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Insights

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A NEW WHISTLEBLOWING CASE LOOKS AT WHETHER THERE WAS A "REASONABLE BELIEF" IN DISCLOSURES AND WHETHER A DECISION MAKER CAN BE BLAMED FOR THE ACTIONS/MOTIVES OF OTHERS, AND A CASE ON THE EXTENT TO WHICH CONDUCT CAUSED BY A DISABILITY CAN INFLUENCE A DISMISSAL – PLUS A GENERAL NEWS ROUND-UP

May 30, 2024

SUMMARY

Our May update includes a case on whistleblowing where the claimant's belief in the disclosures was questioned along with whether decision makers who knew little or nothing about the disclosures could be blamed for those who did – and a disability dismissal case where the bad behaviour/conduct of an individual, caused by a disability, may have contributed towards the dismissal. We also feature a news roundup on responses to the "Sexism in the City Report" and the Labour Party's plans for reforming employment law if they are elected on 4 July.

WHISTLEBLOWING– IS THERE A REASONABLE BELIEF IN THE DISCLOSURE, AND CAN DETRIMENT DECISION MAKERS BE MISLED?

It is a requirement of a protected disclosure that the person making the disclosure has a "reasonable belief" that the subject matter of the disclosure tends to show (broadly) that there is some form of wrongdoing.

It is also the case that the individual(s) responsible for imposing detriments on a whistleblower may know little or nothing about the disclosure – because of this it might be argued that they can be manipulated/misled by others who do know about and are motivated by the disclosure into subjecting the whistleblower to a detriment, or even dismissal.

The claimant was a medical doctor working as a paediatrician at a London hospital. She had a poor working relationship with two of her colleagues, which led to several incidents at the hospital, including:

- A complex twin birth on 30 July 2019, where a confrontation occurred, and a colleague of the claimant filmed part of what took place on her phone. This was later posted on a Consultants' WhatsApp group;
- A complaint by the claimant that her colleague (the same one who made the recording) carried out a very poor handover of work on 13 July 2019 which had a negative impact on patient care;
- A complaint by the claimant that rates of Necrotising Enterocolitis (NEC), a serious illness affecting new-born babies, was higher than average at the hospital and that a few deaths had occurred following treatment from the claimant's colleague (again the same one); and
- A complaint that clinical feeding guidelines being prepared by the claimant, which were relevant to NEC, were ignored, and guidelines from another health authority used.

As a result of the 30 July incident in particular, the claimant was suspended from work for several months and a formal MHPS (Maintaining High Professional Standards) investigation took place. The claimant alleged that this investigation, along with an extension to her suspension and a disciplinary process followed by a written warning, amounted to detriments imposed because of making protected disclosures.

REASONABLE BELIEF

The tribunal found most of the claimant's disclosures not to be protected disclosures, except for the 13 July handover, where it was held the claimant held a reasonable belief that the health and safety of patients was likely to be endangered.

The tribunal had difficulty with "reasonable belief" in the other disclosures. On the issue of higher-than-average NEC rates for example, the tribunal held the claimant did not hold a reasonable belief in this. The NEC rates were no higher than the national average, and it was not accurate to say that there had been "a few deaths" - there had been one. A belief held by the claimant on these points was not objectively reasonable. There were other disclosures where the claimant also failed to show her belief was reasonably held. Only the 13 July disclosure was a protected disclosure.

The claimant appealed. The EAT applied the accepted test that a tribunal should consider whether, in respect of each disclosure, (a) the claimant held the belief in question and (b) if she held the belief, was it objectively reasonable to do so?

Most of the claimant's disclosures were based on written evidence (an audit carried out by the claimant and other junior doctors) and her disclosures did not reflect that evidence. The claimant's disclosure that NEC rates at the hospital were higher than national rates was inconsistent with the audit. As mentioned above, the audit found that the hospital's NEC rates were no higher than national UK rates.

