Employment Law webinar Case Studies

Employment law update and legal implications of managing new ways of working

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Recent cases

Rodgers v Leeds Laser Cutting Ltd ● Employment Tribunal March 2021

In March 2020, the Claimant texted his manager saying that because he had a child with sickle cell disease (regarded as clinically extremely vulnerable), he had to stay off work until the national lockdown had eased.

He was subsequently dismissed and brought a claim for automatic unfair dismissal under section 100 of the Employment Rights Act 1996 (ERA).

Section 100(1)(d) and (e) ERA provide that dismissal will be automatically unfair if the sole or principal reason for dismissal is that, in circumstances of danger which the employee reasonably believed to be serious and imminent:

- He left or refused to return to his place of work (or proposed to do so), it not being reasonable to expect him to avert the danger; and/or
- He took (or proposed to take) appropriate steps to protect himself or others from the danger.

The ET dismissed the claim.

The Claimant accepted that it was generally possible to socially distance from colleagues and that the Respondent had conducted a proper risk assessment and taken steps to implement it, including regular reminders about social distancing and handwashing and providing suitable facilities. Further, the Claimant's text referred to staying away from work until the lockdown had eased, as opposed to when improvements were made to the workplace.

The ET found that, even if the Claimant had a genuine belief of circumstances of serious and imminent danger, it would not have been reasonable taking into account the above factors and the knowledge of COVID-19 at the time. Further, to the extent that there were circumstances of danger, the Claimant could reasonably have been expected to avert them.

While section 100(1)(e) could apply to steps taken to protect his vulnerable family members, rather than himself, the Claimant's steps in this case were not appropriate.

Comment: The decision provides a very helpful analysis of s100 ERA claims but employers must still be mindful of potential claims for personal injury and indirect discrimination where clinically extremely vulnerable family members are involved. However, following the applicable COVID-19 guidance about workplace safety should put employers in a good position to defend claims.

Gibson v Lothian Leisure ● Employment Tribunal April 2021

The Claimant was furloughed from work in March 2020. In preparation for his return to work, the Claimant raised concerns about the lack of PPE and other COVID -19 secure workplace precautions.

He was worried about catching COVID-19 at work and passing it on to his clinically vulnerable father. The Respondent told him to "shut up and get on with it".

With no prior discussion, the Claimant was summarily dismissed on 30 May 2020 without notice or accrued holiday pay. The Respondent said it was changing the format of its business and would be running a smaller team after lockdown.

The ET held that the dismissal was automatically unfair under section 100(1)(e) because the Claimant had taken steps to protect his father in what he believed to be circumstances of serious and imminent danger.

Alternatively, the ET held that, because of the reasons given for his dismissal, the Claimant had been unfairly selected for redundancy under section 105(3) because he had taken those steps. Until the Claimant had voiced his concerns, he had been a successful and valued member of staff.

The ET also considered whether the matters raised by the Claimant amounted to the making of a public interest disclosure under the whistleblowing provisions of the ERA.

It held that the Claimant's concerns were about his father rather than the public interest, and so the whistleblowing claim was dismissed.

Comment: This case reminds us that claims under section 100(1)(e) ERA turn on the particular facts and merits of each case. Moreover, the steps that an employee takes due to a lack of COVID-19 secure workplace precautions will ultimately support (or not) a claim for automatic unfair dismissal.

Accattatis v Fortuna Group (London) Ltd ● Employment Tribunal May 2021

Throughout March and April 2020, the Claimant repeatedly asked to work from home or be placed on furlough as he was uncomfortable using public transport and working in the office. The Respondent explained that the Claimant's job could not be done from home and that furlough was not possible because the business was so busy.

The Respondent informed the Claimant that he could take holiday or unpaid leave. The Claimant declined and made three further requests to be furloughed. On the date of his final request, the Claimant was dismissed.

The Claimant alleged that his dismissal was automatically unfair under section 100(1)(e) of ERA as he had been dismissed for taking steps to protect himself from danger.

The ET found that, although there were circumstances of danger which an employee could reasonably have believed to be serious and imminent, the Claimant's demands to work from home (on full pay) or be furloughed (on 80% pay) were not appropriate steps to protect himself from danger. The Respondent was justified in concluding that the Claimant could not work from home and did not qualify for the furlough scheme. Moreover, the Claimant had been offered to take holiday or unpaid leave and had declined. As such, the claim was dismissed.

Comment: This case is a reminder that anxiety related to the Covid-19 pandemic may not on its own justify a refusal to attend work under section 100(1)(e) if employers have reasonably tried to accommodate employees' concerns and reduce transmission risk.

