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EMPLOYMENT LAW BULLETIN

FEBRUARY 2020

Welcome to the February edition of our employment law bulletin.

We start this month with the far-reaching judgment of the Supreme Court in ***Royal Mail Group Ltd v Jhuti*** on when an employment tribunal should take into account the motivation of someone who manipulates the person making the decision to dismiss.

We look at two recent cases in the EAT. In ***Q v Secretary of State for Justice***, the EAT has given a helpful judgment considering whether a dismissal for failing to disclose the employee's own safeguarding risk to her child was unfair and in breach of her human rights. In ***Tesco Stores Limited v Mrs C Tennant***, the EAT considered the complex issue of when an employee's impairment becomes long term and so a disability for the purposes of the Equality Act 2010.

We also look at the first instance decision of an employment tribunal in ***Forstater v CGD Europe and others*** that a philosophical belief that men and women cannot change their sex is not protected under the Equality Act as it is not compatible with the rights of other people.

And in our Question of the Month for February we consider the tricky question of what should employers do if an employee raises a grievance about being offered a settlement agreement.

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

Forthcoming events:

- **Charity Governance Seminar: Leadership - Come Rain or Shine**
  12th March 2020, Sage Gateshead, Gateshead
  For more information or to book

- **Employment Breakfast Briefing - Unfair dismissal: an update**
  7th April 2020, Radisson Blu, Leeds
  For more information or to book

- **SAVE THE DATE: Employment Law Update for Charities**
  2nd June 2020, Hilton City , Leeds
  For more information or to book

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Unfair dismissal: whose reason is it anyway?

When the decision-maker's reason for dismissal is not the real reason.

In an unfair dismissal claim, the employer must show that the reason, or if there is more than one reason, the principal reason for the dismissal was one of the five potentially fair reasons (capability, conduct, redundancy, breach of a statutory duty or "some other substantial reason"). The tribunal will make findings about the facts which were known to the employer and the beliefs held by the employer which caused the employee to be dismissed.

Usually, the tribunal will only examine the knowledge and beliefs (at the time of the decision) of the individuals who make the decision to dismiss, for example the dismissing officer and person hearing an appeal.

How will the tribunal deal with cases where there is evidence to show that someone manipulated evidence before the decision-maker and that the real reason for dismissal was not in fact one of the potentially fair reasons? A recent case has provided clear guidance on when a tribunal can look behind an invented reason for dismissal to the real motivation of someone else in the organisation.

Case details: ***Royal Mail Group Ltd v Jhuti***

Ms Jhuti worked in the Royal Mail Group's media sales team. During her probation period, she reported to her line manager (Mr Widmer) concerns about a colleague's breach of Ofcom compliance rules. Under pressure from Mr Widmer, she retracted the allegations. Mr Widmer then made working life difficult for Ms Jhuti by raising unjustified performance concerns and singling her out by holding intensive weekly performance review and target setting meetings. Ms Jhuti went on sick leave for stress and raised a grievance accusing Mr Widmer of bullying and harassment.

A different manager, Ms Vickers, undertook a paper-based review of Ms Jhuti's performance as her probation was coming to an end. Mr Widmer told Ms Vickers briefly that Ms Jhuti had made allegations about a breach of compliance rules and that these allegations had been retracted. Ms Vickers did not speak to Ms Jhuti during her review (because of Ms Jhuti's sickness absence) and did not have sight of the grievance, although she was aware of it. Ms Vickers dismissed Ms Jhuti on the ground of poor performance, taking into account the paper trail created by Mr Widmer.

Ms Jhuti brought claims for detriment and automatic unfair dismissal on the grounds of whistle-blowing. An employment tribunal upheld her whistle-blowing detriment claim. However, the tribunal dismissed the automatic unfair dismissal claim on the basis that the dismissing officer did not know about the protected disclosures and so could not have been motivated by them.

There followed a series of appeals in which the tribunal's decision was initially overturned by the EAT and then reinstated by the Court of Appeal. The Supreme Court has now clarified matters by agreeing with the EAT that Ms Jhuti's dismissal was automatically unfair on the ground of whistle-blowing.

This decision was on the basis that: "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".

Comment

This is a very important decision which is relevant to all dismissal cases and not only those which involve whistle-blowing. Where an employee can show that the real reason for their dismissal was not a fair reason, even where that real reason was unknown to the dismissing officer, a tribunal can find the dismissal to be unfair. This will only be the case, however, where the person manipulating the dismissing officer or putting forward false evidence to the investigation is someone above the dismissed employee in the hierarchy of the organisation. It would not apply, for example, where a colleague at the same level as the employee gave dishonest evidence to the investigation; although such a case might lead to a finding of an unfair process where the investigation was found to be inadequate in the circumstances.

