



Brachers Bitesize

Case Law Update

11 June 2024

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Presenter



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A photograph of a wooden desk with a pair of glasses, a book, and a document titled "Employee Termination". A blue arrow-shaped graphic points from the left towards the document.

Employee Termination.

Unfair Dismissal

Unfair Dismissal

Bugden v Royal Mail Group

- Claimant was dismissed following a series of ill health-related absences.
- Claim for unfair dismissal and disability discrimination, including failure to make reasonable adjustments.
- Claims failed before the tribunal.
- Claimant's appeal:
 - Tribunal should have considered if moving to another role could have been a reasonable adjustment.
 - Tribunal should have considered if the possibility of moving to another role, and the Respondent's failure to consider it, affected the fairness of the dismissal.
- EAT dismissed reasonable adjustments claim as it was not sufficiently clear.
- EAT allowed appeal for unfair dismissal. Tribunal should have considered redeployment despite employee not raising it.

Unfair Dismissal- Band of Reasonable Responses

Vaultex v Bialas

- Claimant was dismissed for posting a racist “joke” on the Respondent’s intranet.
- The Tribunal held the Claimant was unfairly dismissed as the decision fell outside the band of reasonable responses.
- As the Claimant had a long, unblemished service record and apologised for his actions, the Tribunal found any decision beyond a final written warning fell outside a decision a reasonable employer could have reached.
- The Respondent appealed the decision.
- The EAT found the dismissal fair and concluded that *‘any tribunal properly applying the law could not have concluded other than that dismissal, however harsh the tribunal might think the decision, was within the band of reasonable responses open to the employer in this case’*.

Automatic Unfair Dismissal- Parental Leave

Wright v Hilton Food Solutions

- Claimant was made redundant but alleged the real reason for his dismissal was because he had **sought to** take parental leave.
- The Respondent applied for the claim to be dismissed on the basis he could not have sought to take parental leave as he had not made a formal application during his employment. The Tribunal refused.
- The EAT agreed and held that an employee could show that they had ‘sought’ to take parental leave without actually needing to have made a formal application.
- Whether an employee has ‘sought’ to take parental leave is a question of fact for the employment tribunal having considered all the relevant evidence.

Unfair Dismissal- Health and Safety

Herve v Goldstein

- The Respondent enforced a hybrid arrangement during the second COVID-19 lockdown.
- The Claimant (whose partner was high risk) requested to work from home full time. The Respondent rejected the request and sent her a message accusing her of unprofessional conduct and malingering.
- The Claimant resigned after refusing to attend her workplace.
- The Tribunal held the Claimant was automatically unfairly dismissed and subjected to detriment on health and safety grounds.
 - The Claimant reasonably believed her returning to her workplace would be harmful or potentially harmful to health and safety.
 - The Claimant had refused to return to the workplace ie to the risk of danger which she reasonably believed was serious and imminent.
 - The Respondent breached trust by objecting to her refusal and pressing the Claimant to attend.

Automatic Unfair Dismissal- Health and Safety

Accattatis v Fortuna

- Claimant proposed to work from home or be furloughed.
- The Claimant claimed he was unfairly dismissed because he reasonably believed to be in serious and imminent danger during the Covid-19 pandemic.
- The tribunal rejected his automatic unfair dismissal claim. It held that he had been dismissed because he was a difficult and challenging employee.
- The tribunal found that, although there were circumstances of serious and imminent danger, neither of these reasons was protected.
- The EAT, allowing the appeal, held that the tribunal needed to look again at whether the demand to work from home or be furloughed was an appropriate step which was protected.
- Section 100(1)(e) required a single 'principal reason' to be identified.

Unfair Constructive Dismissal- Unilateral Demotion

Humby v Barts Health NHS Trust

- Tribunal concluded that a band 6 NHS employee's reassignment to a band 5 position, following a restructure, did not breach an express term of his contract of employment for the purposes of his unfair constructive dismissal claim.
- EAT did not uphold this decision and stated that the tribunal should have raised the question of whether the employer's actions amounted to an actual dismissal- see the principles identified in **Hogg v Dover College 1990 ICR 39**.
- The EAT also did not agree with the tribunal's decision that the employee's offer to work more than his six weeks' notice amounted to affirmation of his contract.
- An employee who gives more notice than contractually required may be taken to have affirmed the contract. However, there is no absolute rule and all the circumstances need to be considered.



