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UK People, Reward and Mobility Newsletter

SEPTEMBER 2020

IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: steps employers can take to increase inclusion and diversity in the workplace; re-engagement of an employee following unfair dismissal where trust and confidence in the employment relationship has broken down; dyslexia and adjustments in the workplace; and new Acas guidance and case law that provide clarity to employers on redundancy process.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobility Hub.

Black History Month

Every year in October, since 1987, the UK has celebrated Black History Month. The purpose is to raise awareness and recognise the many contributions of African, Asian and Caribbean people to economic, cultural and political life in the UK. This year, however, Black History Month arguably holds even more significance than usual in light of the "Black Lives Matter" movement, which has received global media coverage since the death of George Floyd in May this year. While much of the Black Lives Matter media coverage has, sadly, focused on police brutality, it has once again opened up the wider conversation of racism in the UK across all institutions. While certain public authorities and institutions grapple with how to reconcile their own history with current practices, where do employers fit in? Employers have legal obligations to all their employees, to be both proactive and properly reactive to discrimination in the workplace. However, beyond the minimum legal obligations, can employers do more?

WHAT IS THE LAW?

FThe fundamental protections against racism in employment in the UK are currently enshrined in the Equality Act 2010 (the Act). It is unlawful to discriminate against, amongst others, workers, job seekers and trainees because of a protected characteristic. There are nine protected characteristics, one of which is race. Section 9 of the Act defines race as "colour, nationality and ethnic or national origins". The Act details four prohibited forms of discrimination: direct discrimination, indirect discrimination, harassment and victimisation.

WHEN DO RISKS ARISE AND HOW CAN THEY BE MITIGATED?

Employers need to be mindful of the risk of discrimination at all stages of the employment relationship – from recruitment to post-employment references.

Recruitment

Employers must ensure they do not discriminate in their recruitment practices. Discrimination can creep in as early in the process as sourcing candidates – employers need to recognise this and actively consider whether recruiters are putting forward a diverse pool of candidates. If recruiting graduates, are you looking at universities with a diverse pool, access programmes and work experience etc.? Discrimination is most likely to arise as a result of unconscious bias, so employers should review their recruitment practices to assess any bias in the process and how this may be mitigated. For example, is it possible to anonymise CVs so that no assumptions can be made in relation to the race of a candidate based on their name?

Terms and conditions of employment

The proactive employer may wish to consider ethnicity pay gap reporting. While not mandatory (yet!), ethnicity pay gap reporting may highlight and allow employers to address any (often unintentional and/or previously unrecognised) instances of inequality in remuneration.

Promotions and career development

As with recruitment, discrimination can arise at all stages of the development process – from access to final decision. When considering leadership positions and promotions, employers must ensure that there is no opportunity for unconscious (or even conscious) bias to pollute any such decision-making. In terms of management and/or executive positions in particular, it is important to recognise the importance and value of diversity of thought and a diverse leadership team.

Micro-inequities

Discrimination in the workplace can also take the form of micro-inequities in day-to-day activities. Are certain people not given the opportunity to speak in meetings? Have you noticed that a colleague's name is being consistently mispronounced despite the proper pronunciation being clarified? Employers should take steps to ensure that such micro-inequities are addressed and not allowed to slide because they are "micro". They can result in "macro" issues.

Being proactive is not the only way to mitigate risk. Reacting to situations promptly and effectively can also help avoid an incident evolving into a much larger complaint or, worse still, litigation. Establishing and sticking to robust grievance and equal opportunity procedures will help manage the risk of future employment tribunal claims. Allegations of discrimination need to be taken seriously, and a prompt investigation may be in order.

HOW CAN EMPLOYERS BE A POSITIVE FORCE FOR CHANGE?

Employers have a large amount of influence. There are many ways in which employers can be an advocate for their employees and for equal opportunities and diversity in the workplace.

A workplace which is not inclusive can lead to employees feeling isolated or ostracised. However, sometimes these feelings of isolation may actually be caused by colleagues, whether it be peers or line managers, simply not understanding or turning their minds to the particular struggles faced by black individuals. Employers should consider setting up support groups and networks, encouraging employees to speak out, raise awareness, connect, share experiences and provide feedback, which can then, if appropriate, be reported up to senior leadership and dealt with promptly. Thinking again about micro-inequities, and micro-aggressions, these can often be unconscious but that does not make them excusable. Fostering a culture of speaking out can make challenging micro-inequities and micro-aggressions (in the right way) easier and more commonplace. The support networks are important in this respect, not only in relation to allyship but also to encourage black employees to talk about their experiences, giving real-life examples to aid in understanding and recognising micro-inequities and micro-aggressions. Of course, just asking those employees who might experience such issues on a day-to-day basis to share their experience can be a challenge in itself and should be handled respectfully and sensitively.

