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EMPLOYMENT LAW BULLETIN

SEPTEMBER 2023

Welcome to Wrigleys' Employment Law Bulletin, September 2023.

We consider this month a number of cases which provide useful insights for employers on equality law and good practice.

Taking lessons from case law, including the recent EAT case of ***AECOM Ltd v Mallon***, our first article explores the reasonable adjustments employers might need to make to the recruitment process, especially for neurodiverse candidates.

We consider the nuanced employment tribunal decision in ***Borg-Neal v Lloyds Banking Group Plc*** which considered whether dismissal for using a highly offensive term within the context of EDI training was fair.

And the use of offensive language in the workplace is also the context of the employment tribunal's decision in ***Fischer v London United Busways Ltd***. The tribunal considered whether the offensive term was gender-specific and so potentially direct gender reassignment discrimination when used to refer to an individual's assigned (rather than affirmed) gender.

We hope you can join us for our upcoming free virtual **Employment Brunch Briefing** on 3 October, a practical and interactive session exploring the tricky interaction between disciplinary procedures and discrimination law. Please click on the link below to book your place.

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

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Reasonable adjustments for neurodiverse job applicants

Article published on 22 September 2023

A reasonable employer would have picked up the phone…and other useful lessons from case law.

Many employers are working hard to attract neurodiverse employees and to develop policies and practices which support these employees to remain and thrive in the working environment. The recruitment process can be a tricky first hurdle for neurodiverse candidates and employers must ensure they make reasonable adjustments to any recruitment process when it creates obstacles for candidates with disabilities.

When does the duty to make reasonable adjustments arise in the recruitment process?

The duty to make adjustments will arise if:

- an employer knows, or ought reasonably to know, of an employee's disability; and
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- the applicant is placed at a substantial disadvantage by an employer's provision, criterion or practice (PCP), a physical feature of the employer's premises or an employer's failure to provide an auxiliary 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.

Adjustments which might be reasonable to make to the recruitment process

Whether any particular adjustment is reasonable will depend on the resources of the employer and the disadvantage faced by the applicant. The following list includes suggestions to consider, but these will not be relevant or reasonable in the case of every employer or applicant.

- Adapt short-listing criteria to account for the impact of the disability on education and employment history
- Arrange pre-visits so that the applicant feels more comfortable in the selection environment
- Consider alternative approaches to personality type and psychometric tests which may have in-built bias against neurodiverse candidates
- Explain selection tasks and questions in advance and allow preparation time
- Ensure questions are short, focused and specific
- Provide for alternative question formats
- Allow oral rather than written responses
- Allow candidates to use their own devices or technology
- Interrogate any judgements at interview based on neurotypical expectations of social interaction and body language

Case law on multiple choice recruitment tests

In Government *Legal Service v Brookes*, the EAT held that a job candidate was discriminated against when the prospective employer insisted that she take a multiple choice psychometric test in the first round of recruitment.

Ms Brookes applied to join the Government Legal Service (GLS) as a trainee solicitor. She informed the GLS one month before the test of her Asperger's syndrome and she requested that she be allowed to provide short narrative answers rather than choosing from a range of answers. The GLS refused. Ms Brookes took the test and failed to reach the pass mark.

Ms Brookes brought claims of indirect discrimination on the ground of disability, discrimination arising from disability and a failure to make reasonable adjustments. The GLS accepted that Ms Brookes is disabled and that it knew of her disability at the time of its refusal. Ms Brookes' claims were successful at first instance despite the fact that the tribunal found that medical evidence was "inconclusive" on the question of whether Ms Brookes was disadvantaged by the multiple choice format because of her condition. The tribunal took into account that medical experts for each side agreed that the claimant fitted the profile of someone with Asperger's who was likely to be disadvantaged in the test because of a lack of "social imagination". The EAT agreed.

Ms Brookes was awarded £860 and the GLS was ordered to apologise to her. The tribunal also made a recommendation that the GLS review its recruitment practices and consider a more flexible approach to psychometric testing.