In practice, it can be difficult for a dismissing manager to know whether the evidence put before them gives a true picture of the employee's performance or conduct. It is important that managers in this position seek to have as a full a picture of events as possible rather than relying on what they suspect to be partial evidence. Taking steps to hear the employee's version of events is a fundamental part of the investigation process, as is seeking full documentary evidence relating to any grievances or concerns raised by the employee.

Where the employee is not well enough to take part in meetings, adjustments should be made to the process to enable them to participate, such as conducting meetings by telephone, taking written submissions or allowing a representative to attend on their behalf. Where there are compelling reasons to continue a process in the employee's absence, employers can still fairly dismiss. However, this is a risky step to take and we recommend taking legal advice before doing so.

Was a dismissal for failing to disclose the employee's own safeguarding risk to her child unfair and in breach of human rights?

Dismissal and breach of right to privacy were justified by potential risk to employer's reputation as statutory safeguarding partner.

Employers can be faced with very difficult decisions where internal disciplinary proceedings arise from conduct outside of work. All the more so where that conduct raises a safeguarding risk which could impact on the employer's work and reputation.

Employees who work with children or vulnerable adults clearly have to comply with rigorous safeguarding procedures in the workplace to protect service users. More complex can be the question of whether such an employee has a duty to disclose a safeguarding risk arising from their own private life.

Within the education and child care sector, the rules on reporting a safeguarding risk arising from people the employee lived with (the disqualification by association rules) have been relaxed since 31 August 2018. Further details of these changes are available in a previous article, available on the Wrigleys website. The question of whether a headteacher was required under her contract to report her own relationship with a convicted sex offender was considered in the interesting case of Reilly v Sandwell Metropolitan Borough Council (a case which was considered before the disqualification by association rule change but to which the rules did not apply).

Despite the change in these rules, those working with children or vulnerable people are still likely to have a safeguarding duty to disclose to their employee where there is a risk of harm to children or vulnerable people arising from their own personal life. If the failure to disclose

comes to light, the employee is likely to face disciplinary allegations including the potential damage to the employer's reputation as well as the breach of the safeguarding duty itself.

In a recent case, the EAT considered whether a probation officer's dismissal for failing to report that she was considered by social services to be a risk to her own daughter was unfair and in breach of her right to respect for private and family life.

Case details: ***Q v Secretary of State for Justice***

The claimant (Q) was employed as a Probation Service Officer, a role which included safeguarding duties although it did not include work with children. Her daughter was placed on the Child Protection Register in 2014 following allegations that Q had been violent towards her. Q did not follow social services' advice to tell her employer about this and so social services disclosed the information directly to the Probation Service. After disciplinary proceedings, Q was given a final written warning for failing to report a potential safeguarding issue and she was demoted. In 2015, a Child Protection Plan was put in place for Q's daughter. Q failed to inform her employer despite having been advised that she should keep them updated. The Probation Service summarily dismissed Q for this failure to disclose and for reputational damage consequent on the way Q had dealt with social services.

Q brought a claim for unfair dismissal which was not upheld by an employment tribunal. It found that the dismissal was fair in the circumstances as a final written warning had previously been given in relation to the same conduct and Q was aware of her obligation to disclose. The tribunal commented that the claimant's actions in not disclosing "showed a lack of professional judgment regarding safeguarding issues which could have impacted on her work". This was the case even though the claimant did not work with children as part of her role.

The tribunal also found that Q's actions were clearly capable of bringing the employer into disrepute and undermining public confidence in the Probation Service. These actions included both the nature of the incident itself, which involved a child, and Q's refusal to engage with social services. As an employee of the Probation Service, with its integral role in the criminal justice system, the claimant was to be held to a higher standard of conduct than employees might be in other sectors. This included personal conduct outside work which was likely to damage the reputation of the Probation Service. The tribunal accepted that the reputational risk was heightened by the fact that the Probation Service was a statutory partner on Local Authority Safeguarding Children Boards.

When considering whether Q's human rights had been infringed, the tribunal determined that the interference with Q's right to respect for a private and family life was proportionate. The Probation Service's requirement to "ensure that its staff behave in a way which is commensurate to their obligations to the public in terms of safeguarding the vulnerable and children" was of particular relevance to this decision.