Khatun v Winn Solicitors Ltd ● Employment Tribunal April 2021

The Claimant was employed as a solicitor. In March 2020, the Respondent furloughed 50% of their staff. The staff that were not furloughed were expected to "babysit" the cases of the furloughed staff and agree to a variation of their employment contract, requiring them to go on furlough leave or have their hours and pay reduced on five days' notice.

The Claimant's Head of Department informed her that the variation was non-negotiable and that she was required to sign it within 24 hours or she would face dismissal.

The Claimant said that she would consider the variation if and when the need for such changes should arise. The Claimant was dismissed the next day and subsequently brought a claim for unfair dismissal under sections 94 and 98 ERA.

The ET held that the dismissal was unfair. Whilst the ET agreed with the Respondent that their reasons for implementing the variation were "sound, good business reasons", the Claimant's dismissal did not fall within the band of reasonable responses.

In reaching its decision, the ET took into account the fact that there had been no meaningful consultation with the Claimant and the Respondent had not engaged in a reasonable process (e.g. the dismissal took place within 48 hours of the Claimant receiving the variation and there was no right to appeal). A reasonable employer would have done more.

Comment: This case demonstrates that dismissal for refusal to agree changes to the terms and conditions of employment will only be fair if the employer has a sound business reason for the changes ***and*** *carries out fair process, including meaningful consultation with the employees concerned. This is particularly relevant in light of the COVID-19 pandemic with many employers implementing rapid contractual changes to meet business needs.*

Royal Mencap Society v Tomlinson-Blake ● Supreme Court March 2021

Mencap provides 24 hour care to vulnerable adults on behalf of local authorities. They have residential properties where staff sleep in case the residents need assistance during the night. Mencap paid staff a flat rate for those so-called 'sleep-shifts'.

This practice was challenged by one worker, Ms Claire Tomlinson-Blake, who argued at an Employment Tribunal that the fact that she was required to be present at her workplace and to 'keep an ear out' while asleep meant she was actively working the whole time and was therefore entitled to receive the national minimum wage (NMW) for every hour of the shift.

The Employment Tribunal agreed with her and so did the Employment Appeal Tribunal when Mencap appealed the first decision. However, the Court of Appeal allowed Mencap's appeal and held that for NMW entitlement, staff had to be awake for the purpose of working. Ms Tomlinson-Blake was then given permission to appeal this ruling at the Supreme Court.

The Supreme Court focused on the definition of 'time work' in the National Minimum Wage Regulations 2015. It noted the distinction in the Regulations between being merely available for work and actually carrying out work and concluded that the fact that someone is present for work does not mean that they are actually working. It also relied heavily on a recommendation first made in 1998 by the Low Pay Commission, and accepted by the Government as part of the National Minimum Wage Regulations 1999 and subsequently in the 2015 Regulations, that sleep-in workers should receive an allowance and not the NMW, unless they are specifically awake for the purposes of working.

Comment: This ruling will come as a relief to employers in the care sector but also to other employers whose staff are required to sleep near their work or onsite but who only actively work if needed. Note that on 23 April 2021, the Government updated its National Minimum Wage Guidance and specifically the section on sleep in shifts in the light of this ruling.

Price v Powys County Council ● Employment Appeal Tribunal March 2021

Mr Price was employed by Powys County Council. His wife became pregnant and they decided that he would care for the child so that his wife could return to work. Mr Price made enquiries about his entitlement under the Council's "Supporting Working Parents Policy". He was told that shared parental leave was paid at the statutory rate. By comparison, employees' taking maternity leave or adoption leave were entitled to enhanced pay.

Mr Price argued that it was direct sex discrimination to pay female employees on maternity or adoption leave more than male employees and brought a claim before the Employment Tribunal. He identified two comparators:

1. A female employee on maternity leave receiving enhanced maternity pay; and
2. A female employee on adoption leave receiving enhanced adoption pay.

Citing *Ali v Capita Customer Management Ltd*, the Employment Tribunal dismissed the first comparator as the circumstances of female employees on maternity leave were not materially similar to Mr Price's.

The Employment Tribunal recognised that the similarities were more marked between Mr Price and his second comparator, however this too was dismissed. The Employment Tribunal found that the correct comparator for Mr Price was a female employee on shared parental leave and since the correct comparator would have received the same pay as Mr Price under the Council's policy, the claim failed.

Mr Price brought an appeal before the EAT, arguing that the Employment Tribunal was wrong to reject his second comparator as the underlying purpose of adoption leave was the same as that of shared parental leave, this being the facilitation of childcare.

The EAT disagreed, finding that the purpose of adoption leave went beyond the facilitation of childcare and included the forming of a parental bond and taking steps to prepare and maintain a safe environment for the adopted child. This constituted a material difference between Mr Price and his chosen comparator, and his appeal was dismissed.