Recent case law on reasonable adjustments to the application process

Case details: *AECOM Ltd v Mallon*

Mr Mallon applied for a consultant role with AECOM Ltd. He was required to create a personal profile with a username and password in order to complete the online application form.

Mr Mallon emailed his CV to the HR department and asked if he could submit an oral application because of his disability (dyspraxia). Mr Mallon was told he had to complete the online application form and that assistance with submitting the form could be provided. He was also asked on a number of occasions by email to state which parts of the form he was finding difficult to complete. Mr Mallon did not provide this information. The HR department corresponded with Mr Mallon only by email and did not call Mr Mallon to discuss the application process. Mr Mallon's application was not successful.

Mr Mallon brought an employment tribunal claim that the employer had failed in its duty to make reasonable adjustments to the application process.

The employment tribunal decided that the requirement to complete an online application form was a PCP which put Mr Mallon at a substantial disadvantage. The disadvantage in this case was that Mr Mallon was too anxious because of his dyspraxia to provide a username and password to begin accessing the online form. It found that the employer did not have actual knowledge of this disadvantage, but ought to have known that Mr Mallon's dyspraxia could create difficulties for him in accessing the online form. The tribunal considered that a reasonable employer would have telephoned the applicant to ask for more details about his difficulties rather than expecting Mr Mallon to explain his difficulties by email, given his issues with written communication. The tribunal therefore found that AECOM Ltd failed in its duty to make reasonable adjustments and awarded him £2,000 for injury to feelings, together with interest of £700.

The EAT agreed but allowed AECOM Ltd's appeal on the ground that the tribunal had made a material factual error when assessing whether Mr Mallon was a genuine applicant for the advertised role. The EAT remitted the case to the tribunal for reconsideration on this point.

Employers are expected to make reasonable enquiries of applicants about possible disadvantage due to disability

The duty to make reasonable adjustments does not arise if an employer does not know and could not reasonably be expected to know about the disability and that the applicant is likely to be placed at the particular substantial disadvantage when going through the application process.

However, employers cannot simply rely on ignorance to defend a claim. Mr Mallon's case highlights that, where an employer has notice of an applicant's disability and that a disadvantage might arise

in the recruitment process because of that disability, the employer should take steps to find out more by making reasonable enquiries of the applicant.

Employment Tribunal indicates that offensive term is not 'gender-neutral' in consideration of gender reassignment discrimination

Article published on 28 September 2023

Recent case indicates that employers will need to take common sense approach to insulting terms.

Workplace environments can become heated and it is not uncommon for harsh language and swearing to occur between colleagues in some settings. Language is a tool but is often employed as a weapon by those seeking to bully, harass and demean others, which means employers need to be sensitive to the use of language in the context of protected characteristics.

Whilst swearing can in and of itself be a disciplinary matter, a recent Employment Tribunal decision also highlights how common insulting language can be gender-specific and the potential implications this has for discrimination claims.

Case details: ***Fischer v London United Busways Ltd [2023***]

Miss Fischer worked via an agency for LUB as a bus driver on a busy route in London.

When Miss Fischer joined LUB in 2020 she had the protected characteristic of gender reassignment. She worked for LUB until 16 January 2021. During this period, Miss Fischer submitted multiple complaints about her treatment by colleagues and other third parties. However, following LUB's decision to terminate her agency role she brought a direct discrimination claim in relation to three incidents.

These incidents included a 'near miss' where Miss Fischer claimed another driver had nearly hit her with their bus; an 'insult' incident when another driver had called her a 'wanker'; and her termination. Each incident, Miss Fischer alleged, amounted to less favourable treatment because of her gender reassignment and that a hypothetical comparator driver without this characteristic would not have suffered the same treatment.

Employment Tribunal's decision

The Tribunal dismissed all of Miss Fischer's claims, finding that the 'near miss' and 'insult' incident did not occur on the basis of the facts presented to the Tribunal. The Tribunal also found that, on the balance of probabilities, the decision to dismiss Miss Fischer from her role was taken because of a combination of factors ranging from Miss Fischer's failure to follow incident reporting procedures, demonstrating questionable driving competency and that by failing to complete her routes she had led LUB to lose income under its agreement with TfL.