EMPLOYMENT TRIBUNAL

Morbi consectetur maximus
e dui lectus, feugiat at diam
estibulum congue aliquam.

d turpis. Ut nec eros eget
tra neque eu, venenatis
terisque suscipit sem.
lita. Vivamus sit amet

Tribunal Procedure

Tribunal Procedure- Disclosure

Virgin Atlantic Airways v Loveseed and other

- The Claimant (a pilot) was made redundant after Covid-19 by the Respondent.
- The Claimant disputed the fairness of their selection.
- The Respondent disclosed different versions of an internal document which contained financial information.
- The Respondent redacted pilot costs and potential savings in these documents. They claimed that the redacted information wasn't needed for fair disposal of the proceedings.
- The Claimant made an application for specific disclosure of the unredacted documents. The tribunal granted this on the basis that the unredacted documents were relevant to fair selection and any argument of justification for the indirect discrimination claims.
- The Respondent appealed. EAT upheld the tribunal's decision.



General Election and proposed changes

General Election



- National Insurance will be cut by a further 2%.
- Minor reforms to TUPE and the abolition of European Works Council in the UK.
- Enhanced paternity leave to fathers whose partner dies in childbirth.
- The Workers (Predictable Terms and Conditions) Act 2023
- Get people with health conditions back to work



- Collective/Trade Union Right
- Rights for trade union to access workplaces
- Duty on employer to inform employees of rights to join a union
- Duty on employer to inform employees of rights to join a union
- Banning zero-hour contracts
- Banning fire and re-hire
- Changes to collective redundancy consultation laws
- Statutory sick pay
- Right to switch off



- 'Dependent contractor' employment.
- Reviewing the tax and National Insurance status of employees, dependent contractors and freelancers.
- Setting a 20% higher minimum wage for people on zero-hour contracts at times of normal demand.
- Right to request a fixed-hours contract after 12 months for 'zero hours' and agency workers, not to be unreasonably refused.
- Shifting the burden of proof in employment tribunals regarding employment to employer.
- Expand parental leave and pay, including making them day-one rights
- Changes to statutory sick pay



Discrimination

Indirect Discrimination

Boohene v The Royal Parks Ltd

- RPL had decided not to require a contractor to pay its own staff the London Living Wage.
- The Claimants claimed indirect race discrimination by RPL, under s41 Equality Act due to RPL effectively determining their pay rates, and compared to RPL staff, a higher proportion of the Claimants were of BME origin.
- The ET upheld the claims based on a comparison between RPL staff and the Claimants. The EAT overturned the ET; the Court of Appeal upheld the EAT's decision but on different grounds.
- Court of Appeal held that a charity did not indirectly discriminate against contract workers by not requiring a contractor to pay them then London Living Wage compared to their own staff.

Race Discrimination

Atif v Dolce & Gabbana

- The Claimant was an Arab-speaking Algerian.
- She raised a grievance which was not concluded by the Respondent. She was then dismissed for abusing the Respondent's sickness policy.
- The Claimant claimed unfair dismissal and race discrimination.
- The tribunal dismissed both claims. On race discrimination, the tribunal found that the Claimant had not shown facts that raised an inference of discrimination.
- The EAT held that the Claimant had raised facts which could amount to discrimination.
- The EAT held the tribunal should have applied the reverse burden of proof in a race discrimination claim where the claimant showed facts from which a tribunal could conclude that discrimination had occurred.
- The EAT dismissed the Claimant's appeal. Although they had gone the wrong way about it, the tribunal had grappled in detail with the facts and their implications

Continuing Acts

Allen v Worcestershire Health and Care NHS Trust.

- The Claimant was offered a role at a lower pay grade following a restructure. The Claimant rejected the role but was not made redundant as the Respondent had no redundancy process.
- The Claimant went off sick and was dismissed for ill-health.
- A claim for unfair dismissal, age and disability discrimination was made.
- The tribunal found that ticking a box to consider the Claimant for ill-health retirement was age discrimination, as was pre-determining the Claimant's grievance. They also found that her dismissal was for a reason related to her disability.
- The EAT concluded:
 - The pre-determination of the Claimant's grievance was not discriminatory.
 - The act of dismissal was the only act of discrimination within ordinary tribunal time limits.
 - **Where unconnected acts of discrimination are linked by their factual setting, they should not be treated as “conduct extending over a period” to bring them all within the ordinary time limit for discrimination claims.**

Disability Discrimination

Miller v Rentokil

- The Claimant worked as a field-based pest controller. The role involved working at heights for 40% of his role.
- The Claimant was diagnosed with multiple sclerosis and could no longer work at heights and could only work slowly.
- The Claimant applied for an administrator role within the business but was unsuccessful and was dismissed.
- **The Claimant claimed that failing to place him in the role for a trial basis amounted to a failure to make reasonable adjustments under Equality Act 2010. The Tribunal upheld the claim.**
- **The EAT agreed. Moving the Claimant to an alternative role was potentially a reasonable adjustment which would remove the disadvantage because of his disability.**