Comment: This decision will provide comfort to employers that offer enhanced pay for employees on adoption leave (and/or maternity leave) but offer only the statutory rate for shared parental leave. However, there are strong positive reasons for offering equal benefits to male and female employees, namely, encouraging the sharing of childcare responsibilities between men and women, retaining current talent through enhanced and progressive family policies, and helping to reduce the gender pay gap.

Maya Forstater v CGD Europe and Others ● Employment Appeal Tribunal June 2021

Ms Forstater was engaged as a visiting fellow with CGD Europe, a non-profit think tank which focusses on international development. She carried out paid consultancy work on specific projects.

Ms Forstater holds what are referred to in this case as "gender-critical beliefs", that is, she believes that biological sex is real, important and immutable. For Ms Forstater, sex is set at birth and she does not believe it is possible for one sex to transition to another. She would regard a statement such as "*trans women are male*" to be a statement of neutral fact.

Ms Forstater expressed these gender-critical beliefs on her personal Twitter account and her colleagues alleged that they were "transphobic", "exclusionary or offensive" and made them feel "uncomfortable". An investigation followed and CGD Europe decided not to renew Ms Forstater's contract as a visiting fellow.

Ms Forstater brought claims in the Employment Tribunal for (amongst other things) direct discrimination because of her philosophical belief and harassment related to that belief. The ET held a preliminary hearing to determine whether the Claimant's gender-critical views were a philosophical belief capable of protection under the Equality Act 2010.

The relevant legal test was set out in *Grainger plc & Others v Nicholson [2010]*. The ET found that Ms Forstater's beliefs failed to meet the fifth criterion of that test and were "not worthy of respect in a democratic society". This was because Ms Forstater's views were "absolutist" in nature and because she would "refer to a person by the sex she considers appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading or offensive environment."

Ms Forstater appealed the decision. The EAT found that case law dictates that a philosophical belief would only fail to be protected if it was the kind of belief akin to Nazism or totalitarianism. In the view of the EAT, Ms Forstater's belief "does not get anywhere near to approaching" this kind of belief.

Whilst the EAT recognised that gender-critical beliefs may cause offence to trans persons and allies, it concluded that "the potential for offence cannot be a reason to exclude a belief from protection altogether".

Comment: This case has given rise to much discussion on both sides of the argument, but it is important to remember that it only decided whether Ms Forstater's beliefs were capable of being protected as a philosophical belief under the Equality Act 2010. It did not decide whether she had been discriminated against or the outcome of any of her other claims – this will be for another hearing. This decision also does not mean that Ms Forstater's gender-critical beliefs are generally acceptable or not offensive to trans persons and their allies. The EAT emphasised in particular that it does not give license to anyone to discriminate or harass trans persons on grounds of gender-critical beliefs.

Mr D Robson v NGP Utilities Ltd ● Employment Tribunal July 2021

Mr Robson was employed by NGP Utilities Ltd. Throughout his 6 months' employment, Mr Robson was subjected to a lengthy campaign of discrimination and harassment on the grounds of his sexual orientation. He brought claims for harassment related to sexual orientation, a failure to make reasonable adjustments, constructive dismissal and victimisation before the Employment Tribunal and succeeded on all counts.

In deciding compensation, the Employment Tribunal awarded Mr Robson damages for injury to feelings of £20,800. This was made up of £8,800 for the failure to make reasonable adjustments and £12,000 for harassment related to sexual orientation.

The Employment Tribunal made an additional award for aggravated damages in the sum of £10,000. The ET found that NGP Utilities Ltd had conducted litigation in an intimidating and heavy-handed way. They had sought to portray Mr Robson as a liar, making serious accusations of dishonesty whilst failing to subject Mr Robson's evidence to scrutiny before the Tribunal.

Exceptionally, the Employment Tribunal also exercised its discretion under section 12A Employment Tribunals Act 1996 to impose a significant financial penalty to the Secretary of State in the sum of £18,353.501. These penalties are imposed very rarely, and as the minimum award for this type of penalty is £100 and the maximum £20,000, the amount imposed shows that the Employment Tribunal found this a particularly serious case. The penalty serves as punishment for NGP Utilities Ltd failure to recognise or prevent a culture of homophobia that was embedded throughout the organisation. At managerial level, nobody took responsibility to stop the harassment and discriminatory behaviour. It was in fact, actively encouraged.

Comment: This case serves as a reminder to employers of the importance of Employment, Diversity and Inclusion training and policies. Organisations must ensure that discrimination on the basis of a protected

characteristic is completely outlawed, or else they may be liable for significant financial penalties such as this if claims for unlawful discrimination are brought against them.

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