Although the claims were dismissed, of particular note is the Tribunal's contention at paragraph 78 of the decision (linked above) where it dismissed LUB's argument that the insult could not be discriminatory in nature because 'wanker' was a gender-neutral term. The Tribunal's reasoning was that, at least to the panel assigned to this case, the term used was an insult with clear links and connotations to men and that there were 'equivalent but different swear words that are used […] to insult women.'

Had Miss Fischer been able to establish that the term had been used against her by a colleague then a gender reassignment discrimination claim may have been successful. Despite this the

Tribunal considered the employer's 'all reasonable steps' defence set out at s.109(4) of the Equality Act 2010 and concluded that the employer had not taken all reasonable steps to avoid being found vicariously liable for this incident.

Comment

The English language is replete with insulting and suggestive language that is commonly understood to have gender-specific applications. The Tribunal here was clear that the use of the term in question was sufficiently closely connected to the claimant's birth sex for use of the term to make out a prima facie case of discrimination. In other words, gender-specific terms of this kind referring to an individual's former or assigned gender could constitute harassment or direct discrimination on the basis of gender reassignment.

It is also true that English continues to evolve and the meaning and understanding of terms evolves over time, often as groups who were the target of words seek to adopt them as a way to claim the term and nullify its impact. That said, employers need to take a common-sense view of the language used in the context of its use and consider carefully on the balance of probabilities what connotations the use of a particular word has.

The case report on Fischer is useful for employers as the Tribunal took the time to consider the 'all reasonable steps' defence in the context of this claim. In particular, paras 130 to 132 note the steps LUB had taken to create an inclusive work environment but also where it could and should have done more.

For example, the Tribunal notes that whilst LUB had an equal opportunities policy and displayed it in the depot, it had not been updated since 2007 (i.e. since before the Equality Act 2010 came into law) and that many drivers spent little to no time in the depot to see the notices. In addition, the Tribunal considered that for an organisation the size of LUB it was surprised that there were not employee minority representative groups and/ or that these did not help to provide feedback or update relevant policies and procedures.

Employee who used racial slur during EDI training was unfairly dismissed

Article published on 27 September 2023

Decision to dismiss was outside the band of reasonable responses.

A recent employment tribunal case provides useful insight into getting the right balance between condemning harmful behaviour and recognising the need for open discussion in the context of Equality, Diversity and Inclusivity training.

Unfair dismissal and the "band of reasonable responses"

When determining whether an employee has been unfairly dismissed, the tribunal must first ask whether the dismissal arose out of one of the 'potentially fair reasons' set out in the Employment Rights Act 1996, those being:

- Capability or qualifications
- Conduct
- Redundancy
- Illegality
- Some other substantial reason

Once one of these reasons has been established, the tribunal will move on to consider whether

the dismissal was unfair in all the circumstances. This is done with reference to the 'band of reasonable responses', i.e. did the employer's decision to dismiss fall within one of the (potentially many) reasonable responses to the employee's behaviour? If the answer to this question is no, then the employee has been unfairly dismissed. As can be seen from this test, the tribunal will not determine whether they themselves would have dismissed the employee, rather, was it reasonable for the employer to come to this determination?

Where the conduct of the employee was to blame for their dismissal, the tribunal will set the scope of the 'band of reasonable responses' with reference to a further three questions:

- Did the employer genuinely believe the employee to be guilty of misconduct?

- Did the employer have reasonable grounds for believing that the employee was guilty of that misconduct?

- At the time it held that belief, had the employer carried out an investigation that could be regarded by a reasonable employer as adequate?

Case details: ***Borg-Neal v Lloyds Banking Group Plc***

Mr Borg-Neal was a long-standing employee with a clean disciplinary record. As part of the bank's "Race Action Plan", the claimant attended an online race education session run by a third-party provider and discussing "intent vs effect" of language. At the beginning of the session, the trainer made an opening statement setting out expectations for the session. Though the exact words said are not clear, the script prepared for trainers outlined that the session was an "opportunity to be clumsy" and "lean into [the] discomfort" which might be caused by discussions, but that attendees agreed to ensure they created a "safe space for our Black and Asian colleagues" and should not use any bad language. However, several attendees, including the claimant, had suffered a log-in error which had prevented them from hearing all of the statement.

