4 November 2021

James English and Claire Turner

Employment Law Update
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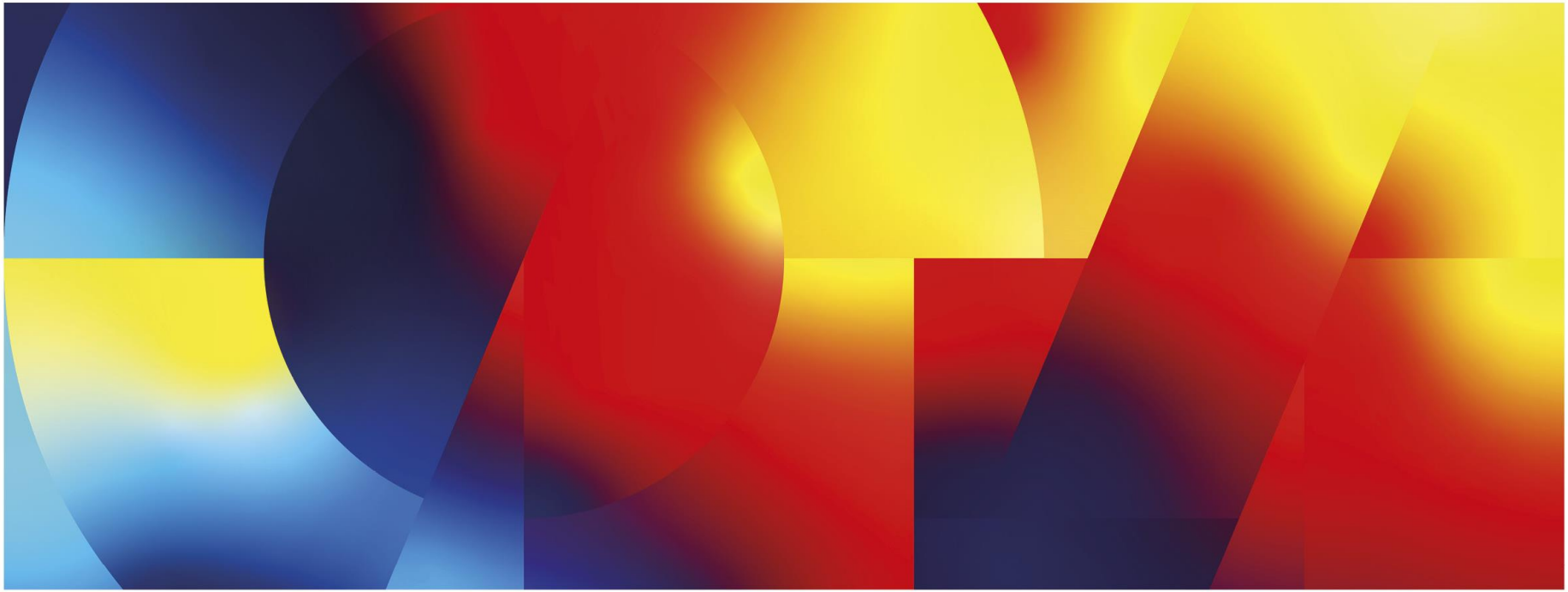

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James English, Associate
Claire Turner, Solicitor

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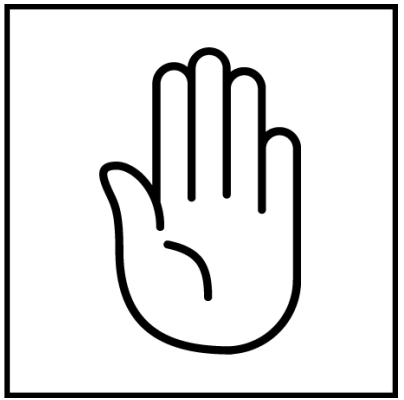
Housekeeping



Employment Law Update

- Employment case law update
- Long COVID
- Sexual harassment legislation

Royal Mail v Efobi (2021) (1)

- The Claimant applied (unsuccessfully) over 30 times for various IT positions with the Respondent over 4 years.
- He brought claims including direct race discrimination.