Further support for black employees may be needed. Current media articles can be alarming and make employees feel vulnerable or targeted. Offering mental health services within the workplace or as a benefit of employment demonstrates sensitivity, support and an acknowledgment that, sometimes, the workplace can be triggering and difficult to navigate.

Beyond speaking out, employers need to look at their overall work culture. The conduct of other employees shapes this culture. Change is difficult, but employers can start with initiatives such as diversity and inclusion training programmes. Raising awareness within a business can help facilitate conversations and make other employees more comfortable in addressing racism in their daily lives, even if starting this change is uncomfortable.

This Black History Month, and in light of the Black Lives Matter movement, employers should consider whether they can make a change today. If you want to build an inclusive work culture, start with having those conversations, reviewing policies and practices, and creating mechanisms in order to respond to racism and prevent racism in the future. Employers do not always need to be passive and reactive, but they can also be a positive force for change. There is, after all, a clear business case for such action too – employees who are happy and supported at work are likely to be more productive, take less sick days and contribute more meaningfully to your success.

Finally, shout about all these good things! If you support the Black Lives Matter movement and are celebrating Black History Month, be vocal and publicise your great work.

Unfair dismissal: alternative remedy to compensation

The Employment Tribunal's ability to make an order for reinstatement or re-engagement of an employee who is found to have been unfairly missed is often overlooked by, or comes as a surprise to, most employers. It is understandable that, having dismissed an employee and then being forced to engage in legal proceedings to defend their actions, employers can be alarmed at the prospect of being ordered to either reinstate the employee into their former position or re-engage him or her in another suitable role within the business.

However, where an employee has expressed a wish for such an order during their unfair dismissal claim, it is a remedy that is available to the tribunal. The recent case of Kelly v. PGA European Tour highlights the need for employers to be alive to the possibility that they can, as result of an unfair dismissal finding, be ordered to re-engage or reinstate a dismissed employee.

KELLY V. PGA EUROPEAN TOUR: OVERVIEW

Mr Kelly was dismissed from his role as Group Marketing Director with the PGA European Tour (the PGA) over concerns about his performance and willingness to "buy in" to the newly appointed Chief Executive's ideas. He had been in the employment of the PGA since 1989. Mr Kelly subsequently brought an unfair dismissal claim, but this was not before he had covertly recorded the meetings at which his dismissal had been discussed and implemented.

During the course of the unfair dismissal proceedings, the PGA admitted that Mr Kelly's dismissal was unfair, based on a lack of procedure. Mr Kelly sought reinstatement or re-engagement as his remedy for being unfairly dismissed. While the Employment Tribunal refused to order reinstatement, it did consider that re-engaging Mr Kelly in the role of Commercial Director of the China PGA Tour, for which the ability to speak Mandarin was an essential requirement, was practicable.

The tribunal considered that any trust and confidence issues arising following Mr Kelly's covert recording of meetings were not so significant as to make re-engagement impracticable. Further, it considered that Mr Kelly's willingness to learn Mandarin and his proficiency in languages meant that re-engagement was also practicable from this standpoint.

The PGA appealed, arguing that the tribunal had erred in considering for itself whether trust and confidence had been damaged irreparably, instead of asking whether the PGA had a rational basis for believing that it had. The Employment Appeal Tribunal (EAT) allowed the appeal.

The EAT held that it is the employer's view of trust and confidence which is key. The tribunals' role is limited to testing whether this view is genuinely and rationally held by the employer. The EAT ruled that the tribunal had overstepped the mark in reaching its own view. With regards to Mr Kelly's covert recording, which only came to light following his dismissal, the EAT held that all of the evidence available at the time of the remedy hearing was to be considered.

There was also a finding by the EAT that the tribunal had overstepped the mark regarding its view on Mr Kelly's ability to rapidly learn Mandarin, and had failed to give adequate weight to the PGA's commercial judgment and requirements for the role.

KEY TAKEAWAY POINTS FOR EMPLOYERS

Orders for reinstatement or re-engagement are extremely rare – it is reported that they are granted in less than 1% of cases. Nevertheless, they are a remedy at the tribunal's disposal in the context of a successful unfair dismissal claim.

With that in mind, where an employer finds itself embroiled in unfair dismissal litigation, and where an employee has expressed a wish to be reinstated or re-engaged, the employer should carefully consider how it would respond if the tribunal considers such an order. If it wishes to object on the ground that trust and confidence have been irreparably damaged, making it unjust for an order of reinstatement or re-engagement to be made, it must be able to show that this is both a genuine and rational belief.

