EMPLOYMENT NEWS HEADLINES MAY-JUN 2019 ISSUE 21

DISABILITY RAISED AT DISMISSAL STAGE STILL DISCRIMINATORY – BALDEH - V -CHURCHES HOUSING ASSOCIATION OF DUDLEY AND DISTRICT LTD (EAT)

This is an important case for employers to consider when carrying out a capability or conduct dismissal which may have a disability component in order to minimise the risk of a disability discrimination claim under the Equality Act 2010 (the Act). Section 15 of the Act states "where an employer acts to the employee's detriment on the grounds of "*something arising out of a disability",* it will be discriminatory *unless* (a) either it is justified or (b) the employer was unaware of the disability.

The *Baldeh v Churches Housing Assoc.* case spotlights the narrow conditions under which lack of awareness can be used as a defence.

Background

Mrs Baldeh was a housing support worker who was still in her six-month probationary period at the end of which she was dismissed on the grounds of poor conduct. Primarily the issues the employer relied on was:

- Her curt tone and language in communications with clients and in her interactions with management and colleagues;
- A breach of professional conduct in relation to handling money;
- A breach of confidentiality and confidential information relating to clients;
- A failure to notify and consult with senior staff on instructions given to her.

Mrs Baldeh appealed the decision to dismiss her. As a part of her appeal she informed the employer that she suffered from depression which sometimes caused her to communicate in an unguarded way and contributed to short term memory loss. This was the first time Mrs Baldeh had eluded to a disability which the employer had not been aware of before. The decision to dismiss her was upheld following her appeal.

Mrs Baldeh brought a claim for disability discrimination in the Employment Tribunal. She was unsuccessful at first instance based on the second limb of section 15 of the Act as well as the fact that there was more than one reason for the decision to dismiss. She appealed. The Employment Appeal Tribunal has overturned the ET's decision and remitted the case to a fresh tribunal based on the following:

- It stated that the appeal process was an "integral part of the overall decision to dismiss", although the employer had not been aware of the potential disability previously, it was

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deemed to have *actual or constructive* knowledge at the appeal stage and this should have been considered further before the appeal was rejected;

- It was relevant that her disability had some influence on her conduct that resulted in the dismissal. It was not necessary for the employee to show that it was the sole or main reason for the decision to dismiss her for it to be potentially discrimination;
- The new ET will need to determine whether with actual or constructive knowledge of the disability, the employer was still justified under Section 15 of the Act in dismissing her.

The case demonstrates that late or even deemed knowledge could put the employer on the hook for discrimination claims. It is always prudent for employers to carry out the necessary and thorough medical investigations, consider early risk assessments based on unusual behaviour and seek expert opinion on reasonable adjustments that could go some way to alleviating the employee's behaviour or issues with performance. Ultimately, it will be for the courts to decide (a) whether the employee has a disability and is protected within the meaning of the Act and (b) whether the employer acted reasonably, on all the facts, before it was justified in terminating the contract.

ALI V CAPITA CUSTOMER MANAGEMENT LTD (COURT OF APPEAL) – UPDATE

Regular readers of Maxlaw Global employment news will recall the case of *Ali v Capita Customer Management Ltd* (see Issue 15). The case was appealed to the Court of Appeal by Mr Ali and was heard jointly in May this year with an equal pay and indirect discrimination case with similar comparator issues for the Court to consider in *Hextall v Chief Constable of Leicestershire Police*.

The Court has unanimously dismissed both appeals finding that:

- A pregnant woman on maternity leave is not the correct comparator for a male on shared parental leave (SPL). It reaffirmed the EAT's position that the correct comparator would be a woman on SPL;
- Likewise, in *Hextall* the Court confirmed that it would have dismissed an indirect discrimination claim for the same reason as Mr Hextall was not disadvantaged by a Provision Practice or Criterion (PCP) when compared with women in the same pool;
- In light of this there is no direct discrimination where employers have a policy of enhanced maternity pay for a woman on maternity leave but statutory shared parental leave pay where a man or woman was taking SPL.
- The reason for these findings, it confirmed, was the special treatment afforded to pregnant women or after childbirth under s. 13 of the Equality Act 2010.

This case importantly highlights the justification for special treatment of pregnant and new mothers for health and safety reasons until they are fully recovered from childbirth as well as mother-child bonding and such special treatment by employers cannot be considered in anyway directly or indirectly discriminatory against men. This finding will be a welcome relief for employers although that is not to say enhanced ShPP to encourage take up of SPL by new parents should not be considered where possible.