Employment Tribunal, Employment Appeal Tribunal and Court of Appeal

- The Employment Tribunal rejected the claims.
- The decision makers who rejected his application were not called, instead the two managers familiar with the recruitment process were called. The Tribunal did not draw adverse inferences from the failure of the Respondent to call them.
- The Court of Appeal (agreeing with the Tribunal) held that it was for the Claimant to establish an arguable case of discrimination, so that the burden of proof would shift.

Royal Mail v Efobi (2021) (2)

The Supreme Court

- The Supreme Court decided two issues:
  - The burden remains on the Claimant to prove a prima facie case. A Tribunal can consider all the evidence, including any from the Respondent, not just the Claimant.
  - The Tribunal should not draw adverse inferences at this stage from the failure to provide an explanation (that is the second stage). However, the Tribunal could draw an inference from the failure to call a relevant witness.
- The Supreme Court (also agreeing with the Tribunal) held that it was reasonable not to draw any adverse inferences in this case, so the Claimant's claim of direct discrimination failed.

IX v WABE & MH Muller v MJ (2021) (1)

- The first Respondent prohibited employees from displaying, in a manner visible to parents, children or third parties, any signs of political, philosophical or religious beliefs. This was due to adopting a position of neutrality.
- The second Respondent had instructed the second Claimant to refrain from wearing conspicuous, large sized political, religious or philosophical items.
- The two Claimants wore Islamic headscarves.
- Both Claimants brought claims in their domestic courts claiming that their treatment constituted direct and indirect religious and belief discrimination.
- The first Respondents submitted evidence that they had applied the same policy to an employee wearing a visible crucifix around their neck.
- The question was referred to the CJEU.

IX v WABE & MH Muller v MJ (2021) (2)

- A policy applied uniformly to all employees in a general and unconditional manner for all visible signs would not constitute direct discrimination if there is no difference in treatment based on religion or belief.
- In respect of a claim for indirect discrimination, the policy could be objectively justified.
- To be justified, the employer would need to demonstrate a “genuine need” for the policy, the rule must be appropriate for achieving a policy of neutrality and be properly applied and the rule must be limited to what is strictly necessary having regard to the scale and severity of the consequences the employer is looking to avoid.

XR v Dopravní (2021) (1)

- XR worked as a firefighter in Prague.
- Between 6:30am and 1:30pm, he could go to the canteen provided he remained on standby with 2 minutes notice.
- The rest breaks were unpaid. They were only calculated as working time if the breaks were interrupted.
- XR challenged this method of calculation arguing that all the breaks, including uninterrupted ones, should amount to working time.
- The CJEU was asked to determine whether the rest break was working time.

XR v Dopravní (2021) (2)

- A period should be considered working time where the restrictions on the worker objectively and significantly interfere with the worker's ability to manage their own time and devote time to their own interests.
- In distinguishing work and rest time, there are various factors than can be considered:
  - How long the breaks is;
  - Whether any work is undertaken;
  - How frequently the worker is interrupted;
  - Whether the interruptions are foreseeable;
  - What restrictions there are on where the worker can be;
  - What restrictions there are on what the worker can do.
- On the facts, a rest break in which a worker can be called back on 2 minutes' notice from a location about 200 metres from their workplace is working time.

Kong v Gulf International Bank (UK) Ltd (2021) (1)

- The Claimant was employed by the Respondent as Head of Financial Audit. She raised protected disclosures that an existing legal agreement did not provide sufficient protection to the Respondent.
- The Head of Legal disputed this, felt that the comments had impugned her integrity and asserted that they could no longer work with the Claimant. The head of HR and CEO began to take the view that the Claimant should be dismissed.
- The Head of Legal was not directly involved in the dismissal process.
- The Claimant brought a claim for automatic unfair dismissal due to making a protected disclosure, amongst other claims.

