

Brachers Bitesize

Legal Update

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Recent key cases and the progress of
the Employment Bill

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Introduction

Presenters



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Recent Key Cases

Part Time Worker Discrimination

Case: Augustine v Data Cars Ltd

Level: Court of Appeal

Issue: Part Time Worker Discrimination

What is the correct legal test

Part Time Worker Discrimination

Background

- A part-time worker has the right not to be treated less favourably than the employer treats a comparable full-time worker either:
 - As regards the terms of their contract.
 - By being subjected to any other detriment by any act, or deliberate failure to act, by their employer.

(Regulation 5, PTW Regulations.)

Part Time Worker Discrimination

Background

- This applies only where the less favourable treatment is “on the ground of the worker's part-time status”
- and
- The treatment is not justified on objective grounds.
- Question: Does on the ground that mean the "Sole reason" or the "effective and predominant cause"?

Part Time Worker Discrimination

Background

- Scotland vs England!
- McMenemy – Scotland - Court of Session – Sole
- Gibson – Scotland – EAT – Sole
- Sharma and Carl – England – EAT – Effective/predominant

Augustine (England)

Facts:

- Claimant was a part-time taxi driver.
- He was required to pay a flat weekly circuit fee of £148 to the Respondent.
- The same fee was payable by all drivers, regardless of the number of hours they worked.
- The Claimant alleged part-time worker discrimination in relation to the flat-fee.

Augustine Decision

Decision:

- There was no part-time worker discrimination in this case.
- *McMenemy v Capita Business Services* followed.
- Unfavourable treatment is only 'on the ground' of part-time worker status where being part-time is the sole reason for that treatment.
- It was not the sole reason for the application of the flat-fee in this case.

But

Supreme Court:

- Permission given by Court of Appeal to go to the Supreme Court.
- Indicated not in agreement with McMenemy but overridden by not having competing same level court decisions.

Disability Discrimination

Case: Steadman v Haven Leisure

Level: Employment Appeal Tribunal

Issue: Disability Discrimination

Meaning of disability

Meaning of Disability

- To bring a disability discrimination claim – Claimant has to prove they are disabled.
- Four Stage Test:
 - Does the person have a physical or mental impairment
 - Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
 - Is that effect substantial?
 - Is that effect long-term?

Stedman - Facts

Facts:

- Mr Stedman had a diagnosis of Autism Spectrum Disorder (ASD) and ADHD,
- He applied for a job with Haven.
- He brought a claim of disability discrimination in relation to Haven's handling of his unsuccessful application.

Stedman - Decision

Decision:

- EAT – Obiter - observed that a clinical diagnosis of ADHD or autism could be used as evidence, not only of the existence of an impairment, but also of its impact (substantial disadvantage).
- A clinical diagnosis of autism or ADHD means that the person has been judged by a clinician to have significant difficulties with certain areas of functioning.
- Would remove the need for separate evidence from the Claimant of substantial adverse impact on normal day to day activities

Stedman - Decision

Decision reiterated the test:

- The mental or physical impairment need only have a substantial (more than minor or trivial) adverse effect on just one day-to-day activity.
- The Tribunal should not have balanced what Mr Stedman could do against what he couldn't – either for one activity or across the board.
- To decide if an effect is substantial, the correct comparison is between the person with the impairment and how they would be without it.

Disability Discrimination

Case: Hindmarch v North East Ambulance NHS

Level: Employment Appeal Tribunal

Issue: Disability Discrimination

Duty to make reasonable adjustments

Disability Discrimination

Background:

- Duty on employers to make reasonable adjustments.
- Arises where a disabled person is placed at a substantial disadvantage (as compared to a non-disabled person) by:
 - An employer's provision, criterion or practice (PCP).
 - A physical feature of the employer's premises.
 - An employer's failure to provide an auxiliary aid.

Disability Discrimination

Background:

- An employer will not be obliged to make reasonable adjustments unless it knows or ought reasonably to know that the individual in question is disabled
- and
- likely to be placed at a substantial disadvantage because of their disability.