The Kelly case should provide a degree of comfort to employers in that it is the employer's view that is key. The tribunal must not overstep the mark by reaching its own view as to whether (i) trust and confidence have broken down; and (ii) the employee meets the commercial requirements of the re-engaged role.

World Dyslexia Awareness Day – adjustments in the workplace

World Dyslexia Awareness Day will be celebrated on 4 October to promote awareness and understanding of dyslexia. The British Dyslexia Association estimates dyslexia to affect 10% of the UK population. Dyslexia is a neurological difference which can cause problems with reading, writing, spelling, memory or organisation, with varying degrees of severity. Common signs include reading and/or writing slowly, confusing the order of letters in words, struggling with planning or meeting deadlines and poor spelling. Some people with dyslexia will also have other problems not connected to reading or writing, including difficulty with numbers (dyscalculia) and physical co-ordination problems (dyspraxia).

It is important to understand that dyslexia affects the way the brain retains and processes information, and this does not correlate with a person's intellectual ability. Dyslexia is a common condition that will be encountered in the workplace across all types of roles. However, whilst many educational institutions now have support systems in place for those with dyslexia, such support is often not available in the workplace as it is all too frequently overlooked or poorly understood by employers. Additionally, some employees may feel shame or inferiority and therefore avoid talking to their employer about their dyslexia or any associated difficulties.

DYSLEXIA AND THE EQUALITY ACT 2010

Dyslexia can be a disability within the meaning of the Equality Act 2010. It is inherently a long-term physical or mental impairment, so the question for any tribunal is therefore whether in the particular case it is severe enough to have a "substantial adverse effect on normal day-to-day activities". For many with dyslexia, it will have such an effect, as dyslexia commonly causes issues with reading and writing.

The Equality Act protects those whose dyslexia amounts to a disability from being treated unfavourably compared to their colleagues. It also places an obligation on their employer to make reasonable adjustments to working arrangements, and failure to do so may result in an employment tribunal claim.

Employers should be aware of their obligations in respect of accommodating employees with dyslexia, and keep in mind that these obligations apply where they know that an individual is considered disabled under the Equality Act, or if they could reasonably be expected to know that.

It is not necessary for an employee to have a medical diagnosis. In Bulloss v Shelter, Mr Bulloss worked as a telephone adviser for Shelter and was given a trial working as part of a team which provided advice via an instant messaging service. Mr Bulloss was doing well in the role, but his chats often featured spelling and grammatical errors. When asked about these errors, Mr Bulloss said that he felt that the webchat role was taking it out of him and he suspected he was dyslexic, but that he was more comfortable on webchat than on the phone and preferred it. Despite receiving good feedback scores from clients, Mr Bulloss was told that his spelling issues "didn't look good" for the charity. He failed his trial period and informed that he was to return to working on the phones. Mr Bulloss did not agree with this decision, and so resigned and brought a claim in the employment tribunal. The tribunal found that Mr Bulloss had been discriminated against and that his employer had failed to make reasonable adjustments. He was

awarded £28,234. The tribunal found that, regardless of the absence of a medical diagnosis, Mr Bulloss had made his manager aware that he was facing disadvantages and the duty to make adjustments was triggered. While Shelter had a discretion to deploy Mr Bulloss where it thought fit, it should not have tried to avoid its duty to make reasonable adjustments. The only adjustment considered was the return of Mr Bulloss to telephone work, and this was not sufficient. Had Shelter considered other reasonable adjustments, it would have allowed Mr Bulloss to continue working via webchat. The tribunal also noted that his job description included both telephone work and webchat work.

WHAT MIGHT REASONABLE ADJUSTMENTS LOOK LIKE FOR SOMEONE WITH DYSLEXIA?

The reasonableness of the steps that an employer is required to take in meeting its obligations under the Equality Act 2010 depend on factors such as: the size of and resources available to the employer; the cost involved in the adjustment; and whether the adjustment would sufficiently address the individual's disadvantage.

Support for an individual with dyslexia can take many forms, and what that looks like will vary depending on the employee's role and the severity of their disability. Practical adjustments may include the following:

- factoring in extra time for another colleague to proofread documents;
- providing extra time for complex tasks that involve extensive reading and/or writing;
- providing extra technological support (for example a Dictaphone, adjustments to the colour of PC screens and presentations, screen reading software or specialist spell checking software);
- adjusting the method of communication (for example more verbal / written instructions depending on the individual); and
- support with organisation and concentration, which may include providing a quieter place for the employee to work (either in the office or encouraging them to work from home if helpful), building planning time into the employee's day or assisting them with prioritising tasks.

