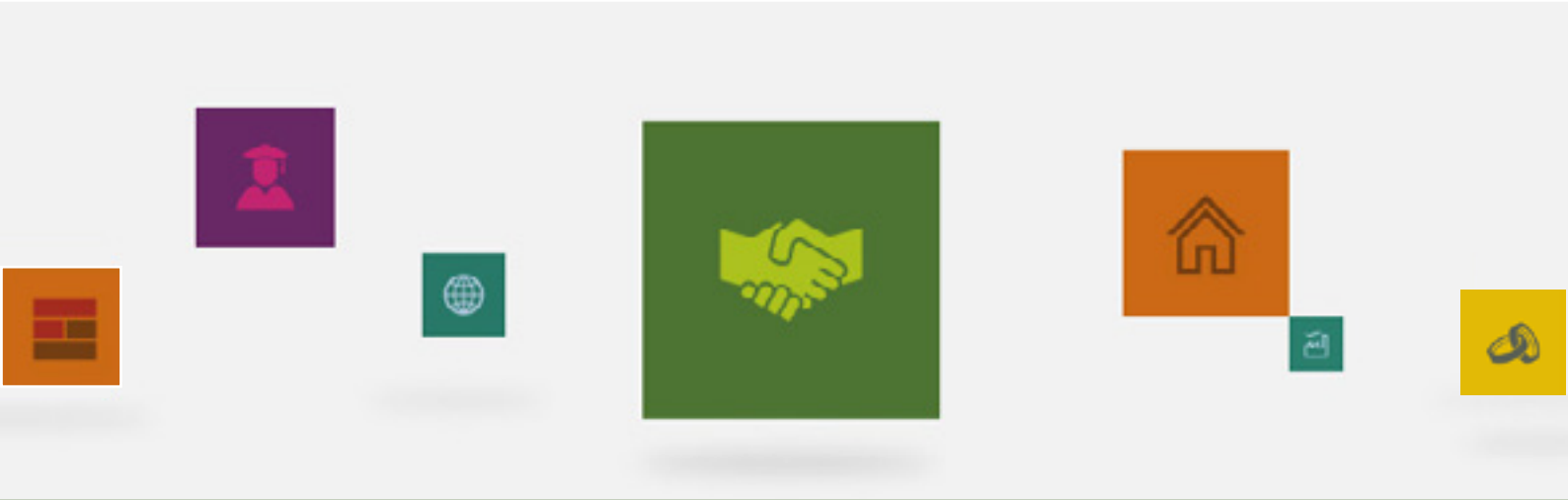

EMPLOYMENT NEWSLETTER - JUNE 2016

1. Employee's misconduct was linked to his disability

The Employment Appeal Tribunal (EAT) has allowed an appeal where a wheelchair bound employee lost his temper following his employer's decision to move a workshop to a venue he could not access.

Background

Mr Risby is a paraplegic who was employed by the London Borough of Waltham Forest (LBWF) for 23 years.

LBWF organised workshops for its managers but the venue for the workshops was changed from an accessible private venue to an inaccessible internal venue (the basement of a LBWF building) for cost saving reasons. Mr Risby became very upset and angry about this and shouted at a junior colleague stating "the council would not get away with this if they said that no fucking niggers were allowed to attend". Mr Risby was unaware that his colleague was mixed race and she believed the comment was directed at her.

Mr Risby was subsequently dismissed for gross misconduct for using offensive and racist language. He brought claims of unfair dismissal and disability discrimination. The Tribunal held that Mr Risby was dismissed for his short temper which was a personality trait not related to his disability and therefore held that there had been no disability discrimination. Mr Risby appealed to the EAT.

What does this mean?

The EAT upheld the appeal and held that all Mr Risby had to prove was that his conduct arose in consequence of his disability. Had Mr Risby not been disabled, he would not have been angered by LBWF's decision to move the workshop to a venue which he could not access. His misconduct, the EAT said, was the product of indignation caused by that decision and his disability was the cause of that indignation and therefore his misconduct. The Tribunal had therefore been wrong to find that Mr Risby's misconduct was unrelated to his disability.

The EAT remitted the case back to the Tribunal for rehearing.