Disability Discrimination

Background:

- Smith v Churchill's Stairlifts plc 2006 - Court of Appeal
- The test of reasonableness is objective and to be determined by the tribunal.
- A rare example of legislation that requires tribunals to substitute their own opinion for that of the employer and to decide if the employer's time and resources should be spent in a particular way.

Disability Discrimination

- The extent to which the adjustment would have ameliorated the disadvantage.
- The extent to which the adjustment was practicable.
- The financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities.
- The financial and other resources available to the employer.
- The availability of external financial or other assistance.
- The nature of the employer's activities and the size of the undertaking.

Disability Discrimination

- South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley 2015
- An employee need not show that the reasonable adjustment proposed would be effective to avoid the disadvantage to which they are subjected.
- In other words, they need only show that there is a chance that the adjustment would be successful. This is one of the factors to be weighed up by the tribunal.

Disability Discrimination

- Leeds Teaching Hospital NHS Trust v Foster 2010.
- There need not be a "good or real prospect" of a proposed adjustment removing a disabled employee's disadvantage for that adjustment to be reasonable.
- An adjustment might be reasonable, and therefore required, where there is "a prospect" that it will succeed.

Disability Discrimination

- Griffiths v The Secretary of State for Work and Pensions 2015.

"... So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed: the uncertainty is one of the factors to weigh up when assessing the question of reasonableness".

Disability Discrimination

- Noor v Foreign & Commonwealth Office 2010
- An adjustment might be reasonable even if it does not remove all the disabled employee's disadvantage.

"although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective".

Disability Discrimination

- Judd v Cabinet Office 2020
- Held that an employer is not required to adopt any adjustment that has the prospect of alleviating an employee's disadvantage.
- The likelihood of an adjustment benefiting an employee, and to what extent, were factors which were relevant in assessing its reasonableness.

Hindmarch - Facts

Facts:

- Mr Hindmarch worked as a non-emergency ambulance driver.
- He had severe anxiety, which was accepted to be a disability.
- During the COVID-19 pandemic, emergency staff were given FFP3 masks, while non-emergency staff were given FFP2 masks.

Hindmarch - Facts

Facts:

- Mr Hindmarch was very anxious about catching COVID and this stopped him from going to work.
- Eventually, he was dismissed.
- Mr Hindmarch claimed unfair dismissal and failure to make reasonable adjustments.
- He argued that the Trust should have given him an FFP3 mask to help him return to work.

Hindmarch - Decision

Decision:

- No failure to make reasonable adjustments.
- The Trust were under a duty to take such steps as it was reasonable to have to take to avoid the disadvantage faced by Mr Hindmarch (his inability to attend work).
- On the evidence, there was no chance (no prospect) that the provision of an FFP3 mask would have removed the disadvantage (i.e. enabled him to return from sick leave).
- Given there was no chance of the adjustment helping to avoid the disadvantage, it was not reasonable to expect the Trust to make it.

Hindmarch - Decision

- Noted that the question of the likelihood that the adjustment will help will be only one of a number of relevant considerations.
- There are cases in which the conclusion that the adjustment has no real prospect of making a positive difference provides a complete answer.
- Referred to the "real prospect test" applied in *Paulley v FirstGroup Plc* 2017, which made clear that for a claim for breach of reasonable adjustments to succeed, it must be shown that there would have been at least a real prospect that the adjustment would have made a difference.

Hindmarch – Decision

- Considered this to be "entirely consistent" with the EHRC Code.
- Referred to paragraph 6.23 of the EHRC Code, which states that what is a reasonable step for the employer to take will depend on all the circumstances of the case, paragraph 6.28 which states that a relevant factor is whether taking any particular step would be effective in preventing the substantive disadvantage, and paragraph 6.29 which states that ultimately the test of reasonableness of any step is objective and will depend on the circumstances of the case.
- Concluded there is nothing in the Code to contradict the proposition that if there is no real prospect of the adjustment making a difference, it will not be a reasonable adjustment.

