



## What's new

### **Proof of disability is not required where the employee's condition had a 'material influence' over her behaviour**

The recent case of *Baldeh v Churches Housing Association* established that an employee could satisfy the test of disability where their condition had a material influence on their behaviour even though the extent of the employee's condition was not known to the employer.

Mrs Baldeh was dismissed at the end of her six months' probationary period following concerns about her performance and behaviour. Mrs Baldeh unsuccessfully appealed the decision. Mrs Baldeh was in fact disabled as she suffered from depression and therefore claimed disability discrimination.

The Employment Tribunal (ET) rejected her claim because the employer did not know and could not reasonably have been expected to know that she was disabled at the time of dismissal. There was no proof that her behaviour towards her colleagues arose as a consequence of her disability. Mrs Baldeh appealed to the Employment Appeal Tribunal (EAT).

The EAT held that actual or constructive knowledge that Mrs Baldeh was suffering from a mental health condition was sufficient. Mrs Baldeh had raised her condition at the appeal hearing and therefore the rejection of the appeal formed part of the unfavourable treatment. Further, it was sufficient that her condition had a 'material influence' on her behaviour and her dismissal arose in consequence of her condition.

### **One off act of discrimination is sufficient to claim a higher award for injury to feelings**

The EAT in *Base Childrenswear Ltd v Otshudi* held that a higher award for injury to feelings can be made even where a claim for only one of a series of alleged acts of discrimination is upheld.

In the case, Mrs Otshudi complained of six acts of racial harassment during her employment. However, the majority of these complaints were dismissed as they were brought out of time. Mrs Otshudi was successful only in relation to one claim of harassment and she sought an award of £16,000 (falling within the middle Vento band) in relation to this claim. The employer challenged the

award and claimed on the basis that the one-off incident could not amount to an award in the middle band. The ET agreed with the employer.

The EAT held that the ET's finding of unlawful discrimination in relation to an isolated event did not mean that an award for injury to feelings was limited to the lowest Vento band. The question for the Tribunal should be whether the effect of the discriminatory act on the claimant was serious enough to warrant an award in the middle band.

### **Religious expressions of faith or preaching?**

In the case of *Kuteh v Dartford and Gravesham NHS Trust*, the Court of Appeal held that the dismissal of a Christian nurse who was initiating unwanted religious discussions with patients was fair, especially where the management team had instructed her not to do so.

Mrs Kuteh was a Christian nurse employed by the Trust. In her role, she assessed patients who were due to undergo surgery and was required to ask them about their religion. However, Mrs Kuteh continuously engaged in religious discussion with patients which made them uncomfortable. Mrs Kuteh was reprimanded by her matron and she agreed that she would desist from discussing religion with patients. Following this agreement, three further incidents occurred, including complaints that Mrs Kuteh had offered her bible to a patient, led prayers and persuaded patients to sing psalms with her. As a result, Mrs Kuteh was suspended and later dismissed for gross misconduct. Subsequently, Mrs Kuteh brought a claim for unfair dismissal.

The ET held that Mrs Kuteh's behaviour fell into the category of inappropriately proselytising beliefs rather than being prevented from manifesting them. The investigation and disciplinary hearing carried out by the Trust was fair and reasonable and the decision to dismiss Mrs Kuteh was within the band of reasonable responses. Mrs Kuteh appealed to the EAT which upheld the ET's decision. Mrs Kuteh then appealed to the Court of Appeal.

The Court of Appeal upheld the ET's decision, highlighting that the Trust did not impose a blanket ban on religious speeches in the workplace. However, it considered Mrs Kuteh actions of initiating discussions about religion inappropriate. Mrs Kuteh had given assurances to the Trust to follow the lawful management instruction yet continued to initiate such discussions. Therefore the Trust's decision to dismiss her was within the band of reasonable responses and did not impose on her right to freedom of religion.

## **WHAT TO LOOK OUT FOR**

### **Mental health first aider: a necessary feature of all workplaces**

Those involved in the 'Where's Your Head At?' campaign are petitioning for the government to create a legal requirement for workplaces to have someone trained in mental health first aid. The campaign has over 200,000 signatures and is supported by over 50 organisations including WHSmith and Standard Chartered.

This campaign, alongside Mental Health Week (which occurred on the week beginning Monday 13 May) highlights a growing need for employees to be provided a safe space to discuss their mental health issues.

### **New guidance to improve health and safety for expectant mothers**

The Trades Union Congress (TUC), in conjunction with the Maternity Action, has published new

guidance on pregnancy, breastfeeding and health and safety, which highlights the need for employers to better cater for expectant employees and new mothers.

The guidance pushes for better enforcement of legal protections already in place for women in the workplace and seeks to equip health and safety representatives with the tools to assist pregnant women and new mothers. Further, the guidance covers the legal implications for employers and the different actions they can take to protect their expectant employees.

Following the TUC guidance, Maria Miller MP, the chair of the Women and Equalities Committee, introduced a Ten Minute Rule Bill on 20 May 2019 for further legislation to protect women and new mothers from redundancy. The Pregnancy and Maternity (Redundancy Protection) Bill 2019 seeks to prohibit making employees redundant during pregnancy, maternity leave and for six months after the end of maternity leave except in specified circumstances.

For more information about any of the topics covered in this update please contact Nicholas Hall by clicking [here](#).



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