Whatever adjustments are implemented, dialogue is important. Employers should follow up with the employee to make sure that any adjustments are successful or need to be re-evaluated. Extra training for surrounding colleagues should also be considered in order to de-stigmatise dyslexia, promote understanding and create a more open workplace.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- EAT holds that (some) foster carers are employees
- Can unguaranteed work constitute alternative employment in redundancy situations?
- COVID-19 and the UK labour market: is it time for an occupational change?
- UK trials self-isolation payments in highest risk areas
- Can a dismissal without any procedure ever be fair?

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New Acas guidance and case law provide clarity to employers on redundancy process

Redundancies are, unfortunately, big news at the moment. Given the impact of COVID-19 on the economy, in combination with the winding down of the Coronavirus Job Retention Scheme, many businesses are having to think about the best way to restructure their organisation in order to ensure survival.

It has recently been reported that, in June, 1,888 employers filed plans for 156,000 job cuts, a six-fold increase from June 2019. While in July, 1,784 firms made plans to cut nearly 150,000 jobs, an almost seven-fold increase on the same period last year. This information is based on those employers who are planning collective redundancies (i.e. 20 or more redundancies at a single "establishment") and so are legally required to notify the government of their plans. The reality is that far more businesses would have been planning redundancies then and more still will be making employees redundant in the coming months, and the true figure will be much larger. Acas has reported a marked increase in calls to its helpline on the subject, with calls concerning redundancy up by 160% over June and July when compared to the same period in 2019.

ACAS GUIDANCE

In timely fashion, Acas has issued updated guidance for employers who are considering making redundancies. The guidance helpfully adds clarity to changes regarding redundancy and notice pay for furloughed employees. As set out in the guidance, furloughed employees are entitled to redundancy pay based on their normal wages, not their furlough rate. Basic awards for unfair dismissal cases must also be based on full pay rather than furlough pay.

Acas stresses that redundancy should always be a last resort after having made attempts to save roles. Suggested measures to retain jobs include:

- implementing a hiring freeze
- offering voluntary redundancy or early retirement
- temporarily reducing working hours
- asking employees to voluntarily stop working for a short time
- retraining employees to do other jobs in the business
- letting go of temporary or contract workers, and
- limiting or stopping overtime.

Employers should also consider moving employees into suitable alternative roles. If another role is indeed "suitable" and it is not offered, Acas advises that this can be judged as unfair dismissal. Indeed, employers' failings around the process of managing suitable alternative roles is a common cause and contributor to tribunal claims, including in the recent case of Gwynedd Council v. Barratt & Other.

GWYNEDD COUNCIL V. BARRATT & OTHER

Employers generally use an objective scoring matrix when selecting employees for redundancy. However, in this case, instead of applying a scoring matrix to determine which employees would be made redundant, the council decided that new positions would be decided by an application and interview process. Both claimants applied for roles but were unsuccessful. The council did not consult with the unsuccessful employees and there was no right of appeal – the claimants were subsequently made redundant. The Employment Tribunal found that the

redundancy process was unfair, because of the use of an interview process, and the Employment Appeal Tribunal (EAT) has now endorsed that decision.

The EAT found there was a difference between a redundancy process where employees are considered for alternative roles using a "forward-looking" selection process, such as the competitive interview process used in this case, and a process of consultation and selection using fair and objective criteria. In this case, the claimants were applying for essentially the same jobs that they had been carrying out previously – as such, the process was more akin to a process to select employees for redundancy from a competitive pool. Because of this, requiring the employees to interview for their own jobs, with no consultation or appeal, was unreasonable and the dismissals were unfair.

This will no doubt be a significant finding for employers who are currently grappling with redundancies, and who are unsure how best to go about selecting for their new, rationalised workforce.

Conclusion

In light of the Gwynedd Council case, the key takeaways for employers are that they can use an interview process when considering redundant employees for alternative employment, where that alternative employment is for a genuinely new role. However, interviews are unlikely to be the right approach if the roles are essentially the same as those which the employees had previously been carrying out. In those cases, the employer should identify appropriate "pools" and then select employees for redundancy using fair and objective selection criteria.

However, it is important that employers show they attempted, or at the very least considered, alternative measures to prevent job losses in the first place. If redundancies are indeed unavoidable, employers should take advice and review the Acas guidance to ensure they are managing each stage of the redundancy process correctly. Otherwise, the increasing tide of redundancies will be met with a similar rise in tribunal claims.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

Using NDAs in a post #MeToo era
– by Tom Fancett, 24 Aug

Preparing for new disclosure changes in Scotland
– by Mark Hamilton, 8 Sept

If you have an idea of a topic you'd like us to cover in a future round-up or seminar, please provide your comments – here.

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