Redundancy

Case: Hendy Group v Kennedy

Level: Employment Appeal Tribunal

Issue: Redundancy

Alternative employment.

Redundancy

Background:

- Vokes Limited v Bear 1973 established this principle, on the basis that the availability of alternative employment was relevant to all the circumstances of the case.
- Quinton Hazell Ltd v WC Earl 1976 made clear that the duty on the employer is not to make every possible effort to look for alternative employment but to make reasonable efforts.

Redundancy

- Polkey v A E Dayton Services Ltd 1987 indicated considering suitable alternative employment is fundamental to the fairness of any dismissal for redundancy.
- As a result, dismissal is likely to be unfair if, at the time of dismissal, the employer gave no consideration to whether suitable alternative employment existed within its organisation.

Kennedy - Facts

Facts:

- Mr Kennedy was a training manager for car sales.
- Before holding this position, he had over 10 years' experience as a car salesperson.
- The training role was placed at risk of redundancy.
- It was accepted that the redundancy situation was genuine and that Mr Kennedy's selection was fair.
- Mr Kennedy claimed unfair dismissal, arguing that his employer had failed in its legal duty to help him find another job within the business.

Kennedy - Decision

Decision:

- The employer had not made a reasonable effort to identify or support alternative employment.
- Its approach was one which no reasonable employer would have adopted.

Kennedy - Decision

- In particular:
 - During his notice period, Mr Kennedy could only see job vacancies in the same way as external applicants.
 - He was given no guidance or help in identifying what roles might be suitable for him to apply for.
 - After his applications for several sales roles were rejected, the employer told him any further applications for sales roles would be unsuccessful as they questioned his motive in applying for them.

Kennedy - Decision

- In particular:
 - HR communicated with him via an email account he couldn't access.
 - HR did not tell managers he was at risk of redundancy.
 - There was no evidence that the employer tried to match him to available roles.

TUPE

Case: ABC v Huntercombe (No.12) Ltd and ors

Level: High Court

Issue: TUPE

Transfer of tortious liabilities

TUPE

- ABC issued proceedings seeking damages for injuries suffered while she was an in-patient.
- ABC argued that H Ltd was vicariously liable for the alleged tortious acts of two of its employees.
- The allegedly negligent employees' employment subsequently transferred from H Ltd to AYP Ltd under TUPE.
- The High Court had to determine whether any vicarious liability that H Ltd owed to ABC for the alleged torts of the employees that it employed immediately prior to the transfer transferred to AYP Ltd under TUPE.

TUPE

- Held that a transferor's vicarious liability for the alleged torts committed by two of its employees did not transfer
- For a transferor's liability to transfer, the connection between the liability and the transferred contract must be direct, in the sense of being a liability that the transferor has to an employee.
- In this case the direct liability was that of the employees to the claimant.
- If the Court was wrong, and liability transferred from the transferor to the transferee, the transferor's right to claim on an insurance policy would also have transferred.

Employment Bill Update

Roadmap – Upon Royal Assent

- Repeal of the Strikes (Minimum Service Levels) Act 2023 and major parts of the Trade Union Act 2016
- New protections preventing dismissal for participating in industrial action

Roadmap – April 2026

- Protective award for collective redundancies – doubling maximum period
- ‘Day 1’ paternity and unpaid parental leave
- Enhanced whistleblower protections
- Establishment of a Fair Work Agency
- Statutory Sick Pay improvements (removal of lower earnings limit and waiting period)
- Simplified trade union recognition and digital/workplace balloting systems

Roadmap – October 2026

- Ban on fire-and-rehire
- Launch of a Fair Pay Agreement Negotiating Body for adult social care
- Stronger tipping laws
- Employer duty to take ‘all reasonable steps’ to prevent sexual harassment
- Expanded trade union rights