The EAT agreed. It held that, given the nature and importance to society of the employer's activities and responsibilities, and the importance of its relationship with Local Authorities as statutory partners, the tribunal was right to find the interference with Q's human rights was proportionate and justified, and did not render the dismissal unfair.

Comment

A key question in unfair dismissal claims is whether the employer acted reasonably in treating the reason for dismissal as a sufficient reason to dismiss. This question takes into account all the circumstances of the case. In this case, these circumstances included the employer's activities, policies, duties, standing in society and relationship with statutory partners. The employer was able to show that the importance of these to the organisation had been taken into account in the decision to dismiss.

In this case, the existence of a final written warning about the same issue put the employee on notice that she was obliged to disclose information about the involvement of social services with her family in future and made clear the standards expected of the employee.

When taking the decision to dismiss in gross misconduct cases, it is vital for employers to document clearly the contractual terms, rules, policies, or duties which the employee has been found to have breached. Employers should also explain in the outcome letter the importance of the relevant rules or duties to the organisation and why the breach is therefore a fundamental breach of contract. Where dismissal is because of reputational risk, employers should articulate the nature of that risk and why this risk arose from the employee's conduct itself and/or from the failure to disclose.

It is important to note that not all conduct outside of the workplace will have an impact on the employment relationship and properly lead to a disciplinary process. When deciding whether to take disciplinary action, employers should first consider whether the conduct has any bearing on the employee's ability to perform the role and/or raises reputational risks for the organisation.

Employment tribunal: a philosophical belief that men and women cannot change their sex is not protected

Judge finds views were incompatible with human decency and conflicted with the fundamental rights of others.

Religion and belief is one of the nine protected characteristics set out in the Equality Act 2010 (the Act). A belief means any religious or philosophical belief and includes a lack of belief. Philosophical belief is not defined in the Act. Courts and tribunals must therefore test the concept by reference to the following:

i) the belief must be genuinely held;

ii) it must be a 'belief' and not just an opinion or view based on the present state of information;

iii) it must relate to a 'weighty and substantial' aspect of human life and behaviour;

iv) the belief must be sufficiently cogent, serious, coherent and important; and

v) the belief must be worthy of respect in a democratic society and not incompatible with human dignity or conflict with the fundamental rights of others.

An employment tribunal has recently decided a case many will have seen in the news about whether an individual's views on transgenderism were protected under the Act.

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

Ms Forstater worked as a researcher for CGD, a think tank, from 2015 and was employed through a series of contracts. In 2018, Ms Forstater became actively involved in social media exchanges around government proposals to amend the Gender Recognition Act 2004 (the 'GRA') to allow individuals to self-identify their gender, expressing her concerns about these proposals.

Under the GRA, someone who transitions under specific circumstances, including professional

medical involvement, is granted a certificate which, for all legal intents and purposes, identifies that person's sex. In this way transgender women can therefore legally be recognised as women and transgender men can be recognised as men.

After a series of exchanges via social media, complaints were raised about Ms Forstater's use of language and she was alleged to have made transphobic statements. CGD questioned Ms Forstater on this point via internal processes and she denied the allegations.

When Ms Forstater's contract was not renewed in 2019 she brought employment tribunal claims against CGD for belief discrimination, amongst other things. In particular, Ms Forstater claimed that her contract was not renewed because she had expressed a 'gender critical' opinion, which in essence is that sex is unalterable and whatever a person's status was at birth in regard to sex, this could not be changed.

Employment tribunal

The tribunal took evidence from a variety of sources, including Ms Forstater's social media posts, to gauge the degree to which her views were genuine but also to understand their impact on others.

The tribunal heard evidence of a complaint from outside of work where Ms Forstater was alleged to have 'misgendered' someone as a male when that person preferred to be referred to by the plural pronouns 'they' and 'them'. Ms Forstater responded to the allegations by saying '[I]n reality Murray is a man. It is Murray's right to believe that Murray is not a man, but Murray cannot compel others to believe this' and that she '[reserved] the right to use the pronouns 'he' and 'him' to refer to male people' and that while she might choose to use alternative pronouns as a courtesy, she could not be compelled to use them.

In particular, attention was given to Ms Forstater's unwillingness to accommodate a transgender person's wishes. As well as taking Ms Forstater's comments about Murray into account, Ms Forstater denied the right of a person with a GRA certificate to be the sex to which they transitioned, on the basis that this was a 'mere legal fiction'. The tribunal disagreed; the GRA certificate provided a right by giving effect to Articles 8 and 12 of the European Convention on Human Rights (to respect for private and family life and to marry) and this was not something Ms Forstater was entitled to ignore.