DECISION MAKERS BEING MISLED

A disclosure must have a material influence/impact on the organisation/individual imposing a detriment. Where the detriment is imposed by an individual, the disclosure must have a material influence/impact on the individual. The alleged detriments were:

- The suspension, including an extension based on a mistaken view that the claimant had breached the suspension;
- The MHPS investigation; and
- Receiving a written warning following a disciplinary meeting.

They were imposed by Dr Harding, the Deputy Medical Director, and Helen Peskett, Divisional Director of Operations.

The EAT, following the tribunal, held that the protected disclosure (the 13 July handover to the claimant) was not the focus of either Dr Harding or Mrs Peskett. They were influenced by the MHPS investigation, the 30 July incident and the alleged breach of the claimant's suspension. None of these was a protected disclosure for reasons explained above.

The EAT believed the decisions were harsh, particularly Mrs Heskett's decision to initiate a disciplinary process when the MHPS report cleared the claimant, and she did not breach the terms of the suspension. However, although the decisions may have been harsh, the EAT saw no causal link between the decisions and the 13 July handover, the only protected disclosure.

The claimant also raised the argument that, although Dr Harding and Mrs Heskett were not materially influenced by the disclosures, the claimant's immediate colleagues were, and those colleagues manipulated/ misled Dr Hardy and Mrs Heskett by giving them false information, encouraging/procuring them to take action against the claimant.

The EAT did not accept this line of argument for three reasons. First, there has to be a causal link between the detriment and the disclosure. In this case the individuals imposing the detriments were not affected by the disclosure and did not take it into account. Secondly, the individuals who were motivated by the disclosures may have manipulated/conveyed false information, but this had no influence over the decision makers. There was no evidence the decision makers were in any way affected.

Thirdly, the principle that innocent decision makers can be misled/manipulated into imposing detriments/dismissals, leading to the unlawful motivation of the "manipulators" being adopted by the innocent decision-makers, is not applicable to detriment cases. The EAT held that, in detriment cases, the manipulators can be sued personally for their unlawful conduct as individual employees can be joined as separate respondents, and it had always been open to the claimant to join in the alleged manipulators as parties to the claim. She did not do this.

This argument can be run in dismissal cases (see below) but not detriment cases.

WHY THIS MATTERS

This case emphasises the importance of a belief in a protected disclosure being "reasonably held", and the extent to which tribunals will go to establish this. It also emphasises the critical importance of establishing a causal link between a disclosure and a detriment. Just because the two co-exist does not mean they are linked.

It also illustrates a difference between whistleblowing dismissal and detriment claims. In dismissal claims innocent decision makers can, in specific and limited circumstances, be held responsible for whistleblowing dismissals where they have relied on misleading/false information provided by individuals who **are** motivated by protected disclosures. In detriment claims this argument does not work because, on the EAT's judgment, the individuals providing the misleading/false information can be joined into the action personally by the claimant (similar to a discrimination claim), which cannot happen in a dismissal claim.

Williams -v- Lewisham and Greenwich NHS Trust

CONDUCT CAUSED BY A DISABILITY CAN BE RELEVANT EVEN IF IT IS ONLY A MINOR/CONTRIBUTORY FACTOR IN DECISION MAKING

In this case, the EAT considered section 15 of the Equality Act 2010 (EqA) which provides that a person discriminates against a disabled person if they treat them unfavourably because of something arising in consequence of the person's disability.

The claimant worked at a Christian Care Home until her dismissal in 2019. The claimant suffered from anxiety and depression and was disabled for these reasons under the EqA. Following an investigation and disciplinary meeting, the respondent found the claimant had been responsible for a number of serious incidents, including vandalism. During the investigation, the claimant conducted herself poorly and gave short, evasive answers to questions. The claimant argued that her conduct during the investigation interview was a major factor in the decision to progress matters to a disciplinary meeting. Following the meeting, she was dismissed for gross misconduct and brought multiple claims against the respondent, including claims for unfair dismissal and discrimination arising from a disability.