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TRANSFER OF UNDERTAKING (PROTECTION OF EMPLOYMENT) REGULATIONS (TUPE) AND AUTOMATIC UNFAIR DISMISSAL – HARE WINES LIMITED V KAUR (COURT OF APPEAL)

The case of *Hare Wines v Kaur* is an important reminder to employers to be clear about the reason for terminating an employee and the timing of that termination.

Mrs Kaur was a cashier working for a wine wholesaler, H&W Ltd. The business was acquired by Hare Wines Limited and all but Mrs Kaur's employment was transferred to Hare Wines under TUPE. Mrs Kaur's employment was terminated on the day of the transfer. She brought a claim for automatic unfair dismissal.

She argued that her termination was automatically unfair as the principal reason was due to the transfer. She claimed that Hare Wines did not want to take her on as she had for some time had a strained working relationship with a colleague who would, as a consequence of the transfer, have become her manager.

At first instance, Hare Wines claimed that Mrs Kaur had said she was unhappy to work for them and this was treated as an objection to the transfer under regulation 4 of TUPE. However, the Employment Tribunal found that Mrs Kaur had been given notice of termination and paid notice pay and rejected Hare Wine's argument as not credible. The ET accepted Mrs Kaur's reasoning and found her termination was transfer related under regulation 7 of TUPE and, therefore, automatically unfair. The EAT went onto uphold the ET's finding on the same grounds and now the Court of Appeal has also upheld this finding. Specifically, the Courts found:

- It was important to note that Mrs Kaur's employment was terminated on the day of the transfer;
- Furthermore, the strained relations with her colleague had been ongoing for some period of time yet a dismissal had not occurred earlier for this reason. The Court highlighted the fact that this was not a fair reason in law to terminate employment in any event; and
- The initial defence that Mrs Kaur had objected to the transfer was untrue and this finding by the ET could not be appealed.

The facts around the termination and the proximity to the transfer was enough to infer under TUPE that the principal reason for the termination was the transfer. In the absence of an economic, technical or organisation (ETO) defence, Mrs Kaur's termination was automatically unfair.

HMRC CONSULTS AND GOVERNMENT PUBLISHES DRAFT ON IR35 IN THE PRIVATE SECTOR

Readers may be aware that a second round of consultations ended in May 2019 on extending to the private sector, the IR35 practice already implemented in the public sector in 2017. The Government has now published its draft legislation. It is anticipated that, from 6 April 2020 the following changes are likely to be introduced for private companies:

- Certain employers, meaning medium and large sized companies, will be required to apply PAYE and NIC (including employer's NIC) directly to its contractor workforce (known as "off payroll workers") as an end user rather than the intermediary it contracts with. This will be the case whether that is a personal services company (PSC) or one intermediary in a chain of suppliers.

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- Employers will be required to determine if the contractor is captured by IR35 and whether they are subject to the tax deduction (excluding VAT) obligations on the fees paid. Generally, this test will be whether the contractor would be deemed to be an employee of the end user company if the intermediary or intermediaries were removed (HMRC already has an employment status checker tool on-line). If the answer is "yes", IR35 will apply and the obligation which previously rested with the intermediary will shift to the end user.

- Once the determination is made and if IR35 applies the employer will need to notify the intermediary and/or individual in writing on or before the first payment under the contract. Where there is a chain of intermediaries, HMRC intends to impose the obligation to provide the information all along the chain with the tax liability resting with the party which fails to communicate down the chain.

- It is envisaged that situations will arise where the contractor or intermediary disputes the applicability of IR35. A process has been put in place to consider such disagreements. Where the employer does not comply with the 'status disagreement process' they will be liable for the tax.

- The good news is that 'small' companies will be exempt from this determination requirement and potential tax obligations. The Government has looked to the Companies Act 2006 to define what that means for employers. Where two of the three requirements below apply, the employer will be exempt.

  - Annual turnover is no more than £10.2m;
  - There is not more than £5.1m on the balance sheet;
  - The number of employees does not exceed 50 employees in total.

Private limited companies that have off payroll workers in its business should now start to carry out the necessary due diligence and audits in order to determine its future needs and any liabilities that may result. This will include contract reviews, assessment of workforce structure and practices, budgeting and tax reviews.

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