The tribunal went further and noted that calling a trans woman a man is likely to be profoundly distressing for that individual and may even be unlawful harassment (gender reassignment is also a protected characteristic under the Act). In such a scenario, the tribunal concluded that a person could not expect to be protected if their core belief or a component of it would necessarily result in the violation of the dignity of others.

The tribunal concluded that Ms Forstater's belief met the identified requirements of items i) to iv) set out above, but found that it was not a view which could be respected in a democratic society because it was ultimately incompatible with human dignity and impinged on the fundamental rights of others.

As a result, Ms Forstater's claim for belief discrimination failed.

Comment

We discussed in our October 2019 Employment Law Bulletin a similar decision in the case of Mackereth v DWP and another, where a doctor's beliefs were found to be incompatible with human dignity, conflicted with the fundamental rights of transgender individuals and as a result were not therefore protected under the Act.

Cases such as these are good examples of when employers should think early on about engaging the appropriate advice.

It is not uncommon to see employment tribunal cases where an employer has been caught between sets of fundamental rights. It is difficult for employers to navigate these situations because each will depend on their own particular set of circumstances and can be highly nuanced. In situations like this an employer needs to assess whether a belief held by an employee is genuine and exercised in a manner worthy of protection under the Equality Act before delving into the circumstances surrounding an employee leaving their job. However, those that engage with their advisers at an early stage will likely be best placed to manage any potential discrimination claims.

This case is a first instance employment tribunal case and may be appealed.

At what point is a disabled employee disabled for the purposes of the Equality Act?

EAT confirms employee must show the effect of their impairment is 'long term' at the time of the discriminatory acts.

Under the Equality Act 2010 ('the Act') a person has a disability if they have a physical or mental impairment and the impairment has a substantial, long-term, adverse effect on their ability to carry out normal day-to-day activities.

Paragraph 2 of Schedule 1 of the Act ('Para 2') adds that an impairment is long-term if (a) it has lasted 12 months or (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.

Case details: ***Tesco Stores Limited v Mrs C Tennant***

Mrs Tennant was employed by Tesco as a checkout manager. She went off sick for extended periods from September 2016 as a consequence of depression. A year later, she brought proceedings against Tesco alleging disability discrimination, harassment and victimisation. The acts relied on were alleged to have occurred between September 2016 and September 2017.

At a preliminary hearing an employment judge found Mrs Tennant had suffered depression, which was an impairment that had a substantial effect on her, from 6 September 2016. The judge then determined that because the effect lasted for a period of 12 months through to September 2017, she was suffering a disability during the whole of that period under Para 2(a). For this reason she was disabled for the purposes of the Act from 6 September 2016.

The EAT confirmed that the employment judge's application of Para 2(a) was wrong. The correct interpretation is that the employee must have had an impairment for 12 months or more to be disabled under that section. This means that disability claims can only be brought under that section for acts which occur after that 12 month period.

Accordingly, the EAT concluded that Mrs Tennant could only have been disabled for the purposes of Para 2(a) from 6 September 2017 and any acts prior to that date were not acts of disability discrimination under the Act.

Comment

Whilst the EAT's decision appears obvious on the face of it, this case highlights the potential confusion that the definition of disability in the Act can produce and it was noted that no there

was no legal authority on the specific interpretation of Para 2(a) to guide the tribunal.

It is possible that the judge may have been 'creative' in his interpretation of Para 2(a) in an effort to help Mrs Tennant continue her claim, as it appears she did not bring evidence to show that her condition was likely to last 12 months at the time of the alleged acts. Had Mrs Tennant done so, the judge may have been able to find that Para 2(b) or (c) applied, on the basis that the condition was likely to last for at least 12 months.

Employers should not take comfort from this case when dealing with employees who have started suffering with an impairment which could be a disability. It is possible that an employee will be able to bring evidence to show that their impairment was likely to last for 12 months at the time of the alleged discrimination. As Mrs Tennant did not bring a cross-appeal in the EAT to argue that her impairment was likely to last 12 months at the relevant dates, the EAT could not consider this argument.

Whilst an employee may still be many months away from gaining protection under Para 2(a), employers need to proactively find out more information about the employee's condition once they are on notice that the employee might be disabled for the purposes of the Act. If evidence, including reports from health professionals, indicates that at employee's impairment has lasted or is likely to last for at least 12 months, it is important to ensure that reasonable adjustments are made. Employers should also ensure that any unfavourable treatment of the employee because of something arising from their disability (for example the management of any performance issues) is justifiable in the circumstances.