The decision of both the tribunal and EAT revolved around whether the claimant's conduct and evasive answers at the investigatory meeting were material factors in the respondent progressing to a disciplinary meeting and dismissing the claimant. This was critical, as the claimant's conduct/evasive answers were attributable to her disability. The claimant maintained that her conduct at the investigatory meeting was a material factor in her dismissal and, if the claimant's argument were sustainable, the dismissal could be discriminatory.

The tribunal dismissed the claimant's claims, in particular that the decision to progress to a disciplinary meeting and to dismiss the claimant represented unfavourable treatment because of something arising in consequence of her disability. The tribunal took the view that the claimant's conduct may have influenced the decision to take matters further slightly, but that it did not play any significant part in the decision. Put another way, even if the claimant's conduct had not been taken into account, matters would still have progressed to a disciplinary process. The tribunal noted that the investigator, in his report, did not focus on the claimant's poor conduct in answering the questions and only very briefly referred to her evasive answers during the interview.

Taking one step further, the tribunal held that even if the claimant's conduct, caused by her disability, had been a more significant contributory factor and the outcome was potentially discriminatory as a result, it was justified as it was proportionate to go forward to a disciplinary process - given the total breakdown of trust and confidence between the claimant and the respondent, and that "no lesser measure" than a disciplinary would have achieved the respondent's legitimate aim.

The tribunal also rejected the claim for unfair dismissal holding that, after a reasonable investigation, the respondent had reasonably concluded that the claimant was guilty of the misconduct alleged against her, and that dismissal fell within the band of reasonable responses.

The claimant appealed to the EAT.

The EAT found that the tribunal erred in law on the disability/conduct issue. The EAT found that the claimant's conduct at the meetings was capable of being something "arising from" the claimant's disability **even if it was only a minor part of the reason for the treatment**. However, the appeal ultimately failed as the EAT upheld the tribunal's ruling that the respondent's treatment of the claimant was justified, being a proportionate means of achieving a legitimate aim.

WHY THIS MATTERS

This case serves as a reminder that an employee's conduct which arises from a disability, even if it plays a minor role as a contributory factor to a decision, can still amount to discrimination arising from a disability. In this case the respondent had the safety net of a justification defence at both the tribunal and EAT stages, but employers should always take very seriously conduct caused by a disability, even if it appears to have only a minor effect on decision-making.

Ms N Bodis -v- Lindfield Christian Care Home Limited

NEWS ROUNDUP

RESPONSES TO "SEXISM IN THE CITY" REPORT PUBLISHED

The Treasury has very recently published responses from the government, the FCA and the PRA to the "Sexism in the City" report, which considered sexual harassment and bullying in the financial services sector.

In its response, the government welcomed the report, but rejected many of its more far-reaching recommendations. In particular:

- **NDAs -** One of the most notable recommendations in the report was the call for a legislative ban on NDAs in harassment cases. In its response, the government recognised that there is a legitimate place for clauses that protect commercially sensitive information, ideas or IP in many contexts. In an employment setting, these provisions usually take the form of confidentiality clauses in employee/employer settlement agreements. For a settlement agreement to waive statutory rights, the employee must receive independent legal advice on its terms and effect. There are already limits on the scope of NDAs in settlement agreements, which would be unenforceable if they sought to prevent an employee from blowing the whistle, including to a regulator. Many employees who sign a settlement agreement at the end of their employment also value the inclusion of confidentiality clauses, which allow them to move on and make a clean break. The government did note that steps have been taken to prevent the use of NDAs in higher education settings, in cases of abuse, harassment or misconduct. There is also a commitment to bringing forward legislation to clarify that NDAs cannot be legally enforced if they prevent victims from reporting a crime.

- **Gender pay gap and pay transparency -** The report made a number of recommendations in relation to the gender pay gap. These included a requirement to include salary band information on job advertisements, and to ban prospective employers from asking for salary history as part of the job application process. The government response rejected the call for legislation in this area, noting that many employers will be contending with historic pay decisions, may not have agreed pay scales and could have legitimate reasons why they do not include pay information on job adverts. This is an emerging area – several countries are exploring legislative options and the government proposes to first learn from their experience.

