Hewitsons' Employment
LEGAL UPDATE

January 2017
Vol.19 No.1

Disability Discrimination & Workplace Stress

In the recent case of *Herry v Dudley Metropolitan Council* the Employment Appeal Tribunal (EAT) considered two issues, namely (1) whether workplace stress was a disability in accordance with the Equality Act 2010 and (2) if the original Employment Tribunal's (ET) approach to costs was correct.

Mr Herry had been diagnosed with dyslexia as a student in 1996 but worked from 2008 onwards as a teacher of design and technology and a part-time youth worker without mentioning his condition to his employer. Two lengthy periods of sickness had been taken, one being attributed to a fractured ankle and stress and the second to stress alone. Mr Herry brought more than 90 allegations, spanning over 4 years, against the Council despite being advised that his claims had no real prospect of success and several costs warnings.

The ET dismissed all of Mr Herry's claims and ordered that he pay the Council's costs which were in excess of £100,000.

On appeal, the EAT confirmed that the ET had been correct in finding that Mr Herry did not have a disability for the purposes of the Equality Act 2010. The burden of proving a disability requires that a physical or mental impairment be substantial (more than minor or trivial), long-term (lasting at least 12 months) and have a substantial adverse effect on a person's ability to carry out their normal day-to-day activities. Mr Herry, who had long been engaged as a teacher with dyslexia, had not suffered a substantial adverse effect as a result of the condition.

Dealing with disability as a result of stress, the EAT found that there was a lack of supporting medical evidence and only references to stress at the time of the ET proceedings itself. The EAT pointed to case law which distinguished between a mental impairment, such as medically-recognised depression, and a negative reaction to life events (i.e. unhappiness about perceived unfair treatment), which are often labelled as stress by doctors and result in an individual being signed off from work. The EAT did not consider that Mr Herry's time off was indicative of a mental impairment and there was no evidence that his stress had any effect on his ability to carry out his day-to-day work activities.

With regards to costs, the EAT found that the ET had been entitled to award the Council with the whole of the amount claimed (in excess of £100,000) on the basis that Mr Herry had acted unreasonably in commencing and pursuing litigation. Nevertheless, the ET had failed to consider awarding a smaller proportion of costs on the basis of the improbability of Mr Herry being able to pay the costs in the future. Whilst acknowledging that the same award could potentially be made, the EAT referred the issue of costs back to the ET for reconsideration.

Unfair Dismissal & Expired Warnings

In the recent case of *Stratford v AutoTrail* the Employment Appeals Tribunal (EAT) confirmed that the Employment Tribunal (ET) had been correct to find a dismissal was fair where an employer had taken into account expired warnings in its decision.

Mr Stratford had a history of seventeen previous instances of misconduct during his thirteen years with AutoTrail. This included two disciplinary warnings, one for nine months for failing to make contact whilst off sick and a second of three months for using company machinery and time for personal purposes.

The most recent incident, which was the subject of disciplinary proceedings, involved Mr Stratford being caught using his mobile telephone on the shop floor which was strictly prohibited in accordance with Company rules.

At the disciplinary hearing, the disciplining officer confirmed that the incident was not a case of gross misconduct and would therefore ordinarily attract a final written warning. However, in light of Mr Stratford's previous misdemeanours, and that it was not felt his behaviour would change moving forwards, Mr Stratford was dismissed and paid in lieu of his 12 weeks' notice.

Following an unsuccessful internal appeal against his dismissal, Mr Stratford filed a claim for unfair dismissal. Rejecting his claim the ET held that, given Mr Stratford's disciplinary record and his attitude to discipline generally, AutoTrail was "entitled to decide enough was enough". Mr Stratford appealed to the EAT.

Dismissing the appeal, the EAT concluding that AutoTrail had been entitled to take into account Mr Stratford's previous record, which included expired warnings, as well as its prediction as to the future (i.e. the likelihood of the behaviour reoccurring) when making its decision.

What To Look Out For

Gender Pay Gap Reporting €“ New Acas Guidance

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (the Regulations) are expected to come into force on 6 April 2017.

The Regulations will require employers with 250 or more employees to publish, both on the employer's own website as well as on a government site, statutory calculations every year showing how large the pay gap is between their male and female employees.

Acas has produced new guidance entitled "Managing gender pay reporting in the private and voluntary sectors" to assist employers to understand:

- what the gender pay gap is and how workplaces contribute to it;
- how the gender pay gap is different to equal pay;
- whether the Regulations apply to their organisation; and
- how gender pay gap reporting should be carried out.

This guidance along with new fact sheets and a gender pay reporting notification template can be downloaded here.

For more information on the information shared in this update please contact Nicholas Hall on 01604 463375 or click here to email Nick.

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