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EMPLOYMENT LAW BULLETIN

APRIL 2019

Welcome to our April edition of the employment law bulletin.

We report on recent decisions in the Employment Tribunal, EAT and the High Court.

In *Linsley v Commissioners for Her Majesty's Revenue and Customs,* the EAT considered whether it would have been reasonable for the employer to provide a dedicated car parking space for a disabled employee as set out in its own car parking policy.

In *Shelbourne v Cancer Research UK*, the High Court considered another case on vicarious liability for injury caused at a Christmas party. A key question for the court was whether the provision of alcohol meant the employer had to take additional steps to protect its employees from harm.

We cover the interesting first instance employment tribunal case of *Furlong v The Chief Constable of Cheshire Police* which considered when the positive action provisions of the Equality Act 2010 will apply.

We also examine in detail the implications of including a probationary period in the employment contract, with a particular focus on ensuring active performance management of the probationer and the need for a fair dismissal process where probation is not passed.

Wrigleys has recently contributed to the Government consultation on the use of confidentiality agreements, with a particular focus on their use and abuse in cases of harassment and discrimination complaints. Our contributions incorporated the views of clients sought during a recent Employment Law Breakfast Briefing. You can view our contributions on our website here. Wrigleys regularly contributes to Government consultations. Check our events listings here for details of future opportunities to contribute.

Finally, may I remind you of our forthcoming events:

- **Employment Law Update for Charities**
  A full day conference - 18 June 2019, Hilton City Centre, Leeds
  For more information or to book

- **Annual Charity Governance Conference**
  A full day conference - 10 November 2019, Hilton City Centre, Leeds
  For more information or to book

- **SAVE THE DATE - Northern Education Conference**
  A full day conference - 20th November 2019, Hilton City, Leeds

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Would it have been a reasonable adjustment for an employer to follow its own policy?

A disabled employee should have been offered a dedicated parking space as a reasonable adjustment in line with the employer's own policy

Employers have a duty to make "reasonable" adjustments which help to avoid the disadvantage caused to a disabled employee by a policy or working practice. If a disabled employee requests a particular adjustment, employers may at times put forward an alternative adjustment to avoid the disadvantage.

A recent case clarifies the approach an employment tribunal will take when considering whether a particular adjustment is reasonable: a key question is whether the adjustment in question properly addresses the particular disadvantage to the employee.

Case details: *Linsley v Commissioners for Her Majesty's Revenue and Customs*

Ms Linsley suffers from ulcerative colitis which can make someone urgently need to use the toilet and is aggravated by stress. The condition's impact on Ms Linsley amounts to a disability within the meaning of the Equality Act 2010.

HMRC have a national car park policy stating that priority for parking is to be given to staff requiring a parking space as a reasonable adjustment whether or not they are blue badge holders. In 2012 an occupational health (OH) report stated that Ms Linsley would benefit from a dedicated car parking space at work. This was provided.

OH continued to produce reports that recommended making reasonable adjustments for Ms Linsley and highlighting that stress was an aggravating factor for her condition, though the need for a dedicated parking space was not always explicitly stated.

In 2016 Ms Linsley started a role at a new site where management operated under the false impression that dedicated spaces were only provided to blue badge holders. Ms Linsley was not a blue badge holder at the time so she was told that if she could not park near her building, she had special dispensation to park in a spot near to some toilets, provided that the car was moved later. The stress of trying to find somewhere to park further aggravated her condition.

Having tried and failed to get her employers to provide her with dedicated parking, Ms Linsley issued a tribunal claim complaining of discrimination on the grounds of disability and that HMRC had failed to make reasonable adjustments.

Employment Tribunal

When considering the reasonableness of the adjustments made, the tribunal recognised that HMRC had not applied their own policy on car parking but held that the policy could not be relied upon by the claimant because it was discretionary and non-contractual. The tribunal also

held that a dedicated parking space was not the only possible reasonable adjustment in this case, or that it was necessarily the best solution to enable access to toilets. In this instance the tribunal found that HMRC did make a reasonable adjustment regarding Ms Linsley's parking and that this was sufficient for HMRC to discharge its obligations to Ms Linsley under the Equality Act 2010.

Employment Appeal Tribunal

On appeal, the EAT found the tribunal had made three errors in law.

It held that the tribunal had incorrectly diminished the car parking policy's significance and that a tribunal should expect a reasonable employer to provide a cogent reason to explain why a reasonable adjustments provision in such a policy was not followed. In this case, the EAT found the policy had not been applied due to managerial ignorance, which was an insufficient reason.

The EAT held that stress was the particular disadvantage Ms Linsley had relied upon in her case and the importance of stress as a trigger for her condition had been made clear to HMRC by Ms Linsley herself and in a number of OH reports to HMRC going back to 2012. The EAT held that the tribunal ought to have considered the stress put on Ms Linsley by having to find a parking space, not just her need to have access to toilet facilities.