- **Flexible working** - The report recommended that the government and regulators encourage firms to advertise as many roles as possible to be available on flexible and part-time bases, as a way to attract and retain as wide a talent pool as possible, especially women. The government responded by highlighting the change to flexible working rights which came into effect from April 2024, under which the ability to make such a request became a 'Day 1' right. This was favoured as an alternative to requiring employers to list the available flexible working opportunities in job adverts.

- **Whistleblowing -** the report recommended that whistleblowing legislation be strengthened to provide greater protection and support to whistleblowers in sexual harassment cases. The government did not commit to further steps in its response but noted that a review of

whistleblowing law is underway, with the intention of providing an evidence base to inform future policy choices in this area.

In their responses, the PRA and FCA both welcomed the report and the recognition that regulators have a role to play in this area. Both regulators are currently considering responses to the September consultation papers on Diversity & Inclusion (D&I) in the financial sector.

The report recommended that the regulators drop their plans for extensive data reporting and target setting around D&I. Senior leadership of firms should take greater responsibility for improvements in this area, which should lead to a competitive advantage in the development of talent.

In response, the FCA confirmed that it is now prioritising its work on non-financial misconduct, including sexual harassment and bullying. The FCA is also working with the Equality and Human Rights Commission (EHRC) which will be responsible for enforcement of the new positive duty on employers to take reasonable steps to prevent sexual harassment at work, which we considered in our previous update, and which should be coming into force in October of this year.

The regulators will also work together to review the impact of the removal of the bankers' bonus cap on gender pay and inequality.

EMPLOYMENT LAW UNDER LABOUR

We are now only five weeks from a general election and current polling has Labour 21 points in the lead. This might always change but, if Labour wins the election, there may be significant changes to employment law, and at least some of these could be in force as early as October. Labour's proposals were originally set out in their January 2024 green paper "*A new deal for working people*", but this was updated very recently on 24 May by new proposals called "*Labour's plan to make work pay*". Both state that the reforms will be introduced in the first 100 days/three months of coming into power.

The proposed reforms include:

- Qualifying periods to bring any employment claim, including unfair dismissal (currently two years), will be abolished. Employers will still be able to operate "fair and transparent" probationary periods, which seems to allude to some form of exemption, but no detail is provided;
- Creating a single employment law category of "workers", rather than having "workers" and "employees". The most likely interpretation would be to extend employment rights to workers so there will only be employees and self-employed contractors. Any other interpretation would mean a reduction of employment rights which seems unlikely;
- Ethnicity (and Disability) Pay Gay Reporting to become mandatory for all employers with 250+ employees. Gender Pay Gay Reporting will remain in place;

- Mandatory Menopause Action Plans to be published by all employers with 250+ employees;
- Zero-hours contracts will be banned, and there will be new rights to work regular hours based on hours worked in the last 12 weeks. There has been some confusion as to whether employees will still be permitted to "opt-in" to zero-hours contracts, but this seems unlikely after the most recent proposals;
- There will be severe restrictions on "fire and re-hire", and the introduction of what they consider to be fairer methods for negotiating contractual changes;
- Redundancy and TUPE rights will be strengthened, although no details are provided;
- The "right to switch off" will be introduced, the idea being Labour's view that flexible working should not become 24/7 working. The May 2024 proposals state that Labour's reforms will be based on "switch-off" models in Ireland and Belgium, although no details are provided;
- Restrictions on surveillance at work will be increased, including the use of AI;
- The minimum wage will be reviewed, with the removal of age bands and the cost of living taken into account;
- Unpaid internships will be banned except where they are part of an education or training course;
- Strengthening statutory sick pay by removing the qualifying period and removing the lower earnings limit;
- The repeal of recent anti-strike laws; and
- Strengthening protection for whistleblowers and strengthening protection against sexual harassment.

There are other areas of employment law which Labour intends to reform but those listed above are likely to have the most impact.

This article was written with Trainee Solicitor Jemima Rawding

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