Hewitsons Employment

LEGAL UPDATE

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In this issue...

Religion & Belief Discrimination: Can a belief in the sanctity of copyright be a protectable philosophical belief?

In *Gray v Mulberry Company (Design) Ltd* the Court of Appeal (CA) considered whether there had been any discrimination where an employee was dismissed for refusing to sign a copyright agreement on the basis that she held a philosophical belief she should own the rights to her work.

On commencement of her employment with Mulberry Ms Gray signed the contract of employment but refused to sign a copyright agreement which essentially meant that her employer, Mulberry, would own the rights to any work Ms Gray created whilst she was employed by them. Ms Gray argued that the intellectual property obligations could extend to work undertaken outside of her employment with Mulberry as a writer and filmmaker. Despite Mulberry revising the agreement to clarify that only work carried out on Mulberry's business would be covered, Ms Gray still declined to sign the copyright agreement as she considered its wording to be "general and open to interpretation". Ms Gray was dismissed as a result and filed claims for direct and indirect belief discrimination.

The Employment Tribunal (ET) dismissed Ms Gray's claims holding that Mulberry's actions were a proportionate means of safeguarding intellectual property and that Ms Gray's "belief" was not a philosophical belief capable of protection.

Dismissing Ms Gray's appeal, the Employment Appeal Tribunal (EAT) held that the ET had been correct in its assessment of Ms Gray's direct discrimination claim and further held that her claim for indirect discrimination would not succeed. The EAT held that Ms Gray was the only one who held the belief and so she could not show any group disadvantage. Ms Gray appealed to the CA.

The CA held that it was irrelevant whether or not the stated belief was a protected belief, because it had not put the employee to a disadvantage, there being no causal connection between the belief and either Ms Gray's refusal to sign the copyright agreement or Mulberry's decision to dismiss her. A debate or dispute about the wording or interpretation of an agreement cannot qualify as a philosophical belief. Further, not only was Ms Gray the only member of the group sharing her belief who suffered a disadvantage, but also requesting Ms Gray to sign the copyright agreement was a proportionate means of achieving a legitimate aim (i.e. protection of intellectual property rights). As such, Ms Gray's claim for indirect discrimination did not succeed.

Unlawful Deductions from Wages: Six-year limitation period

In *Bath Hill (Bournemouth) Management Company Ltd v Coletta* the CA held that, in a claim for a series of unlawful deductions from wages issued before 1 July 2015, there was no six-year "backstop" period limiting the period of the deductions and therefore the amount that could be claimed.

At an ET hearing in 2015 Mr Coletta had successfully claimed that his employer, Bath Hill (Bournemouth) Management Ltd (Bath Hill), had failed to pay him at national minimum wage rates. At the subsequent remedies hearing before the ET, Mr Coletta sought to recover payment for the sums that should have been paid, going back to the introduction of the National Minimum Wage Act, a period of some 15 years. Bath Hill contended that the correct interpretation of the law meant Mr Coletta could only recover sums going back six years. Mr Coletta appealed to the EAT.

Allowing the appeal, the EAT held that where a claim was brought under a statute that prescribed a period of limitation, section 39 Limitation Act 1980 provided that the limitations that would otherwise apply pursuant to that Act (including the six-year limitation under section 9 of the Limitation Act) would not do so.

Bath Hills appealed to the CA who dismissed the appeal. The outcome meant that Mr Coletta could recover underpayments for the whole of his 14 years of employment.

Leaked email from lawyers was covered by legal advice privilege

In *Curless v Shell International Ltd* the CA held that a leaked email from a lawyer referring to the possibility of dismissing a client's employee by reason of redundancy was covered by legal advice privilege.

The normal rule is that legal advice will be "off the record" and therefore not disclosable in litigation. An exception to this is if the legal advice is given to effect an "iniquity" (i.e. it has the purpose or effect of furthering a criminal or fraudulent aim), in which case it will be disclosable.

Mr Curless, who suffered from Type 2 diabetes and sleep apnoea, was employed by Shell until he was dismissed as redundant. Mr Curless did not believe that redundancy was the real reason for his dismissal and filed claims for disability discrimination, victimisation and unfair dismissal. Mr Curless relied on a copy of an email dated 29th April 2016, marked "Legally Privileged and Confidential", sent by A (a senior lawyer) to B (a lawyer assigned to Shell). Mr Curless was not named but the email referred to "the individual" and suggested that the redundancy Shell was carrying out was the "best opportunity to end his employment". Mr Curless argued that the email contained advice on how to cloak an act of unlawful victimisation by using the opportunity of the redundancy situation to dismiss him. This interpretation was influenced by a conversation Mr Curless had overheard between two professionally dressed women in a pub, one of whom said that she was dealing with a complaint of disability discrimination by a senior lawyer at Shell whose "days are numbered". Mr Curless surmised that these were lawyers acting for Shell and believed that they were referring to him.

The original ET held that Shell was entitled to claim legal advice privilege. On appeal, the EAT disagreed considering that the email of 29th April 2016 was an attempt to deceive Mr Curless and the courts by dressing up a discriminatory dismissal as a redundancy dismissal. The EAT therefore held that legal advice privilege did not apply to the 29th April email or the conversation he had overheard.

Overturning the EAT's decision, the CA held that the 29th April email was "the sort of advice which employment lawyers give 'day in, day out' in cases where an employer wishes to consider for redundancy an employee who (rightly or wrongly) is regarded by the employer as underperforming". Shell was seeking legal advice on whether, and if so how, Mr Curless might be either offered voluntary severance or dismissed on the grounds of redundancy in the course of the ongoing reorganisation. The lawyer was merely recording advice on how this could be done "with appropriate safeguards and in the right circumstances". Further, the CA was not prepared to allow the contents of the overheard pub conversation to be used to interpret the 29th April email. Neither the email nor the overheard conversation were iniquitous, so legal advice privilege remained and they could not be relied on by Mr Curless in court.

WHAT TO LOOK OUT FOR

New Acas guidance to provide support for menopausal workers

Acas has published new guidance to help employers and managers support menopausal staff. Effects can lead to staff feeling ill, losing confidence to do their job or feeling stressed anxious or depressed. The new guidance seeks to educate employers about the menopause as well as suggesting good practice for managing menopause at work. Tips include:

- creating and implementing a menopause policy;
- making changes where possible, for example altering working hours;
- providing awareness training for managers to deal with concerns in a sensitive way;
- implementing low cost environmental changes such as providing desk fans; and

- creating an open and trusted culture within teams.

For more information, you can find the Acas guidance here.

For more information on any of the items raised in this legal update please contact Nicholas Hall by clicking here.

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