What should employers do?

It is important that employers take into account the needs of their disabled employees and make reasonable adjustments where necessary.

This case seems to loosen further the causal link between disability and something arising in consequence of a disability. However, at the rehearing, it will still be open to the employer to argue that the dismissal was a proportionate means of achieving the legitimate aim of ensuring and promoting its equal opportunities policy. Of course, it will also be open to the Tribunal to conclude that it would have been proportionate for LBWF to issue a final written warning in this case rather than to dismiss.

Case reference: Risby v London Borough of Waltham Forest

2. Teacher who stood by sex offender husband was indirectly discriminated against

The Employment Appeal Tribunal (EAT) has held that a practising Christian teacher who was dismissed for standing by her husband (who was the head teacher at a nearby school) after he was convicted of sex offences suffered indirect religious discrimination.

Background

Ms Pendleton was a practising Christian and her husband was the headmaster of another local school within the same cluster. Her husband was convicted of downloading indecent images of children and voyeurism relating to a hidden camera in the school changing rooms. He was sentenced to 10 months in prison. There was no evidence that Ms Pendleton knew of her husband's activities.

Ms Pendleton decided to stay with her husband in order to remain consistent with her marriage vows, taken in the presence of God, to take her husband for better or worse. She agreed that she would not condone or give the impression that she condoned his actions.

Ms Pendleton was charged with potential gross misconduct. The school claimed that there would be an erosion of trust and confidence in her duties to carry out safeguarding responsibilities as a teacher if she stayed with her husband. She was told that a number of parents had complained but was not provided with any evidence to support this. Ms Pendleton argued that she was a separate person to her husband and that she had an exemplary record in safeguarding and did not present a risk.

Ms Pendleton was subsequently summarily dismissed. The school stated that her decision to stay with her husband eroded her suitability as a teacher and her personal choices were in direct contravention of the ethos of the school. Ms Pendleton brought claims of unfair dismissal and indirect religious discrimination.

What does this mean?

The EAT upheld Ms Pendleton's claims.

The school had argued that Ms Pendleton would have been dismissed in the same circumstances irrespective of her religious beliefs and therefore she had not been put at a particular disadvantage when compared with other people.

However, the EAT held that the school's policy or practice had been to dismiss any employee who elected to stand by their spouse or partner in the circumstances that Ms Pendleton had faced. The comparator in this case would be people who were in long term loving relationships but who did not share Ms Pendleton's protected characteristic.

Whilst accepting that both groups would undoubtedly face a real disadvantage if forced to choose between their partner and their career, the EAT said that those who also held a religious belief in the sanctity of marriage, arising from the sacrosanct nature of vows made before God, faced a particular disadvantage. Accordingly, there had been indirect religious discrimination against Ms Pendleton.

What should employers do?

It would have been open to the school in this case to put forward evidence to demonstrate that Ms Pendleton's dismissal was a proportionate means of achieving a legitimate aim and so had been objectively justified. No such evidence was put forward by the school. Employers in a similar position should be prepared to show that they can objectively justify any decision to dismiss before carrying out a dismissal.

Case reference: Pendleton v Derbyshire County Council and The Governing Body of Glebe Junior School

3. Expectation that a disabled employee would work long hours may amount to discrimination

The Employment Appeal Tribunal (EAT) has held that an expectation that a disabled employee would work long hours was a provision, criterion or practice for the purposes of a disability discrimination claim.

Background

Mr Carreras was employed by United First Partnership Research as an analyst. He was involved in a serious bike accident and, when he returned to work, he continued to suffer from dizziness, fatigue, headaches and difficulty in concentrating. Prior to the accident, Mr Carreras had regularly worked from 9am to 9pm. After the accident, he tended to work from 8am to 7pm but came under pressure to work later. Requests were made by United for him to work later which progressed to an assumption that he would do so.

Mr Carreras eventually sent an email to one of the owners of the business objecting to working late in the evenings due to tiredness. He was told that if he did not like it, he could leave. Mr Carreras subsequently resigned and claimed constructive dismissal and disability discrimination.

What does this mean?

The EAT upheld Mr Carreras' view and remitted the case to the Tribunal.