The EAT confirmed that an employer is not required to select the best or most reasonable adjustment, nor do they have to select the option an employee prefers. However, the test of reasonableness is objective and because the tribunal had not put sufficient emphasis on Ms Linsley's stress as the particular disadvantage she experienced, it had not been able to properly apply the test.

The EAT upheld Ms Linsley's appeal and remitted the case back to the tribunal to reconsider the reasonable adjustment issue.

Wrigleys comment

This case highlights the need for employers to consider the effect a particular disability has on that individual employee and to ensure that that particular disadvantage to the employee is adequately considered when deciding on adjustments. Here, HMRC became fixated on the issue of access to toilet facilities without properly considering whether the adjustment addressed Ms Linsley's stress, which was an aggravating factor to Ms Linsley's condition.

The judgment highlights the need for employers to consider earlier OH reports and medical evidence as well as the most recent reports when considering reasonable adjustments.

It also shows that unless an employer has a clear reason for not applying a relevant policy in relation to reasonable adjustment, failure to follow that policy is likely to be deemed unreasonable.

Was an employer negligent or vicariously liable for injury sustained during an office party at work premises?

Case law has considered the actions of an over-exuberant attendee to an office party in what continues to be a fact-specific area of law.

The law

The law of negligence provides that a duty of care is owed between parties in a relationship of 'sufficient proximity', where the damage suffered is 'reasonably foreseeable' and it is fair, just and reasonable in all circumstances that the duty of care be imposed.

Vicarious liability means that a person (A) can be liable for the actions of another wrongdoer (B), where the relationship between A and B and the wrongful act of B means that it is just and reasonable to hold A legally responsible.

The interpretation of these tests and application to the facts can make it difficult for employers to gauge where they stand in relation to vicarious liability for negligent acts by an employee. Case law is extremely fact sensitive which can lead to very different outcomes.

Case details: Shelbourne v Cancer Research UK [2019]

In 2017 Mrs Shelbourne attended a Christmas party held at Cancer Research UK (CRUK)'s offices. The party had been organised by a group of volunteers within CRUK and was limited to staff, spouses and staff guests. CRUK hired two door staff for the party, primarily to stop employees and guests accessing the office's laboratories. Mr Bielik, a visiting scientist who was not employed by CRUK but worked at the offices, attended the party and for reasons better known to himself decided to lift several members of staff up over the course of the evening. He attempted to pick up Mrs Shelbourne, slipped, and dropped her resulting in Mrs Shelbourne sustaining a serious back injury. Mrs Shelbourne sued CRUK for negligence.

Negligence and the duty of care

The Courts considered that CRUK owed Mrs Shelbourne a duty of care; the issue to be decided was at what level that duty was set and for the Court to then determine if CRUK had breached the required standard of care.

At the centre of this deliberation was the provision of alcohol at the employer's event, to what extent this increased the risk factors and whether this increase meant the injury to Mrs Shelbourne was reasonably foreseeable by CRUK in the circumstances.

Mrs Shelbourne argued that, knowing alcohol was to be served, CRUK needed to meet a high standard of care which included attendees signing a declaration of good behaviour and providing trained staff to supervise the event. She also argued that CRUK should have engaged specially trained personnel to complete risk assessments to ensure the assessment covered all

envisaged forms of inappropriate behaviour resulting from alcohol.

The Court rejected these arguments, noting that the extent of the duty of care was context-specific, and should include consideration of the social environment in which alcohol is served. For example, a nightclub admitting the general public would need to consider a wider range of alcohol-related risks than an office admitting select guests, particularly as in this case previous events of the same or similar nature had passed without incident.

The Court also had to consider what was just and reasonable and opined that a 'reasonable person of the early 21st Century' would consider Mrs Shelbourne's suggested requirements set the standard of care unreasonably high.

Vicarious liability and consideration of the relevant 'field of activities'

The parties accepted that the relationship between Mr Bielik and CRUK was capable of giving rise to vicarious liability. Therefore the main focus was whether it was just and reasonable in the circumstances to hold CRUK legally responsible. The Supreme Court in Mohamud v WM Morrisons Supermarkets plc [2016] ruled that this requires analysis of the nature of the job done by the wrongdoer and whether there was 'sufficient connection' between the wrongdoer's job ('field of activities') and the wrongdoing. If the wrongdoing occurred within a field of activities carried out to further the employer's aims, the principle of social justice is applied to decide if the employer is vicariously liable.

Mrs Shelbourne argued Mr Bielik was acting within his 'field of activities' by drunkenly interacting with staff at the party and that this activity had been authorised by CRUK for its own benefit because it stood to gain from better employee morale forged at the party.