Employment Tribunal

- The Employment Tribunal rejected this claim as, following *Jhuti*, the motivation of the Head of Legal could not be imputed to the dismissing officers.

Kong v Gulf International Bank (UK) Ltd (2021) (2)

Employment Appeal Tribunal

- The Appeal was rejected. *Jhuti* will only operate in very limited circumstances:
  - the person whose motivation is attributed to employer must have tried to procure the employee's dismissal;
  - the dismissing manager must have been "peculiarly dependant" upon that person as the source of the underlying facts involved; and
  - that person's role or position must be of a particular kind that it is appropriate for their motivation to be attributed.

Martin v London Borough of Southwark (2021)

- A teacher raised various concerns about working time.
  - “I am looking at our working hours for teachers and seem unable to reconcile them to statutory guidance, and all my conservative calculations, clearly I may be missing something.”
  - “I am concerned we may be in breach of the second part of [*the terms and conditions*]. I have emailed the head about my concerns and the email trail is below…. it is likely that, over the past two years teaching staff of worked in excess of 212 hours over the statutory directed time.”
  - “I hope that this team will ensure that a budget of directed time’ or similar instrument is used going forward so that we are come in compliance with statutory guidance.”
  - “I am writing to you as a teacher in a local authority school, concerning the allocation of directed time for teaching staff in my school… [*and*] the accumulation of excess directed time over and above the statutory … periods.”
- The Employment Tribunal considered whether these were qualifying disclosures, and decided that…

Martin v London Borough of Southwark (2)

…none of them were.

- The Claimant appealed to the Employment Appeal Tribunal (EAT)
- The EAT reaffirmed the test for a ‘protected disclosure’, Williams v Michelle Brown AM (2019):
  - There must be a disclosure of information.
  - The worker must believe that the disclosure is in the public interest.
  - That belief must be reasonably held.
  - The worker must believe that the disclosure tends to show one of the relevant failures.
  - That belief must also be reasonably held.
- The case was remitted to a new tribunal to reconsider these issues.

Secure Care v Mott (2021)

- The Claimant was the logistics manager for a company that provided patient transport to NHS trusts.
- He raised 9 concerns in total and the Tribunal found that 3 were protected disclosures.
- He claimed that he was dismissed (following a redundancy process) because of these.
- The Employment Appeal Tribunal held that the Tribunal had made 2 errors:
  - The Tribunal had referred to the test for claims of detriment as well as dismissal, and had applied the wrong test.
  - The Tribunal should have considered the impact of the 3 protected disclosures, and if the dismissal was a consequence of these, and not the other 6 concerns (that were not protected disclosures).
- The case was remitted to the same or a new tribunal to reconsider these issues.

Long Covid

- Those who continue to experience the impact/symptoms of Covid-19 after they have recovered from the infection itself (known as long COVID or Post-COVID-19 syndrome)
- According to the NHS most people will make a full recovery within 12 weeks
- Potential to be considered a disability for the purposes of the Equality Act 2010
  - Physical or mental impairment, **and**
  - The impairment has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities
- Acas guidance published in April 2021 regarding managing Long COVID
  - https://www.acas.org.uk/long-covid
- Employers need to ensure they follow a fair procedure. It is recommended to follow usual sickness management procedures.
- Current data suggests those most at risk of contracting long COVID are older people, women and ethnic minorities

Moore v Phoenix Product Development (2021) (1)

- The Claimant was the founder and CEO of the Respondent company.
- He was replaced but remained a director and employee.
- There was a breakdown in the relationship between the Claimant and the other board members.
- The Claimant was dismissed without a right of appeal.
- The Claimant brought a claim for unfair dismissal, partly on the basis of the failure to provide an appeal.
- The Employment Tribunal rejected this as it held the dismissal had been because of the breakdown in the relationship and the conduct of the Claimant during the dismissal process would have rendered an appeal pointless.
- The Claimant appealed.