During the session, Mr Borg-Neal asked how he should respond if a person from an ethnic minority used a term which might be considered offensive if used by a person not in that minority. When the trainer did not respond immediately, he added "the most common example being use of the N word in the black community", though the "N word" was used in full.

The bank was subsequently told that the trainer had been absent from work for 4 – 5 days as a result of the incident. Though the bank accepted that the claimant intended no harm and that the question was innocent and valid, they believed he should have known better than to use the word in a professional setting, and that he should have realised the severe impact of the use of such a word. For these reasons, the bank dismissed Mr Borg-Neal for gross misconduct.

<u>"Context is everything"</u>

The tribunal concluded that the bank did genuinely believe Mr Borg-Neal to be guilty of gross misconduct. However, they found that the bank did not have reasonable grounds to believe that the claimant was guilty of gross misconduct, and further that they had failed to conduct a reasonable investigation.

The tribunal found that a reasonable employer could have considered the claimant's use of the word to be misconduct (rather than gross misconduct), because it was inappropriate and because some euphemism should have been used. However, it concluded that a reasonable employer would not consider it to be gross misconduct.

In the words of the employment judge, “context is everything” and in particular:

- The claimant said the word only once, and the tribunal was satisfied that it was used in the context of a genuine and honest question which related to the subject of the session: intent vs effect of language.

- Though the session began with the trainer giving a speech as to the purpose and rules of the session, several attendees including the claimant were unable to hear it due to technical problems.

- The bank did not have direct evidence from the trainer even though it placed considerable weight on the impact of the language on the trainer. The bank also failed to interview two other trainers who attended the session.

“No reasonable employer could or would have dismissed the claimant in the particular circumstances”

The tribunal believed that two questions had been conflated during the bank’s disciplinary procedure: whether it was wrong to use the word, and whether the claimant should have been dismissed for using it. In fear of being perceived to condone Mr Borg-Neal’s conduct, the bank had failed to reach a sanction which fell within the band of reasonable responses of a reasonable employer.

The claimant’s repeated apologies, offer to apologise directly to the trainer, acknowledgement of wrongdoing and offer to accept a warning and undertake further training were enough to satisfy the tribunal that no reasonable employer would have dismissed Mr Borg-Neal for the use of the word in that particular context.

Comment

It is important to stress at this stage that the decision outlined in this article is only a first-instance decision, and does not create any precedent for future cases.

When deciding whether an employee has committed misconduct or gross misconduct, employers must remember the importance of context, and assess the merits and circumstances of each case individually. It is possible, and indeed necessary, for employers to take a strong stance with regards to equality and diversity without resorting to the automatic application of certain sanctions. Employers must also remember that the question of whether conduct is acceptable, and whether such conduct justifies dismissal, are separate questions. And whilst making such assessments, they must always remember that “context is everything”.

The tribunal was concerned to make clear that “the full N word is an appalling word which should always be avoided in a professional environment” and “simply hearing it said is likely to be intensely painful and shocking for black people because it may well echo other discriminatory experiences in their lives and because of its history and derivation.” However, it commented that dismissal in this case appeared to be motivated by a desire for the employer not to be seen to condone use of the word, rather than a careful assessment of the circumstances of the case.

The tribunal’s reasoning could also prove useful for employers in formulating their approach to structuring both their equality training sessions, and their policies relating to misconduct, particularly regarding the use of offensive discriminatory terms. This case is a pertinent reminder of the importance of setting out expectations for language use clearly, and clarifying what is really meant by a “safe space” in any particular context.

If you would like to contact us please email
alacoque.marvin@wrigleys.co.uk

www.wrigleys.co.uk

Wrigleys Solicitors LLP, 3rd Floor, 3 Wellington Place, Leeds, LS1 4AP. Telephone 0113 244 6100 Fax 0113 244 6101