The Court considered Mrs Shelbourne's argument overstated the role of CRUK who had, in reality, organised the party via a group of staff volunteers at the expectation of staff, rather than because it expected to gain anything from the exercise. In the Court's view, Mr Bielik's field of activities was limited to his research at CRUK and this was not sufficiently connected to the events at the party to give rise to vicarious liability under the principle of social justice.

Wrigleys comment

The decision in Shelbourne is useful in that it demonstrates the courts are unwilling to impose unrealistic duties on employers when it comes to the potential risks of serving alcohol at staff events. However, it is clear that employers should take precautions associated with identified risks informed by risk assessments carried out by appropriately trained staff. Those risk assessments and precautions can reflect on past experiences of similar events and will not necessarily be viewed as inadequate in hindsight.

The Courts' application of Mohamud also clearly shows that they will carefully consider the role and purpose of the wrongdoer in the context of the events as they unfold before finding an employer vicariously liable for their actions – it is not as simple as the wrongdoer being a 'worker' at a work-related event.

Positive discrimination held to be unlawful

Cheshire Police were found to have directly discriminated against a white heterosexual male candidate

Positive discrimination is permitted under s.159 of the Equality Act 2010, which allows employers to treat individuals with protected characteristics (a 'PC') more favourably than those that do not during recruitment and promotion. However, an employer must think carefully about how they meet the requirements of s.159 or they risk being found liable for discrimination under the Act.

Case details

In *Furlong v The Chief Constable of Cheshire Police* Mr Furlong, a white heterosexual male, applied to be a police constable. He was shortlisted and passed both an assessment centre and interview but ultimately did not secure a job.

Mr Furlong later brought a tribunal claim, claiming he had been discriminated against on the grounds of sexual orientation, race and sex. The Cheshire Police defended the claim by stating they had applied positive action measures permitted under s.159 to candidates successful at interview and that Mr Furlong's application did not progress as a result.

The law

The broad effect of s.159 is to allow employers to use positive action as a 'tie-breaker' in recruitment and promotion. This is only permitted in specific circumstances, where:

1. an employer reasonably believes that persons with a PC suffer a disadvantage in connection with the PC, or that participation in an activity by persons with a PC is disproportionately low; and
2. the action taken by the employer is done with the aim of enabling persons with the PC to overcome or minimise the disadvantage, or encourages persons with the PC to participate in the activity; and
3. when taking the action at point 2, it is a proportionate means of achieving a legitimate aim; and
4. when applying the positive action, the person with the PC is as equally qualified as the other person without the PC; and
5. the employer does not have a policy of treating people who have that PC more favourably than those who do not.

The decision

The tribunal found that Mr Furlong had been directly discriminated against on the grounds of his sexual orientation, race and sex.

The tribunal lauded Cheshire Police's efforts to create a force that better represented the population it policed and considered this to be a legitimate aim. However, the tribunal found a number of issues with the application process undertaken by Mr Furlong which went to the heart of the requirements of equal candidacy and of the force taking action that was proportionate in relation to achieving their aim (points 3 and 4 above).

In particular, the tribunal found there were clear qualitative differences between the 127 candidates who passed the interview and it was not correct or appropriate for the force to suggest each candidate had equal merit so as to apply the positive action.

The tribunal found that Mr Furlong scored well on the interview assessment and considered that he likely would have been successful in his application had he not been subject to the 'equal merit' metric applied by the force.

Regarding proportionality, the force presented data showing the positive actions it had been taking and that these indicated the force was improving its diversity makeup. In light of this, the tribunal felt the changes to the force's application process (described as 'radical and substantial') were not proportionate because the force was already making progress in regard to its desired diversity makeup.

Finally, when considering the totality of the actions that Cheshire Police were taking, the tribunal concluded that it did in fact have a policy in place that treated persons with a PC more favourably than those who did not.

Wrigleys comment

If an employer is minded to take positive action, this case makes clear that the employer must carefully think through its recruitment and promotion procedures if it wishes to avoid discrimination.

The starting point for an employer must be that any positive action is only used as a 'tie-breaker' where it is clear that the candidates are otherwise equally qualified for the position. Employers must therefore carefully consider how they will determine the relative strength of candidates and at what stage it will be able to legitimately apply positive action measures.

Assuming employers have a clear legitimate aim for the positive action, they must also consider if the action they intend to take is a proportionate means of achieving that aim. What is proportionate will in part be determined by the context of previous positive actions (if any) taken and their results. Here, Cheshire Police were already seeing results from prior positive actions which were taken before they made 'radical and substantial' changes to their application process which resulted in the disadvantage caused to Mr Furlong. Employers must therefore consider the context of any positive action taken and ask if the action is warranted in their particular circumstances.

