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Employment law newsletter

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1. Assaults in the workplace will not necessarily justify dismissal where the employee is mentally ill

The Employment Appeal Tribunal (EAT) has allowed an appeal by a disabled employee who suffered from a paranoid schizophrenic illness and who was dismissed for gross misconduct after he committed sexual assaults in the workplace.

Background

Mr Burdett worked for Aviva as a senior approval specialist. In 2007, Aviva's occupational health team confirmed that he suffered from a depressive paranoid schizophrenic illness that required medication. In 2010, Mr Burdett stopped taking his medication without taking medical advice. In 2011, he sexually assaulted two female employees and threatened to assault a security guard. When he left the office building, he assaulted a female member of the public. He was subsequently arrested and detained under the Mental Health Act 1983.

Aviva suspended Mr Burdett pending an investigation and discovered that he had received a police caution in 2008 for sexual assault. Mr Burdett accepted the incidents had taken place and admitted that he had made a serious error of judgment in deciding to stop taking his medication. Aviva sought reassurance and guarantees from Mr Burdett's medical advisers that he would continue to take his medication in the future but the advisers could not provide such guarantees.

Following Mr Burdett's criminal prosecution, he was made the subject of a mental health treatment requirement for three years. At his subsequent disciplinary hearing, Aviva expressed concerns about the fact that he had failed to disclose his earlier conviction and about the risk that he would decide to stop taking his medication again. He was therefore dismissed for gross misconduct.

Mr Burdett brought claims for unfair dismissal and discrimination arising from a disability which were dismissed by the Employment Tribunal. He appealed to the EAT.

The EAT held that Aviva did not have reasonable grounds for its belief that Mr Burdett had committed gross misconduct. An admission of guilt did not constitute an admission of gross misconduct, which requires culpability. It was not clear from the Tribunal's judgement whether it had considered if Mr Burdett's decision to stop taking his medication could be considered wilful behaviour or grossly negligent (therefore making him culpable for his misconduct). It was also unclear whether the Tribunal had considered any mitigating factors and why Mr Burdett had stopped taking his medication. The EAT therefore asked the parties to make further representations on these points.

What does this mean?

Gross misconduct requires culpability. It is not sufficient to assume that dismissal will always fall within the band of reasonable responses open to an employer in a case of gross misconduct. Mr Burdett had only committed the assaults because of his mental impairment. The fact that he admitted to having carried out the assaults and to having discontinued his medication without medical advice was not necessarily an admission of culpability. Furthermore, the question as to whether there were any mitigating circumstances had not been considered.

In relation to the discrimination arising from disability claim, Aviva needed to show that its unfavourable treatment of Mr Burdett was objectively justified as a proportionate means of achieving a legitimate aim. The aim identified was adherence to appropriate standards of conduct in the workplace. However, Aviva had failed to carry out a balancing exercise weighing up the discriminatory impact on the employee. In particular, Mr Burdett had suggested that he could work from home and this had not been properly considered. It was also wrong to assume Mr Burdett continued to pose a risk in the absence of evidence to that effect.

What should employers do?

Cases involving mentally ill employees are highly complex and the answers are not always clear cut. A similar EAT case recently raised similar issues but the outcome was different in that the protection of other employees was viewed as paramount.

Employers should remember that gross misconduct requires culpability on the part of the employee. When dealing with a mentally ill employee, careful consideration should be given to this. Any mitigating circumstances in relation to the employee's mental health should be taken into account alongside business needs. In relation to discrimination arising from disability, the employer must make sure that it carries out the requisite balancing exercise (i.e. having regard to both the discriminatory effect on the employee and the company's legitimate business aims).

Reference: Burdett v Aviva Employment Services Limited

2. Employer was unable to make adjustment for disabled employee

The EAT has held that an employer did not fail in its duty to make reasonable adjustments for an employee who had a potentially life threatening sensitivity by not providing a workplace free from aerosols and perfume.

Background

Mrs Dyer was employed by London Ambulance NHS Trust to deal with 999 calls in a control room which was frequented by other employees and members of the public. She developed a severe reaction to aerosol body sprays and, having had several attacks at work, went on long term sick leave. The Trust obtained medical advice from a leading expert to establish what reasonable adjustments could be made but concluded that no adjustments could be made. Mrs Dyer was therefore dismissed on capability grounds.

Mrs Dyer claimed unfair dismissal and disability discrimination. The Tribunal held that it was not reasonable or practical for the Trust to implement and enforce an aerosol and perfume-free policy in the workplace.

Mrs Dyer appealed to the EAT which rejected her appeal.

What does this mean?

Only in relatively rare cases will it not be possible for an employer to make an adjustment for a disabled employee. The Trust in this case had previously attempted to alert employees to the risk that aerosol and perfumes posed to Mrs Dyer but this had not remedied the situation. The EAT held that it might be possible for a company with a small, compact workforce limited to small or restricted premises to achieve a workplace free from aerosols and perfume but it was not possible in this case, given the size and nature of the business.

