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Employment law newsletter - Q3 2021

‘Freedom Day’ has come and gone, but there is still a great deal of uncertainty for many businesses as we move into the third quarter of 2021. In this newsletter, we look at some important recent decisions of the courts and employment tribunals.

One question which one might ask is whether the legal requirements relating to redundancies might be relaxed in some way, given the economic crisis caused by the pandemic. In short, as will be seen from one of the cases in the newsletter, the answer is no. Health and Safety is also a key legal issue in the current situation and we have selected a case on that too.

The gig economy continues to be prevalent in some areas of activity and the weakness of workers’ rights in that domain are underscored by an important Court of Appeal case relating to food delivery drivers.

In our current webinar programme, we have looked at the potential legal implications of long Covid and some key issues for recruitment as businesses seek to recover from the pandemic. In our forthcoming webinars, we will be taking a detailed look at redundancy and restructuring which may ne necessary or desirable for some employers as they move forward in the months ahead. Please feel free to subscribe to our webinar programme or contact us for a workshop designed to help your business address these issues.

To discuss a particular employment law matter further, please contact a member of the team.

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Disabled Teacher Sacked on Capability Grounds Wins Employment Appeal

Employers can be entitled to dismiss workers who are incapable of adequately doing their jobs – but what if such incapacity arises from a disability? The Employment Appeal Tribunal (EAT) addressed that issue in a case concerning a teacher who suffered from dyslexia and hearing impairment.
The teacher became the subject of a formal capability procedure after concerns were raised about her lesson planning, classroom management and book-marking. After her trade union representative raised the possibility of a relationship between poor performance and disability, expert reports were obtained. An occupational health report stated that the teacher's disabilities were having an adverse effect on her ability to fulfil her role.

The headteacher of the school where she worked decided to refer the case to the governing body with a recommendation to dismiss. The governors proceeded to take that course and the teacher's internal appeal was later rejected. She subsequently lodged Employment Tribunal (ET) proceedings, claiming unfair dismissal and disability discrimination based on a failure to make reasonable adjustments.

In dismissing her unfair dismissal claim, the ET roundly rejected claims that she had been the victim of a conspiracy. It found that the capability procedure was pursued with scrupulous honesty and fairness and that the reason for her dismissal was that her teaching was found not to be to the required standard.

Her disability discrimination claim was also rejected on the basis that there was no satisfactory evidence that she had been placed at any disadvantage by the capability procedure or by the requirement to achieve a good standard of teaching. It had not been reasonably necessary to make adjustments to cater for her disabilities.

In upholding her appeal against that outcome, the EAT noted that the ET had made no independent, objective assessment of the effect of her disabilities on her work as a teacher or her performance in the capability procedure. She was entitled to receive a more detailed and systematic analysis before the ET concluded that she had not been put at a substantial disadvantage by her disabilities.

The ET's conclusion that it was not reasonably necessary to make adjustments to her working environment, including provision of specialist software, could also not be supported. There had been no express assessment of the likely effect, cost and practicality of such adjustments. The ET's inadequate reasoning in respect of the disability discrimination issues may have affected its conclusions on the unfair dismissal claim.

In remitting the case for reconsideration by a freshly constituted ET, the EAT noted that it took that step with some hesitation and reluctance. The original ET hearing had lasted 13 days and further litigation was unlikely to do anyone any good in the end. The EAT strongly recommended that the parties engage in mediation with a view to reaching a settlement as soon as possible.

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Pandemic or No Pandemic - Redundancy Exercises Must be Open and Fair

Thousands of businesses left struggling by the COVID-19 pandemic have had little choice but to shed staff. However, as an Employment Tribunal (ET) ruling showed, the legal requirement that redundancy exercises must be transparent and fair has remained in full force throughout the crisis.

The case concerned a relatively small engineering company that was doing well until the virus raised its ugly head. It had not made any redundancies in its entire history but, after the pandemic led to a dramatic decline in orders, its 38 employees were informed by letter that some of them would have to go. A machine operator was placed in a pool of four, one of whom was to be selected for redundancy. The process was run by a director who scored the four against certain criteria, including skills, experience, attendance and disciplinary records. Having scored the lowest, the operator was the one who lost his job.