Probationary periods in employment – an overview of the implications and potential pitfalls

Probationary periods are a common feature of employment – but what exactly are the implications of one?

The idea of probationary periods is simple enough – they provide a period of time in which the employer and employee can see what it is like to work with each other and if either party isn't happy, they can terminate the contract on minimal notice and move on.

However, there is no statutory or common law right to a probationary period and no common legal process setting out how they should be performed. They are entirely the creation of the employment relationship between employer and employee which means that, in reality, a 'probationary period' is really an umbrella term that can vary from employer to employer.

What does this mean in practice?

Drafting an appropriate probationary period clause for the employment contract is tricky. On the one hand an employer could clearly set out how the probationary period works to suit the specific job or role and make clear on what basis an employee will pass it or fail it. On the other hand many employers will avoid doing this to limit the risk of a breach of contract claim. Another problematic issue is the time and attention required - one role can be so different to another, even within the same organisation, that bespoke drafting might be required for each role. In practice, some employers still fail to provide any contract at all.

It is therefore not too surprising that the use of generic and vague references to a probationary period have become widespread.

Why does this present a problem?

A probationary period should not present a problem to employers who actively monitor and manage new employees. However, either due to oversight or lack of resources, many employers will not do so.

Consider a busy employer who checks various metrics towards the end of a probationary period and finds that the employee on probation is falling well short of expected standards. The employer has a small window to take advantage of the shorter length of notice commonly provided for during probation, but also realises the identified performance issues have not been raised with the employee and they won't get the chance to raise them in the window available.

An employer could take the view that, even if the employee felt the decision was unfair, there is no real prospect of an unfair dismissal claim due to a lack of service. Further still, because

it is implied by a probationary period that the employee's performance is monitored, even if no reason is given at the time of dismissal it is arguable that the dismissal is for 'performance reasons'. Might an employer be tempted to think 'why take the time to explain the reason? Why not just dismiss and simply state 'performance reasons'? or give no reason at all?'

How risky is it to dismiss an employee during their probation without giving reasons, or for vague reasons?

This approach raises far greater risks if the employee has done a protected act or has a protected characteristic, giving them a potentially automatic unfair dismissal or discrimination claim which does not need a qualifying period of service. Here, the dismissed employee could understandably be suspicious of their employer's motives and bring a claim.

Even if the employer is comfortable the real reason for dismissal falls under one of the potentially fair reasons for dismissal (e.g. conduct, capability or some other substantial reason), if the employee has not been actively managed, it will still seem suspicious to the employee to be told they are dismissed for 'performance reasons'.

Automatic unfair reasons for dismissal do not require the employee to have two years' continuous employment to qualify to bring a claim. Even if the employer was acting reasonably the following reasons for dismissal are automatically unfair, including dismissal during a probationary period:

- pregnancy and maternity;
- family matters, including parental leave, paternity leave (birth and adoption), adoption leave and time off for dependants;
- acting as an employee or trade union representative or trade union membership;
- being a part-time or fixed-term employee;
- asserting statutory rights relating to pay and working hours, including annual leave and the National Minimum Wage; and
- whistleblowing.

Consider an employee under probation who has poor timekeeping, attendance or general performance. Without appropriate monitoring during probation the cause of any performance issue could go undetected; e.g. a family matter or an illness which covers an underlying disability.

The employer will find themselves on the back foot if they face an automatic unfair dismissal or discrimination claim and they have minimal evidence to show that the dismissal was for a potentially fair reason. Even if a claim may ultimately fail, it is not uncommon for it to progress past the initial sift at tribunal if an employer lacks evidence in their defence. This is especially true in discrimination cases where tribunals are reluctant to dismiss such claims without hearing evidence from the parties and the employer cannot immediately show a clear non-discriminatory explanation for the alleged treatment. There is likely to be scant evidence available if the employer did not actively manage the employee during probation. This will

also be true if the employer can only point to dismissal stated as being for vague 'performance reasons'.

Therefore, the risk of providing vague reasons or no reason for dismissal is that it makes it much more likely that the employer will face the costs of defending or seeking to settle an automatically unfair or discrimination claim. Depending on the circumstances, there is the risk that the employer could lose such a claim.

Wrigleys comment

Performance monitoring is always going to form a key part of any probationary period, whether or not that forms part of any clause in the employment contract. Best practice will always be for employers to ensure that there is some process put in place whereby good and bad performance can be discussed with the employee. This need not be onerous.

Employers should also not shy away from actively managing new employees for fear of uncovering any issues that add complexity, such as a protected characteristic. An employer will be better positioned to protect itself against subsequent claims by taking a proactive approach to identify issues and any legitimate concerns and to make it clear that the employer is not acting on the basis of any protected act or characteristic.

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