What should employers do?

Employers should make reasonable adjustments to accommodate disabled staff. What is reasonable in the circumstances will depend on the facts of each case. However, the strength of an employee's desire to return to work should not affect the assessment of whether it is reasonable to make an adjustment. This must be viewed objectively.

Reference: Dyer v London Ambulance NHS Trust

3. Non-disclosure of material may render a disciplinary procedure unfair

The EAT has allowed an appeal where, during the course of a disciplinary process, material was not disclosed to the employee.

Background

Mrs Old was a teacher who was dismissed for gross misconduct. She lost her unfair dismissal claim and appealed to the EAT.

Mrs Old argued that there had been procedural irregularities in relation to her dismissal. Her employer had not disclosed to her witness statements that had been

obtained during the investigation and which were of potential assistance to her case. The disciplinary panel also relied when making its decision on minutes of meetings between Mrs Old and the Headteacher which she was told would not form part of the panel's deliberations.

The EAT held that there had been procedural irregularities in the disciplinary panel relying on material on which Ms Old had not been permitted to comment. The case was remitted to be heard by a fresh Tribunal.

What does this mean?

Non-disclosure of material will not necessarily render a dismissal unfair. However, a Tribunal is required to consider such matters when deciding whether a fair procedure has been followed.

What should employers do?

If an employer does not intend to disclose some material to an employee during a disciplinary process, it should consider this matter very carefully and consider whether such non-disclosure could render a subsequent dismissal to be unfair. All relevant documentation, whether it assists the employer's case or the employee's case, should be disclosed.

Reference: Old v Palace Fields Primary Academy

4. Redundancy and the duty to offer an alternative suitable vacancy to a woman on maternity leave

The EAT has held that, where a woman's role becomes redundant whilst she is on maternity leave, the duty to offer her a suitable alternative vacancy arises when the employer becomes aware that her role is redundant or potentially redundant.

Background

Mrs Wainwright was employed by Sefton Borough Council and she was dismissed by reason of redundancy whilst she was on maternity leave. As part of a restructure, her role was combined with another role undertaken by Mr Pierce. The Council invited both employees to apply and interview for the newly created role. Mr Pierce was considered to be the better candidate and was offered the new role.

Mrs Wainwright succeeded in her claims for breach of Regulation 10 of the Maternity and Parental Leave Regulations 1999 (which states that women on maternity leave should be offered a suitable vacancy if one exists) and automatically unfair dismissal. The Tribunal and the EAT held that Mrs Wainwright had a right to be offered the new role once the Council knew there was a redundancy situation, not once the restructuring exercise was complete. The EAT did not accept the Council's argument that a role arising out of a restructure was not a vacancy in the conventional sense (because it was not available to anyone other than Mrs Wainwright and Mr Pierce). The EAT held that it would undermine the purpose of Regulation 10 if an employer was free to wait until after a restructure had been completed before offering the woman a vacancy.

However, the EAT allowed the Council's appeal in relation to the Tribunal's finding of discrimination on the grounds of pregnancy or maternity. While the failure to offer a suitable alternative vacancy to a woman on maternity leave will render the dismissal automatically unfair, it does not necessarily mean that direct discrimination has also taken place. The unfavourable treatment was not necessarily caused by Mrs Wainwright having taken maternity leave. The case was remitted to a fresh Tribunal on this point.

What does this mean?

Regulation 10 of the Maternity and Parental Leave Regulations 1999 provides that where a woman is on maternity leave and a redundancy situation arises, the woman has a right to be offered a suitable alternative vacancy if one exists. This is an absolute right and this is the case even if she is not the best candidate for the job. She should not be required to go through any form of interview or selection process. The duty to offer her a suitable alternative vacancy arises at the point when the employer becomes aware that her role is redundant or potentially redundant.

What should employers do?

If a redundancy situation arises during an employee's maternity leave, the employer should offer any suitable vacancy which may be available to the woman when it becomes aware that her role is redundant or potentially redundant, i.e. when it first notifies the employee that she may be at risk of redundancy.

It is worth noting that being on maternity leave does not provide a woman with immunity from being considered for redundancy in the normal way. If she is not put in

a pool for selection purely because she is on maternity leave then a man in the pool could make a claim for sex discrimination.

Reference: Sefton Borough Council v Wainwright

5. Injunction upheld preventing employee from working for a competitor for 10 months

The Court of Appeal has upheld an injunction binding an employee to his employer during his six month notice period and preventing him from working for a competitor for a further four months in order to protect the employer's legitimate business interests.

Background

We reported on the High Court ruling in this case in September 2014. Mr Rodgers was a broker who accepted a job with a competitor and left immediately rather than honour the 12 month notice period in his contract. This fundamental breach of contract was not accepted by the company which requested that he return to work for the length of his notice period. Mr Rodgers refused to return to work and therefore the company did not pay him, although it agreed to reduce his notice period to 6 months. However, after this time, he would still remain bound by his 6 month post-termination restrictive covenants, preventing him from working for a competitor.