Roadmap - 2027

- Mandatory gender pay gap and menopause action plans (voluntary from April 2026)
- Rights for pregnant workers
- Bereavement leave
- Protections against zero-hour contract abuse
- Umbrella company regulation
- 'Day 1' unfair dismissal rights

Proposed Amendments

- Amendments:
 - Banning NDAs (including in settlement agreements) which cover harassment and discrimination at work
 - Softening the ban on fire & rehire
 - Major changes to whistleblowing laws
 - Changes to the very complex zero-hour worker rules

NDA's

- New Clause 22A
- Introduces a new Section 202A to the Employment Rights Act 1996
- Bans NDAs (including in settlement agreements) which cover harassment and discrimination at work

“Harassment and discrimination: contractual duties of confidentiality

202A Contractual duties of confidentiality relating to harassment and discrimination

- (1) Any provision in an agreement between an employer and a worker of the employer (whether a worker’s contract or not) is void in so far as it purports to preclude the worker from making –
 - (a) an allegation of, or a disclosure of information relating to, relevant harassment or discrimination, or
 - (b) an allegation, or a disclosure of information, relating to the response of an employer of the worker to –
 - (i) relevant harassment or discrimination, or
 - (ii) the making of an allegation or disclosure within paragraph (a).

NDA's

- (2) Harassment or discrimination is “relevant” for the purposes of subsection (1) if –
 - (a) the harassment or discrimination consists of, or is alleged to consist of, conduct engaged in by –
 - (i) an employer of the worker, or
 - (ii) another worker of such an employer, or
 - (b) the person who is, or is alleged to be, the victim of the harassment or discrimination is –
 - (i) the worker, or
 - (ii) another worker of an employer of the worker.

NDA's

(10) In this section –

“discrimination” means discrimination within section 13, or any of sections 15 to 19A, of the Equality Act 2010;

“harassment” means harassment of the kind described in subsection (1), (2) or (3) of section 26 of that Act;

“specified” means specified in the regulations.”

Fire and Re-hire

- Proposed amendments to soften its scope and extent.
- Not clear if these are government supported.
- Will only cover 'restricted variations', not any variation to the contract.
- 'Restricted variations' will cover changes to pay, pension, hours of work, holiday entitlement, and anything else the Secretary of State sets out in Regulations.

Fire and Re-hire

- Outsourcing as a redundancy substitute will be banned (or more accurately, any redundancy will be automatically unfair).
- Unless the employer can establish serious financial distress.
- If this is incorporated it would be a major development with serious consequences for agency-use and TUPE service provision models.

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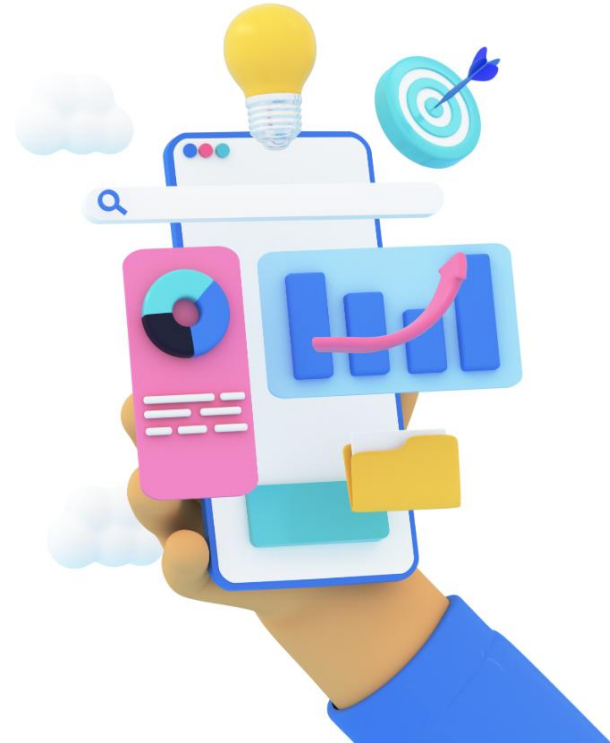
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