EMPLOYMENT NEWS HEADLINES JAN-MAR 2023 ISSUE 39

IS IT POSSIBLE TO SUFFER A DETRIMENT WHEN NOT WORKING? - GLOVER V LACOSTE (UK) LIMITED (EAT)

In this very unusual finding the Employment Appeal Tribunal (EAT) has ruled that it is possible to suffer a detriment even though the detrimental requirement was not actually applied.

Ms Glover was a retail store manager working full time, five days a week on a store roster arrangement. In March 2020 she went on maternity leave around the same time that the world went into Covid-19 lockdown. The store was temporarily closed during this time as with most retail stores. While on maternity leave, Ms Glover submitted a flexible working request to her employer to reduce her work days from 5 days to 3 days a week during weekdays only. She did not have any possibility of acceptable childcare on weekends for various domestic and financial reasons. In March 2021, while on furlough due to the pandemic, her request was rejected by her employer which she appealed. On appeal she was not granted her initial request but was offered a 4 day a week arrangement to work fully flexibly including weekends. She was told this was a final decision with no further right of appeal.

Ms Glover again reiterated that this did not take account of the reason for her request or the request itself which was specifically that she could not work on a Saturday or a Sunday due to childcare difficulties and excessive financial loss if her partner cared for the child. She instructed solicitors to write to her employer explaining that if her request could not be accommodated she would have to consider resigning and claiming constructive dismissal. Following this correspondence, her employer reversed its decision and granted her request prior to her actual return to work from furlough. Notwithstanding this, Ms Glover brought a claim against her employer for indirect sex discrimination claiming that it had applied a provision, practice or criterion (PCP) i.e., the requirement to work fully flexibly including weekends, which was detrimental to her as a woman with childcare responsibility and that this was indirectly discriminatory.

At first instance the employment tribunal disagreed applying the findings of a previous case on slightly different facts, that as the detrimental requirement had been reversed *before* Ms Glover returned to work following furlough, she had not actually suffered any *detriment* which must be shown in an indirect discrimination claim. Ms Glover appealed to the EAT.

The EAT ruled that Ms Glover had suffered a detriment and remitted the case back to a tribunal for further consideration based on the following:

- While the earlier case which the employment tribunal considered was based on similar facts, the EAT found that it had been misinterpreted by the tribunal. In that case the finding was that the employee had not suffered a detriment as she was not at work to have suffered the detriment. However, in that case, the employee had resigned before any internal appeal process has been pursued;
- That was not the situation in this case, Ms Glover had internally appealed, the appeal had been rejected, she was told the appeal decision was final and it did not take account of the specific terms and reason for her request;
- Ms Glover had not resigned but had had to resort to instructing solicitors to indicate she may have no choice but to resign if the decision was not reconsidered;
- During the period following the appeal decision and correspondence by her solicitors, the EAT found she has suffered a detriment believing that the PCP the employer had applied was her only option causing her distress and being forced to take the action she subsequently took by instructing lawyers.

The PCP although subsequently reversed following the intervention of Ms Glover's lawyers was indirectly discriminatory and did cause Ms Glover to suffer a detriment. This case shows that it is possible to suffer a detriment for the purpose of the Equality Act 2010 without actually experiencing it in practice. Although highly fact specific, what this case does highlight for employers is that flexible working requests, especially maternity related requests, need to be considered very carefully with full consideration and contemplation of why the request is being made and the employee's specific situation. A later reversal of a decision does not mean an act of discrimination has not already occurred.

EFFECTIVE DATE OF TERMINATION AND 'WITHOUT PREJUDICE' DISCUSSIONS – MEAKER V CYXTERA TECHNOLOGY (UK) LIMITED (EAT)

As most employers will be aware, it is usually wise to separate out any discussion or correspondence which is intended to be "open" as opposed to "off the record" or legally "without prejudice". This case highlights the issues that arise when this demarcation is not clearly made and a dispute on legal validity arises.

Mr Meaker worked in a heavy manual role and injured his back two years prior to his eventual dismissal. During this period, he was assisted by Occupational Health and an application for Permanent Health Insurance cover was made which was turned down. In 2020 discussions between Mr Meaker and Human Resources took place regarding a possible settlement agreement. On 7 February 2020 Mr Meaker received a letter dated 5 February 2020 marked "without prejudice" setting out a reference to a mutual agreement to terminate his employment effective 7 February 2020. The terms of the settlement agreement were attached to the letter of 5 February 2020. His untaken holiday pay and payment in lieu of notice was made on 14 February 2020. Mr Meaker accepted the payments but rejected the terms of the settlement offer and brought an unfair dismissal claim.