The High Court granted an injunction requiring Mr Rodgers to observe the terms of his contract (although not perform any work) until the end of the revised notice period of 6 months. During that time he could not work for a competitor or contact the company's clients. The restrictions in his contract were also upheld (although for a lesser period of 4 months rather than 6 months). Both the notice period and the period of the restrictions were without pay.

Mr Rodgers appealed to the Court of Appeal on the ground that he would not be paid during the notice period. He also claimed that the total period of 10 months was too long given that the contract only provided for a 6 month post-termination restriction.

What does this mean?

It is an established legal principle that an employee should not be forced to work. However, the Court of Appeal held that this principle was not infringed in this case because Mr Rodgers was not required by the Court to perform work.

It is common practice in these cases for the employer to offer to pay the employee during the notice period to overcome the objection that if the employee is not paid then he will be compelled to work. However, the Court held that non-payment will not always compel an employee to work. Mr Rodgers had failed to produce any evidence to suggest that non-payment would, in effect, compel him to continue to work for the company or cause him financial hardship or cause his skills to atrophy. He had agreed a start date with his new employer which started after the 10 month period which implied that he could cope without pay until then. He had also agreed to a 6 month post-termination restriction during which he would have no right to be paid by the company anyway.

On the facts of this case, the Court held that a ten month period without pay was not unreasonable. Mr Rodgers had accepted an unpaid 6 month post-termination restriction and the fact that he was subject to a further 4 month restriction was as a result of his refusal to return to work when he was asked to do so.

What should employers do?

Employers should note that this was an unusual case involving a wealthy broker. Each case must be considered on its merits but non-payment for a significant length of time is likely to compel some employees to work and therefore infringe the principle that employees should not be forced to work.

The Court confirmed that it is not necessary to be at the point of starvation in order to be compelled to work but that a mere degree of hardship will not suffice. It is up to the employee to adduce evidence of the pressures he is under and provide sufficient information to the Court to enable it to make an assessment of whether the employee is being compelled to work.

Reference: Sunrise Brokers LLP v Rodgers

6. Beauty consultant was not in employment

The Court of Appeal has held that a beauty consultant who provided services through a limited company was not in 'employment' and therefore could not bring a discrimination claim.

Background

Mrs Halawi was a beauty consultant working at a duty free outlet at Heathrow airport. She provided her services through a limited company to another company which provided management services to the cosmetics company. She had no written contract.

On the facts of the case, there was no requirement for Mrs Halawi to work personally and she could provide a substitute to work in her place, which she did on occasion. She did not get paid if she did not work and she had no entitlement to holiday or sick pay. There was no obligation to provide work to her and she could refuse work if it was offered.

Mrs Halawi's airside pass was withdrawn which meant that she could no longer work at the airport. She brought claims of unfair dismissal and discrimination. The EAT held that Mrs Halawi was neither an employee nor a worker due to the fact that she had no contract personally to do work and there was no relationship of subordination or control over the way in which she carried out her work. The Court of Appeal agreed.

What does this mean?

The individual in this case was not in 'employment' for the purposes of section 83 of the Equality Act 2010 as she did not have a contract of employment or a contract personally to do work. Personal service and subordination to the employer are key ingredients of an employment relationship but in this case these two criteria were not satisfied.

Mrs Halawi was held to be an independent provider of services who was not in a relationship of subordination with the person who received the services and therefore was not afforded the protection of the Equality Act 2010.

What should employers do?

Companies should assess all the people they engage to establish their employment status. Whether individuals are employees, workers or self-employed consultants will affect the rights and benefits to which they are entitled under employment law.

Reference: Halawi v WDFG UK Ltd t/a World Duty Free

7. Closing the gender pay gap

The Government has announced a £2 million fund aimed at helping to close the gender pay gap. The fund is intended to help women move from low paid, low skilled work to high paid, high skilled work. The money will be used to fund a training and mentoring programme of events for women to be carried out by the UK Commission for Employment and Skills. The programme will particularly target women working in the science, technology, engineering, maths, retail, hospitality management and agricultural sectors.

This is part of a package of measures to help employers analyse their pay gap and empower women to tackle their employers if they are not being paid correctly.

The Government also intends to:

- Invest £50,000 in further advice to enable female employees to hold their companies to account if they think they are not being paid correctly.
- Launch free pay analysis software to be made available to all UK companies to calculate their gender pay gap (this is expected to be available next year).
- Implement further measures to strengthen the existing 'Think, Act, Report' initiative to encourage companies to use new tools and guidance to collect and publish data on female representation at different levels within the company, the company's overall gender pay gap and the gender pay gap broken down by grade and job type.

Find out more

This is a summary of some of the key principles only and is aimed at providing general information rather than giving any specific advice. If you would like further detailed advice on the matters dealt with in this newsletter than please contact a member of the Employment team.

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