Question of the Month: What should employers do if an employee raises a grievance about being offered a settlement agreement?

And what impact does this have on the nature of protected conversations?

If an employee raises a complaint about the employer offering them a settlement agreement this will no doubt be a moment to pause and consider the potential impact. Employers will rightly be concerned that such a complaint will, either by design or accident, risk the 'off the record' (i.e. not disclosable before a court or tribunal) nature of settlement negotiations by bringing them into an 'on the record' process such as a grievance.

Without prejudice or s.111A?

There are two ways in which settlement discussions may be 'off the record'.

- the 'without prejudice' rule which covers statements made by parties in a genuine attempt to settle a pre-existing dispute. The rule will apply to settlement discussions in practically all situations where there is an existing dispute and can only be lifted in situations where at least one party is found to have abused a privileged occasion.

- s.111A of the Employment Rights Act 1996 is a statutory creation which allows employers to enter into pre-termination negotiations with employees to bring employment to an end by mutual agreement. There doesn't need to be a pre-existing dispute for s.111A to apply, but it will only protect 'off the record' discussions in straightforward unfair dismissal claims. It will not apply if the employee complains of discrimination or automatic unfair dismissal, for example. Also, if a tribunal decides that the employer acted improperly then s.111A can be disapplied. What is 'improper' includes, but is much wider than, the abuse of privilege as per the without prejudice rule and will also cover bullying, harassing or intimidating

behaviour by the employer. This can create a lower bar for lifting s.111A protection than for the without prejudice rule.

How can a grievance affect the application of without prejudice and s.111A?

This will depend on the nature of the complaint. For the purposes of this article, we will assume the grievance alleges that the employee has been offered a settlement agreement because the employer does not want to deal with allegations of discrimination and makes other complaints about the way performance issues have been raised by the employer.

A complaint like this does not lift the without prejudice rule in respect of settlement negotiations and the employer could seek to argue that an offer to settle, and a subsequent complaint about that offer, is part of the off the record discussions. However, ignoring a complaint does create other risks. The employer should also be mindful that s.111A will not cover the settlement agreement negotiations in the event of a claim of discrimination.

Can an employer ignore the complaint?

An employer will be taking a risk if they ignored a complaint, even if it is simply about being offered a settlement agreement. An employer certainly could not ignore a complaint about discrimination or the handling of the employee's performance issues, regardless of whether the without prejudice rule or s.111A applies.

Grievances must be dealt with by an employer, as a tribunal would expect reasonable employers to investigate a complaint from an employee. A failure to deal with an employee complaint could be a breach of the implied term of mutual trust and confidence. That failure could also be an act of discrimination. Either would give the employee the opportunity to resign and claim constructive dismissal.

A complaint or grievance about the offer of a settlement should not mean that the employer halts any settlement discussions. However, if the grievance is about the way in which those discussions are being held, e.g. in an oppressive, intimidatory or discriminative manner, then the employer must take steps to ensure the discussions are being conducted properly.

Can an employer keep off the record matters separate?

If an employer is facing a complaint about the offering of a settlement agreement, regardless of whether the without prejudice rule or s.111A applies or not, it is good practice to assume that the employee will bring a tribunal claim and that the question of admissibility will be fought at a hearing.

An employer could consider the complaint about being offered a settlement agreement separately from the other points in the grievance. This way, if the without prejudice rule or s.111A is upheld, the correspondence dealing with negotiations is easy to separate from open correspondence dealing with the other grievance points. If the without prejudice rule or s.111A is lifted, the employer can still show the complaint was dealt with.

Comment

Employers need to bear in mind that employment tribunal judges will know that efforts have likely been taken to settle a matter off the record either prior to or after the termination of employment, and in many circumstances a judge will expect it.

That said, employers should be attentive to the details when seeking to rely on the without prejudice rule or s.111A. For instance, it is useful for employers to start an on the record process to document an existing dispute before entering into termination negotiations as this

will increase the likelihood that both the without prejudice rule and s.111A will apply to keep settlement discussions off the record.

By engaging with the grievance about the offer, employers avoid giving employees an excuse to claim constructive dismissal. Dealing with the complaint separately (at least in terms of documentation) from other grievance points could help sift out any privileged element.

However, employers must recognise that s111A and the without prejudice rule will not give a blanket protection for everything said or done in the course of negotiations and care must be taken to ensure such negotiations are conducted properly.

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