act claims if they can show that the treatment was a proportionate means of achieving a legitimate aim; in other words it was appropriate and necessary in the circumstances. This means having strong documented business reasons for the decisions taken and being able to show that there was no less discriminatory way to achieve the same aim.

It will usually be difficult to show discriminatory treatment was justified if the employer knew about the disability and reasonable adjustments were not made to help the employee overcome barriers created by their disability. For example, adjustments to HR processes or to the role itself.

Taking legal advice at an early stage in these circumstances can assist employers in lowering the risks of a claim being brought and increasing the chances of defending any claim which does arise.

Dismissal was not because of whistleblowing but because of poor interpersonal skills

Article published on 24 September 2021

Dismissal was unfair but decision-maker was not motivated by protected disclosures.

If an employee is dismissed because they have made a protected disclosure (or "blown the whistle"), this will be automatically unfair. There is no financial cap on compensation where a dismissal is found to be because of a protected disclosure, and there is no requirement for the employee to have two years' service. Where financial losses are likely to be above the current cap of £89,493 or one year's gross pay, a finding of automatic unfair dismissal for whistleblowing can therefore be particularly costly for employers.

For further information on when a disclosure will be protected, see the following article from 2019, which is available from our website: Was disclosure in the public interest when made in defence of concerns about poor performance?.

In addition, both employees and workers are protected from suffering detriment because they have blown the whistle. In our 2018 article, Can an individual be personally liable for dismissing someone because of whistleblowing? we covered the risk of personal liability for individual managers where they subject a member of staff to detriment or dismiss them because of a

protected disclosure.

Can someone be fairly dismissed because of the way they raise their whistleblowing concerns?

In tribunal, the first step is for the claimant to show evidence to suggest, in the absence of another explanation, that they have been dismissed for the sole or principal reason that they blew the whistle. This is called having a "prima facie" case. The burden then shifts to the employer to show that the sole or principal reason for dismissal was a potentially fair reason and not the protected disclosure.

Tribunals have often considered cases where an employee has raised their concerns in an unacceptable way. The question in these cases is whether the employee has been dismissed because of the protected disclosure (which would be automatically unfair) or whether they have been dismissed for misconduct (which would be potentially fair).

Case law in this area is very fact sensitive because the tribunal has to consider what is in the mind of the person making the decision to dismiss and whether they were motivated by the protected disclosures, or by other factors, such as the claimant's unacceptable mode of communication, breakdown in working relationships, or breach of workplace rules.

Can the motivation of another person be attributed to the dismissal decision-maker?

In the case of *Royal Mail Group Ltd v Jhuti*, the Supreme Court made clear that there could be some limited circumstances where the motives of another person in the employer organisation can be attributed to the person making the decision to dismiss. This will happen: "if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason".

We consider this case further in our 2020 article: Unfair dismissal: whose reason is it anyway? (available from our website).

A recent case in the EAT has explored further when the motivations of another person influenced by claimant's protected disclosures will be attributed to the employer. It also sheds more light on when the manner of raising concerns rather than the concerns themselves will be found to be the principal reason for dismissal.

Case details: *Kong v Gulf International Bank (UK) Ltd*

Ms Kong was employed by GIB as Head of Financial Audit. In a draft audit report, Ms Kong raised concerns that a legal agreement GIB was proposing to use in relation to a particular financial product was not suitable for use with non-bank investors. It was not disputed that the claimant had raised protected disclosures when expressing her concerns about this agreement.

The Head of Legal, who was responsible for the legal agreement, disagreed with the claimant's concerns. She entered the claimant's office without knocking and a heated discussion took place. She later gave her version of events to the Head of HR and others, saying she had been upset by the way in which the claimant had questioned her professional integrity and legal awareness, and could not see how she could continue working with the claimant. The Head of HR and CEO considered that the claimant should be dismissed. The Group Chief Auditor (who line managed the claimant) agreed and the claimant was then summarily dismissed.

The claimant brought claims to an employment tribunal for unfair dismissal and for detrimental treatment and automatic unfair dismissal for having made protected disclosures.

The tribunal decided that the conduct of the Head of Legal was detrimental treatment because of the claimant's protected disclosures. However, that claim was brought out of time and so did not succeed.

The tribunal found that those actually making the dismissal decision were not motivated by the claimant's protected disclosures, but by their view of her conduct, in particular her poor interpersonal skills and communication with colleagues. The complaint of automatic unfair dismissal for having made protected disclosures was therefore unsuccessful. However, the claimant was found to have been ordinarily unfairly dismissed because the dismissal by reason of conduct was not fair in all the circumstances.

The claimant appealed against the failure of the automatic unfair dismissal claim.

The EAT agreed with the tribunal that the claimant had not been dismissed because of her protected disclosures. It agreed that the decision-makers had been motivated principally by the way the claimant raised her concerns. That is, the decision-makers considered that the mannerof the claimant's questioning of the Head of Legal's legal awareness and professional integrity was unacceptable conduct and warranted summary dismissal.

The EAT was clear that this was not a case, such as Jhuti, where someone in the hierarchy above the claimant had invented a reason for dismissal as a response to their protected disclosures, and this invented reason had been taken up unwittingly by the dismissing officer. Here, the Head of Legal was not in fact in the hierarchy above the claimant (she was more senior but was not in the claimant's reporting line). Also, the Head of Legal could not be said to have invented a reason for dismissal and misled the decision-makers. She was found to have over-exaggerated the extent to which the claimant had questioned her professional integrity, but this was not in the same order as the invention envisaged by the Supreme Court in *Jhuti*.

Comment

Employers should be aware of the additional risks associated with whistleblowing claims. These include additional financial risks where a dismissal is found to be by reason of protected disclosures, particularly where an employee might claim significant losses relating to pensions, bonuses, or career-loss earnings.