Belief Discrimination

Omooba v Michael Garret Associates

- The Claimant was due to play the lead role at the Respondent's production of The Colour Purple. The play proposed to include a lesbian relationship.
- The Claimant was a Christian and wasn't aware of this at the time.
- Before rehearsals started, a comment that the Claimant had posted on Facebook some years previously calling homosexuality sinful and urging Christians to stick to their beliefs was retweeted.
- Following the retweet, the Respondent dismissed her.
- The Claimant claimed religion or belief discrimination, harassment and breach of contract. She accepted she would have rejected the role upon reading the script.
- The tribunal concluded that, although her beliefs (applying the criteria from **Grainger v Nicholson**) 'scrape[d]' over the threshold of being protected, her claims should fail.

Belief Discrimination

Omooba v Michael Garret Associates

- The Claimant appealed. The EAT rejected the appeal stating:
 - **Direct discrimination**- the Claimant was dismissed because of the effect of the adverse publicity from its retweet on the cast, the audience, the reputation of the producers and the commercial success of the production.
 - **Harassment**- although the Claimant experienced the act of her dismissal by the theatre as being 'hostile', the tribunal was entitled to conclude that it was not reasonable for the conduct to have had that effect. She was aware of the seriousness of the situation and the issues facing the Respondent.
 - **Breach of contract**- EAT agreed should fail.



Holiday Pay

Holiday Pay

De Mello v British Airways Plc

- The Respondent operated a flat rate meal allowance for cabin crew.
- The tribunal concluded that the meal allowance, or a portion of it, should be included in the calculation of normal pay for holiday pay.
- The tribunal stated the payments were ‘intrinsically linked’ to the performance of duties and the Respondent hadn’t been able to show they were intended to cover occasional or ancillary costs.
- The EAT held that the tribunal was wrong to place this burden on the Respondent.
- **EAT held all payments intrinsically linked to the performance of duties need to be included in the calculation of statutory holiday pay. Payments intended to cover occasional or ancillary costs do not.**
- It noted that when looking at the time-gap issue, tribunals should bear in mind that there will always be gaps in time between periods of holiday (and therefore between holiday pay payments).

Whistleblowing Detriment



Whistleblowing Detriment

Williams v Lewisham & Greenwich NHS Trust

- The Claimant had raised concerns about the abandonment of draft guidelines and criticised her colleague (Dr E) for failing to hand-over at the end of a shift.
- An altercation occurred between the Claimant and Dr E some weeks later and the Claimant was suspended twice. A written warning was given.
- The Claimant claimed detriment on grounds of having made a protected disclosure.
- The claim failed and the tribunal held that the lack of hand-over was a protected disclosure. But the concern about guidelines wasn't. The decision-makers in her two suspensions and written warning did not know about the protected disclosure.
- **The EAT determined that the tribunal was right to have looked at the motives of decision-makers only and to have disregarded the issue whether they had been manipulated by those motivated by the protected disclosure.**

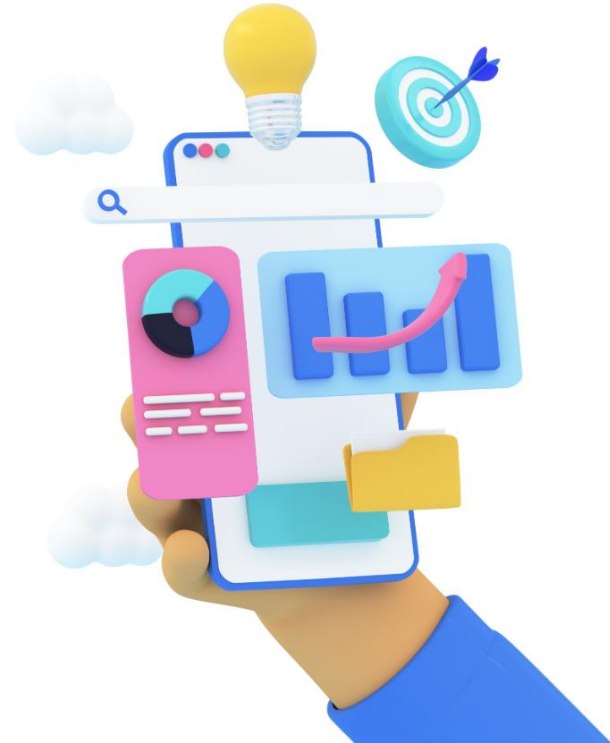


Questions

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