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Employment law newsletter - Q1 2022

Welcome to the latest version of the Grant Saw Employment Law newsletter. As we enter a new year, the uncertainty resulting from the COVID-19 pandemic continues to cause a great deal of pressure for many businesses. In this newsletter, we look at some important recent decisions of the courts and employment tribunals.

Disability discrimination remains an important and topical area of employment law and in one of our articles, we explore a case where an employee with Type 1 diabetes had been subjected to two acts of direct disability discrimination: his dismissal and the refusal of two of the employer's founding directors to acknowledge his health.

We also look at disciplinary proceedings involving an employee who worked on the reception desk at a university library who was dismissed on the grounds of gross misconduct. The disciplinary hearing focused mainly on the conduct of the employee with very little consideration of the provocative behaviour she experienced because of the students' behaviour.

At times, employees can become aware of something at work that they feel they ought to bring to the attention of the authorities or to the wider public. However, an employee has duties of loyalty and confidentiality to their employer and breach of these duties could lead to dismissal without compensation and possibly even legal action against them. In this case, a banking employee made an unacceptable personal attack on the head of the legal department's abilities, a case that was brought before the Employment Appeal Tribunal.

Our Employment department are offering a free thirty-minute video call to discuss any issues you may have with your employment contracts, policies, and handbooks, without further obligation. There is no current time limit on this offer, but weekly slots are limited, so early booking is advised. We can also provide HR workshops and audits to set you up for 2022. To discuss a particular employment law matter further, please contact a member of the team.

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Type 1 Diabetes Sufferer Wins Direct Disability Discrimination Claim

When employees disclose that they are suffering from a disability, it is an important moment that should always put employers on their mettle. The point was powerfully made by the case of a business development manager who was dismissed within days of his employer learning that he had been diagnosed with type 1 diabetes.

After the man launched proceedings, an Employment Tribunal (ET) found that his dismissal was significantly influenced by the employer's knowledge of his disability. He had been subjected to two acts of direct disability discrimination: his dismissal and the refusal of two of the employer's founding directors to acknowledge his ill health. The employer's contention that he had been dismissed solely for the non-discriminatory reason of poor performance was rejected.

The ET found that all three of the employer's directors, who worked closely together, were aware of his condition prior to his dismissal. The employer had moved virtually directly from learning of his disability to terminating his employment. When he complained about his dismissal, two of the directors colluded in maintaining their assertions that they had no advance knowledge of his ill health.

The ET also found that, in seeking to embellish the employer's dissatisfaction with the man's performance and bolster its case, one of the directors had altered an email so as to give the impression that a client had specifically named him as the person responsible for a serious overcharging error.

Anyone aware of his diagnosis would have known that type 1 diabetes is a lifelong condition that, unless controlled by medication, can have a significant effect on a person's ability to carry out normal day-to-day activities. The man testified that the condition caused tiredness and digestive complications that made it difficult for him to perform his extensive role in entertaining clients.

In dismissing the employer's challenge to those findings, the Employment Appeal Tribunal noted that the ET had rejected several other complaints put forward by the man in what was a long and hard-fought case. It could find nothing perverse or unfair in the ET's careful and balanced conclusions. If not agreed, the amount of the man's compensation would be decided at a further hearing.

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Workplace Disciplinary Proceedings – Empathy and Understanding Required

The critical issue in many employment cases is whether an employee's dismissal lies within the range of reasonable responses open to the employer. As an Employment Appeal Tribunal (EAT) ruling showed, the answer to that question often depends on the level of empathy and understanding shown in the disciplinary process.

The case concerned a university library employee who was working alone behind the reception desk when, as she was entitled to do, she asked a student to show her photo identity card. The student was rude, disrespectful and aggressive towards her, accusing her of racism. Further incidents followed during which the woman found herself surrounded by students, one of whom had to be restrained.

Following a disciplinary hearing, she was dismissed on grounds of gross misconduct. The decision-maker described her conduct as antagonistic, inappropriate, negative from the outset and deeply unprofessional. After her internal appeal was rejected, she launched Employment Tribunal (ET) proceedings.

Ruling on the matter, the ET found that the university had a potentially fair reason for dismissing her. The investigation into her conduct was apparently conducted with an open mind and the decision-maker had reasonable grounds for forming a genuine belief that she was guilty of misconduct. The procedure followed was also fair.

In upholding her unfair dismissal claim, however, the ET was struck by the apparent lack of empathy and understanding for the situation in which she found herself. The incidents had caused her a great deal of distress but it did not seem to have crossed the decision-maker's mind that, in the absence of her supervisor, she was out of her depth and quite simply overwhelmed by the situation.

The disciplinary hearing understandably focused on the woman's conduct, but very little if any account was taken of the students' behaviour. There did not appear to have been proper consideration of the provocation to which she was subjected. She had no formal blot on her disciplinary record and, in those circumstances, the decision to dismiss her fell outside the range of reasonable responses.

By her own culpable conduct, the ET found that she made a 65 per cent contribution to her dismissal. After becoming angry, she did not deal well with the situation. She did not walk away as quickly as she should have done and at one point pretended to use her mobile phone to photograph students. It was inappropriate and unreasonable for her to behave in that manner. Following a 65 per cent discount, the university was ordered to pay her £4,730 in damages.

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Whistleblowing and the Need to Prove a Causal Link – Guideline Ruling

In order to succeed in a workplace whistleblowing claim, it is not enough merely to prove that you have made a protected disclosure. As one case showed, it is also necessary to establish a causal link between the disclosure and any detrimental treatment to which you have been subjected.

The case involved a senior employee in a bank's audit department. In a draft report, she expressed concerns about the bank's risk exposure arising from a certain legal agreement. There was no dispute that she had made a protected disclosure but the bank denied that it was that which prompted her subsequent dismissal.

The head of the bank's legal department, who was responsible for the agreement, took strong exception to the employee's views, considering them an attack on her integrity. There was a discussion and an exchange of emails between them and, prior to the employee's dismissal, the head of the legal department raised the matter with the bank's senior managers.

After the employee lodged Employment Tribunal (ET) proceedings, her complaint of ordinary unfair dismissal was upheld. The ET also found that one of her complaints of detrimental treatment, relating to the head of the legal department's conduct, would have been successful had it not been brought too late. Her claim that she was dismissed for whistleblowing was rejected.

Dismissing her challenge to the latter ruling, the Employment Appeal Tribunal noted that the head of the legal department had not participated in the decision to dismiss her. The ET was entitled to conclude that, although the head of the legal department's conduct towards her was influenced by the protected disclosure, the motivation of the managers who dismissed her was different.

There was no flaw in the ET's conclusion that the managers were not motivated by the protected disclosure but by the view they took of the employee's conduct towards the head of the legal department when they met, and in particular in a subsequent email. In their view, the employee had made an unacceptable personal attack on the head of the legal department's abilities, which reflected a wider problem with the former's interpersonal skills.