The EAT held that the provision, criterion or practice relied upon did not have to be an absolute requirement to work late and it was enough that the employer had requested and then expected that Mr Carreras would work late. The reality of the situation was that he felt obliged to work late.

What should employers do?

Employers should avoid creating a workplace culture in which staff feel obliged to work in a particular way, even if it is disadvantageous to their health.

Case reference: Carreras v United First Partnership Research

4. Philosophical belief that public money is being wasted may be protected

The Employment Appeal Tribunal (EAT) has cautioned Tribunals not to set the bar too high when considering whether or not a philosophical belief is one which is protected under the Equality Act 2010.

Background

Mr Harron worked for Dorset police and claimed to have suffered discrimination in relation to his belief in the proper and efficient use of public money in the public sector. His claim was dismissed by the Tribunal and he appealed to the EAT.

What does this mean?

In order for a belief to be protected the following criteria must be met:

- The belief must be genuinely held.
- It must be a belief and not an opinion or viewpoint based on the present state of information available.
- It must be a belief as to a weighty and substantial aspect of human life and behaviour.
- It must attain a certain level of cogency, seriousness, cohesion and importance.
- It must be worthy of respect in a democratic society and not be incompatible with human dignity or conflict with the fundamental rights of others.

The EAT said that it was unclear whether the Tribunal, when dismissing Mr Harron's claim, had in mind the proper approach to the criteria and what the reasons were for holding there had been a failure to meet the criteria. While a belief must relate to matters that are more than merely trivial, the EAT cautioned against setting the bar too high.

This case has been remitted to the Tribunal for re-determination of the question of whether this belief qualifies for protection.

What should employers do?

Employers should exercise caution in their treatment of staff who air any type of philosophical belief.

Case reference: Harron v Chief Constable of Dorset Police

5. Equality Act 2010 did not extend to Afghan interpreters employed by the British Government in Afghanistan

The Court of Appeal has held that the territorial scope of the Equality Act 2010 does not extend to Afghan interpreters who were employed by the British in Afghanistan.

Background

The Equality Act 2010 is silent as to its territorial scope but the ECHR's Code of Practice states that discrimination protection is provided when there is a sufficiently close link between the employment relationship and Great Britain.

Mr Hottak was employed by the British Government as an interpreter working with British military forces in Afghanistan. He worked under a local contract of employment governed by Afhgan law and was paid in US dollars. Mr Hottak claimed that he had been discriminated against on the grounds of his nationality (as prohibited by the Equality Act 2010) in relation to the provision of certain benefits.

What does this mean?

The Court held that the principles applicable to unfair dismissal claims under the Lawson test are also relevant to discrimination claims.

The fact that Mr Hottak's employer was British did not in itself mean that there was a sufficient connection between him and Great Britain for the Equality Act 2010 to apply. Mr Hottak did not work in Great Britain and had no physical contact or connection to Great Britain other than the identity of his employer. He was employed locally under a contract governed by local law, not UK law.

The Court said that other matters should also be considered, such as whether the individual has British nationality and whether they were recruited in Great Britain.

Case reference: R (Hottak and another) v The Secretary of State for Foreign and Commonwealth Affairs and another

6. Football club's Assistant Manager was constructively dismissed

The High Court has held that an Assistant Manager of a football club was constructively dismissed after he resigned following a demotion.

Background

Mr Gibbs was the Assistant Manager of Leeds United Football Club. He received an email from the Club Secretary informing him that he was to have no future contact and/or involvement with the first team and that his role at the Club should be confined to working with the under 21s, under 18s and other non-first team players. Mr Gibbs subsequently resigned and claimed constructive unfair dismissal.

What does this mean?

The High Court upheld Mr Gibbs' claim. It held that he was constructively dismissed because the Club was in repudiatory breach of his contract and his resignation was in response to that breach.

The High Court said that the loss of status was plain and the requirement that Mr Gibbs work as directed by the email showed that the Club was refusing to perform the contract as it had originally been made. The fact that the Club, by its conduct, showed that it no longer intended to be bound by the essential terms of the contract was a repudiatory breach.