It is important to ensure that the reason or reasons for dismissal are well evidenced and documented, including any issues which have arisen previously, as this will assist an employer in showing that the reason for dismissal was not an unlawful reason.

Cases where an employee has breached workplace rules in the way they raise protected disclosures will need very careful handling to minimise the risks to the employer. It is important to note that a tribunal may decide that the real reason for dismissal was the disclosures themselves, no matter how inappropriate the claimant's conduct.

As occurred in this case, even though an employer may be able to defend an automatic unfair dismissal claim, a claimant may still be found to be ordinarily unfairly dismissed if the potentially fair reason for dismissal is not sufficient to justify dismissing in all the circumstances of the case. Following a fair process which complies with the employer's own policies and (for conduct dismissals) with the Acas Code of Practice on Disciplinary and Grievance Procedures is vital to lower the risk of successful claims.

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.

Learning support assistant was constructively dismissed in relation to health and safety failings

Article published on 24 May 2021

Lack of manual handling training in lifting disabled pupil was a fundamental breach of contract.

Duty to take reasonable care of employees' health and safety

Employers have a duty to take reasonable care of the health and safety of their employees, to take reasonable steps to provide a safe workplace and to provide a safe system of work. This duty arises from statutory obligations under the Health and Safety at Work Act 1974 and a number of health and safety regulations, the common law duty of care, and a contractual duty implied into every employment contract.

Constructive dismissal and health and safety failings

Employees can claim constructive dismissal where they resign in response to their employer's fundamental breach of contract. One of the key questions in such cases will be whether the employer's act or failure to act is serious enough to be a fundamental breach of contract. Where the employer fails to comply with its health and safety obligations, the tribunal will consider the nature of the breach. Some health and safety failings will be serious enough to be a fundamental breach entitling the employee to resign as a consequence and to bring a constructive dismissal claim.

After a fundamental breach has occurred, employees can sometimes "affirm" the contract by doing something which shows they are putting up with the situation and acting as if the contract still exists. The case law shows that this question will be very fact-specific, but affirmation can happen where an employee fails to complain about the situation and/or delays too long after the breach before resigning.

A recent case in the EAT considered whether employers can do something to "cure" a fundamental breach of contract after it has occurred but before resignation takes place.

Case details: ***Flatman v Essex County Council***

Ms Flatman worked in a maintained school as a Learning Support Assistant. Her role was to give support to a disabled pupil and included daily weight-bearing and lifting of the pupil. Over a period of around 8 months from September 2017, Ms Flatman made repeated requests for manual handling training. Although the school managers assured her that steps would be taken to arrange this, no training was put in place. In December 2017, she developed back pain and reported this to the school.

At the beginning of May 2018, the Claimant was signed off for three weeks with back pain. The head teacher informed Ms Flatman that she would not be required to lift the pupil on her return to work and that she was considering moving Ms Flatman to another class in the next school year. The head also assured her that manual handling training was being organised for her and other staff in the following few weeks. Ms Flatman resigned at the beginning of June 2018 and she brought a claim for constructive unfair dismissal.

An employment tribunal found that the local authority employer was in breach of the Manual Handling Operations Regulations 1992, but that it had not fundamentally breached its duty to provide a safe system of work. This conclusion was based on the fact that, before the resignation, the head teacher had shown a genuine concern for Ms Flatman's health and safety and taken steps to ensure that she would not be exposed to danger in future. The employment tribunal therefore decided that Ms Flatman was not constructively dismissed.

On appeal, the EAT overturned this decision and held that Ms Flatman had been constructively unfairly dismissed. It made clear that it is not possible for an employer to "cure" a fundamental breach of contract after it has taken place. The tribunal should have considered whether at any point before the resignation the employer had fundamentally breached the contract and should not have taken into account the actions or assurances of the head teacher in May 2018.

According to the EAT, it was clear in this case that the failure over a number of months to put manual handling training in place was a fundamental breach of the duty to provide a safe system of work. In making this decision, the EAT took into account the facts that occupational therapists and physiotherapists visiting the school considered that this training was required, that Ms Flatman had made repeated requests over a number of months, and that she had actually developed back pain, but the training was still not actioned at the school.

The EAT decided that a tribunal could not have properly decided that Ms Flatman had affirmed the contract in this case. It pointed to the fact that she had persistently and repeatedly complained about the lack of training throughout the entire period. It was also relevant that the school had given her assurances which were not fulfilled, and that she had then escalated her complaints. The EAT stated that "this was not a case of an employee who had decided to live with the situation, but of an employee who had, hitherto, soldiered on for a time, because she had hoped that the promised action would occur; but instead the breach was prolonged and exacerbated".

Comment

Although in this case the head teacher was found to have genuine concern for the employee's health and safety just prior to her resignation, the employer's delay in putting in place required manual handling training was a serious breach of the employment contract which entitled the employee to resign. The plans put in place some 8 months after manual handling duties began came too late: the breach of contract had already taken place and could not be cured.

Employers should of course be mindful of their health and safety obligations and the multiple risks

of a failure to take reasonable steps to protect employees. A failure to provide a safe system of work can lead to a number of legal claims, including personal injury and employment tribunal claims. Aside from constructive dismissal claims, employees might seek to bring claims in the employment tribunal for health and safety related detriments (on this issue, please see our recent article Refusing to work because of fears about covid-19 - section 44 of the Employment Rights Act which is available from our website).

Whistleblowing claims can also arise where employees have raised concerns in the public interest about safety in the workplace and then been dismissed or subjected to some disadvantage. These claims do not require two years' service and are not subject to a statutory cap on compensation. Health and safety breaches can also trigger reports to regulators, the possibility of criminal prosecution, and serious reputational risk.

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