Moore v Phoenix Product Development (2021) (2)

- The EAT rejected the appeal.
- This was a rare case where a lack of internal appeal does not render the dismissal unfair. The Tribunal was entitled to find that the appeal would have served no purpose because:
  - The Claimant was a board level director;
  - The organisation was small with no higher level of management;
  - Retraining or different immediate managers would not be possible;
  - The Claimant had contributed to the irreparable breakdown in the relationship;
  - The Claimant was unrepentant about his conduct and showed no signs of change;
  - The remaining board members had all lost trust and confidence in the Claimant.
- This is not a statutory test and each decision is fact specific.

Gwynedd County Council v Barratt (2021) (1)

- The two Claimants were teachers at a school and were employed by the Respondent
- The School was closed. The Claimants contracts were terminated and they were told they would need to apply for a position at the new school.
- The Respondent told them that if they were unsuccessful they would be made redundant, unless they were redeployed.
- Both Claimants were made redundant after unsuccessful applications.

Employment Tribunal and Employment Appeal Tribunal

- The Tribunal accepted their claims of unfair dismissal as the redundancy exercise was conducted:
  - Without consultation;
  - In an inappropriately competitive fashion; and
  - Without an appeal.
- The EAT refused the Respondent's appeal. The Respondent appealed again.

Gwynedd County Council v Barratt (2021) (2)

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Court of Appeal

- It would be incorrect to find a procedurally fair process unfair merely because of the absence of an appeal.
- The Tribunal was not applying a general rule that absent an appeal, a dismissal is unfair.
- The Tribunal was correct to conclude the dismissal was substantively and procedurally unfair having considered the procedures adopted and the lack of consultation as well as the inability of the employees to raise a grievance about the process.
- The Tribunal had applied a test of overall fairness and whether the Respondent's decision was within the band of reasonable responses. This was correct.

Follows v Nationwide Building Society (2021) (1)

- The Claimant was employed as a Senior Lending Manager until being made redundant.
- She was employed on a homeworker contract as she was primary carer for her disabled mother. She attended the office 2/3 days' a week.
- The Respondent decided to cut the number of Senior Lending Mangers and require them to attend the office so that they could supervise junior staff.
- There were sufficient volunteers for redundancy. The Claimant did not volunteer and wanted her existing work arrangement to continue.
- The Respondent retained some of the volunteers and dismissed the Claimant.
- The Claimant brought a claim for associative indirect disability discrimination amongst other claims.
- Section 19, Equality Act 2010, requires a claimant to have the protected characteristic in question.

Follows v Nationwide Building Society (2021) (2)

- The Tribunal upheld the associative indirect discrimination claim;
- Despite the language in Section 19, the impact of the ECJ decision in *Chez* meant that it was sufficient for a Claimant to show that they suffered disadvantage alongside a disadvantaged group.
- It was self-evident that requiring attendance at the office would disadvantage someone with caring responsibilities for a disabled person.
- Alternatives were not discussed with the Claimant and the Claimant's proposals were not engaged with, meaning reasonable steps to avoid the disadvantage were not taken.
- There was no legitimate aim to justify the discrimination. The Tribunal was not persuaded that supervision could not be achieved remotely given the Claimant's previous history of successful supervision under her existing arrangement.

Sexual Harassment in the Workplace – Prospective Changes

- Government published consultation response on 21 July 2021. Its response recommends the following changes:
  - A positive duty on employers to prevent sexual harassment in the workplace (including a defence where “all reasonable steps” have been taken)
  - Explicit employee protection from third party harassment (including a defence where “all reasonable steps” have been taken)
- These changes will be introduced “as soon as parliamentary time allows”.
- Protection not extended to “pure volunteers”
- Government consideration of extending the time limit for Equality Act claims. The most likely change would be an increase to 6 months’.

Questions and answers

Thank you

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