The claim was rejected by the Employment Tribunal as it was out of time. Mr Meaker appealed claiming that it was not out of time:

- The letter terminating his employment was "without prejudice" therefore any reference to the effective termination date was not valid;

- The letter incorrectly stated that termination was by mutual agreement which was not true;
- He had not accepted the terms of the settlement agreement although he had accepted the termination payments made on 14 February 2020 which would make that the earliest valid effective termination date;
- The termination was made in breach of contract as the payments were not made until this date and he had not accepted the breach before that time.

The EAT upholding the ET's position found that Mr Meaker was out of time to bring his claim because:

- Whilst the letter was marked "without prejudice" the ET was entitled to separate out the parts which were clearly intended to be open correspondence i.e., effective termination date and payment terms from the parts that were "without prejudice";
- The summary termination date was 'clear and unambiguous" in its drafting that the employer understood the last day of employment to be 7 February 2020 even though holiday and notice payments were not made until 14 February 2020;
- There was no obvious or clear reason why the claim had not been or could not have been brought earlier within the 3-month time limit.

While it is not ideal that there were inaccuracies in (i) the parties understanding of the agreement, and (ii) that the termination notice and the settlement agreement terms had been lumped together by the employer leading to the dispute regarding what the valid date of termination in the first place, the EAT found that the drafting of the actual effective termination was sufficiently clear and separate in the letter for the claim to be out of time.

REVISITING RIGHT TO WORK CHECKS

The Government recently published revised guidance on the employers right to work checking procedures applicable from 26 January 2023. The purpose is to ensure that employers are fully aware of the processes applicable for British and Irish nationals, EU and EEA nationals and other non-European nationals. The guidance has been subject to many changes since Brexit and the Covid-19 pandemic situation that followed which widely disrupted the employment space globally.

An employers failure to follow the right procedures for each type of check could result in a civil penalty of £20,000 per employee who is employed that is not legally permitted to carry out the work *unless* the employer can demonstrate that it has established a statutory excuse against the liability of a civil penalty. A few highlights that employers need to be aware of:

- The right to work checks should be carried out *before* the employee commences work;
- The responsibility for document and right to work checks remains with the employer however the recruitment has occurred. Employers cannot pass this liability to a recruitment agency or other third parties including, except for British and Irish nationals, Identity Verification/Checking Services;
- Where the employer is a licenced Sponsor, it must be prepared for sponsor compliance visits by the Home Office including correct record keeping and management;
- For most types of biometric cards and visas the checking process is now online via the Home Office systems accessible on a specific employer's portal with a share code which the employee must provide for a valid statutory excuse;

- Where a right to work is time limited, it is the employers' duty to ensure that this is monitored and any arrangements for renewals etc., are made in good time. A failure to do this could render continued employment of the migrant worker illegal;
- In the case of an acquisition of employees with a visa or limited right to work via a transfer of undertakings (TUPE) transfer, under those regulations all rights, duties, obligations and liabilities automatically transfer to the new employer. On the one hand the checks carried out by the outgoing employer are deemed to be carried out by the incoming employer which is fine if they are all correct and up-to-date. However, if the outgoing employer has failed to perform its duties or carried them out incorrectly, the liability will also transfer to the incoming employer. It is advisable therefore for the new employer to carry out its own checks within 60 days of the transfer date for a valid statutory excuse.

For further details on the guidance, see link below:

https://www.gov.uk/government/publications/right-to-work-checks-employers-guide/

A SUMMARY OF NEW STATUTORY RATES EFFECTIVE FROM APRIL 2023

As employers will be aware with the arrival of April and the new tax year there are also changes to various statutory payment rates and compensation award caps for employment tribunal claims. Below are a few key ones to be aware of for the coming year.

	APRIL 2022 RATES	***NEW APRIL 2023 RATES***
Statutory Sick Pay (SSP)	£99.35 per week	£109.40 per week
Weeks' pay for basic award and redundancy pay calculations	£571	£643
Maternity/Paternity/Adoption/shared parental and parental bereavement leave pay	£156.66 per week	£172.48 per week
National Living Wage and Minimum Wage for workers age 23 and over	£9.50 per hour	£10.42 per hour
Basic ET award (cap)	£17,130	£19,290
Compensatory ET award (cap)	£93,878	£105,707

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