In upholding his unfair dismissal claim, the ET accepted that there was a genuine redundancy situation. There was, however, a failure to consult staff in advance as to the best means of reducing costs. The largely subjective criteria used in the selection process were quite different from those specified in the operator's employment contract and were adopted without consultation or discussion.

There was no explanation of how marks were to be awarded and the process was apparently undertaken without any direct reference to objective records. The fact that two employees, whom the employer clearly wanted to retain, were each awarded the maximum possible marks indicated that it was not a fair or genuine exercise.

The procedure was also procedurally and substantively unfair in that there was no explanation as to why other employees were not included in the pool. There did not appear to have been any enquiries made concerning other positions within the company that the operator might have filled. The amount of his compensation would be assessed at a further hearing, if not agreed.

Failure to Provide Health and Safety Training Breached Teacher's Contract

When considering whether there has been a fundamental breach of an employee's contract, Employment Tribunals (ETs) must look at the whole picture of unfolding events over weeks, months, even years. That point was succinctly made in the case of a teacher who repeatedly complained about health and safety breaches to no avail.

The teacher was required to give support to a wheelchair-dependent pupil which involved her in weight-bearing and lifting work. Over a period of months, she made increasingly fervent requests to receive manual handling training. She was assured that arrangements would be made, but no training was provided. She had been suffering back pain for some time before she had to take three weeks off sick. The headteacher informed her that, on her return to work, she would not be required to lift the pupil concerned and that plans were afoot to move her to another class. She was assured that manual handling training would be arranged for her and other members of staff in the following weeks.

After the teacher resigned, she lodged a complaint of unfair constructive dismissal with an ET. Her claim was, however, dismissed on the basis that her employer had not breached its fundamental duty to take reasonable care for her health and safety. Her communications with the headteacher indicated that the employer had genuine concerns for her health and safety and had taken steps to ensure that she would not in future be exposed to danger.

In upholding her challenge to that outcome, the Employment Appeal Tribunal (EAT) found that the ET had erred in law in failing to consider the overall picture painted by the unfolding events. She had for months been requesting appropriate training but the assurances she received went consistently unfulfilled. The point at which there was a fundamental breach of her contract had comfortably been passed prior to her going on sick leave. That breach could not be undone by the headteacher's subsequent intervention. Upholding her claim, the EAT found that that was the only outcome that could properly be reached when the law was correctly applied to the case. The amount of her compensation would be assessed at a further ET hearing, if not agreed.

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Deliveroo Drivers Are Not 'Workers', Court of Appeal Rules in Landmark Case

Are Deliveroo drivers 'workers' with a right to organise themselves into trade unions? In a ruling of critical importance to the operation of the so-called 'gig economy', the Court of Appeal has answered that question with a resounding 'no'.

The case arose from an application to the Central Arbitration Committee (CAC) by the Independent Workers Union of Great Britain to be compulsorily recognised by Deliveroo as representing the company's drivers in part of London for collective bargaining purposes. The CAC rejected the application on the basis that the drivers were not workers within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992 and thus had no entitlement to trade union representation.

In challenging the CAC's decision, the union asserted that it resulted in a violation of the human right of the drivers concerned to protect their interests by joining a trade union, enshrined in Article 11 of the European Convention on Human Rights. The union's case was, however, rejected by the High Court on the basis that, as the drivers were not workers, the right under Article 11 was not engaged.

Dismissing the union's appeal against that outcome, the Court of Appeal detected no legal flaw in the CAC's ruling that the drivers did not enjoy worker status. It noted in particular that the drivers enjoyed an unfettered and genuine right to substitute others to perform their work for Deliveroo. Even if that right was rarely exercised, they were under no legal obligation to provide their services personally.

Other factors pointing away from the drivers having worker status included that they worked no specific hours and were under no obligation to accept jobs from Deliveroo. They were free to provide their services to competitors and themselves provided the most essential tools of their job: a bike and a mobile phone.

The Court was conscious that its decision might appear counterintuitive at first sight. It might be thought that self-employed people engaged in the gig economy would have particular need of a right to organise as a trade union. It was easy to see that the drivers concerned might benefit from organising collectively to represent their interests against Deliveroo.

Although, as the law stands, the right to organise as a trade union does not extend to self-employed people in the gig economy, the Court noted that they do enjoy the more general human right to freedom of association, which is also guaranteed by Article 11.

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