The Court also held that the receipt of the email prompted the resignation even though there was a 3 day gap between the two events.

Mr Gibbs had also from time to time expressed the view that he would be prepared to leave the Club if suitable terms were offered. The Court said that this was beside the point and did not prevent the Club's conduct being a breach of contract.

What should employers do?

Employers should not seek to demote an employee or significantly change their role without their consent.

Case reference: Gibbs v Leeds United Football Club

7. New immigration laws affecting employers and illegal workers

The Immigration Bill has recently received Royal Assent, becoming the Immigration Act 2016.

The following provisions come into force on 12 July 2016:

- The existing criminal offence of 'knowingly' employing an illegal migrant will be extended to apply where an employer has 'reasonable cause to believe' that a person is an illegal worker. The maximum prison sentence , where found guilty of the offence, will be increased from two to five years.
- A new offence of illegal working will apply from 12 July 2016 which will enable the earnings of illegal workers to be seized under the Proceeds of Crime Act 2002.

Also from 12 July 2016, there will be a new post of Director of Labour Market Enforcement. The Director's role will be to oversee and coordinate enforcement of worker exploitation legislation by the Gangmasters Licensing Authority (which will be renamed as the Gangmasters and Labour Abuse Authority), the Employment Standards Inspectorate and HMRC.

The Act also contains the following provisions which will be brought into force on dates that have yet to be announced:

- The Secretary of State will have the power to introduce an immigration skills charge on certain employers who sponsor skilled workers from outside of the EEA.
- Public authorities will be required to ensure that public sector workers in customer facing roles speak fluent English.
- A new criminal offence will be created of aggravated breach of labour market legislation.

Reference: The Immigration Act 2016 and The Immigration Act 2016 (Commencement No.1) Regulations 2016.

8. The Enterprise Act 2016

The Enterprise Bill has recently received Royal Assent, becoming the Enterprise Act 2016.

The Act includes provisions to:

- Cap exit payments in the public sector.
- Regulate the use of the word 'apprenticeship' to cover only Government accredited schemes.
- Give power to set targets for apprentice numbers in the public sector.
- Establish a new Institute for Apprenticeships which will support employer led reforms and the quality of apprenticeships.
- Strengthen retail workers' rights in relation to Sunday working.

The provisions giving shop workers better protection will make the followings changes:

- The notice period for shop workers at large shops to opt out of Sunday working altogether will be reduced from three months to one month.
- Shop workers will be given a new right to opt out of working additional Sunday hours, on giving one month's notice at large shops and three months' notice at smaller shops.
- Employers will be under a duty to notify existing, as well as new, shop workers of these rights.
- The consequences for employers who fail to comply with the notification requirements will be strengthened.

The Act will be brought into force in stages on dates to be announced.

9. The Trade Union Act 2016

The Trade Union Bill has recently received Royal Assent, becoming the Trade Union Act 2016.

The Act includes provisions:

- Requiring minimum ballot thresholds, a 50% turnout in all industrial action ballots and a 40% support requirement in favour of industrial action for specified important public services in certain sectors.
- Requiring an independent review on the delivery of secure methods of electronic balloting in relation to industrial action ballots and for the Secretary of State to publish a response to the review.
- Requiring certain information relating to industrial action is included in the ballot paper and requiring information to be given to union members and to the Certification Officer following a ballot.

- Requiring the arrangements for the timing and duration of industrial action to be specified. 14 days' notice of any action will need to be given to an employer (unless the union and the employer mutually agree to 7 days' notice).
- A ballot mandate for industrial action will expire after six months (or after nine months where there is a mutual agreement between the employer and the union).
- Setting out requirements on unions for the supervision of picketing.
- Concerning political funds.
- Making powers in respect of paid time off for trade union duties and activities in the public sector.
- Restricting the deduction of union subscriptions from wages by relevant public sector employers in certain circumstances.
- Giving new investigatory powers and sanctions to the Certification Officer and new arrangements for funding the Certification Office.
- Introducing a provision which requires the Secretary of State to commission an independent review into industrial action ballots.

The new provisions are expected to come into force in July 2016.

Find out more

Please contact us to discuss your requirements or to find out more.

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