EMPLOYMENT NEWS HEADLINES APR-JUN 2023 ISSUE 40

EMPLOYMENT TRIBUNAL FAILED TO CONSIDER FULL DECISIONMAKING CONTEXT – ALCEDO ORANGE LIMTED V MRS FERRIDGE -GUNN (EAT)

The Employment Appeal Tribunal case of *Alcedo Orange Limited v Mrs Ferridge-Gunn* is an important reminder for employers to be mindful about record keeping during a performance improvement process, the chain of personnel involved and their individual motivations before a decision to dismiss is taken.

Background

Shortly after commencing employment and while still in her probationary period, Mrs Ferridge-Gunn met with her line manager, Ms C and the managing director, Mr B about issues relating to her work performance. About a week later Mrs Ferridge-Gunn notified Ms C that she was pregnant. A second performance meeting followed some days later where although some improvement in performance was noted, performance concerns remained. Mrs Ferridge-Gunn was dismissed from her post after returning from two days of sick leave (due to morning sickness) because, her employer argued, that she had failed to process some documents on time despite these being completed on her return from sick leave and that her employment was not right for the business. Mr B was the final decision maker in the termination decision but this was based on misleading information provided by Ms C, who had used unsympathetic language towards Mrs Ferridge-Gunn on her return from sick leave, making comments such as, “is it contagious” and “how much time off are you going to need for this” referring to her morning sickness.

The Employment Tribunal at first instance upheld Mrs Ferridge-Gunn’s claim that she had been discriminated against on the grounds of her pregnancy. Her employer appealed, the EAT found that the act of discrimination can only occur if the decision maker, either consciously or sub-consciously is motivated by the protected characteristic in the decision-making. A decision made based on incorrect or tainted information of another person who is motivated by discrimination does not make that act discriminatory in and of itself. In this case, the EAT stated that it was unclear whether the decision had been solely taken by Mr B, whether it was solely taken but influenced by others or whether the decision was made jointly with others. The EAT found that the ET at first instance had failed to carry out this analysis and remitted the case back to the ET for further consideration of this point.

CARER'S AND PREGNANCY PROTECTION BILLS APPROVED

Regular readers of Maxlaw Global Employment news will be aware that we discussed some proposed private members' bills relating to family friendly laws which were passing through Parliament during the latter half of last and the first part of this year (see Issue 38). The following bills have now received Royal Assent on 24 May 2023 and will in due course come into force.

- *The Protection from Redundancy (Pregnancy and Family Leave) Act 2023* – it is expected that this act enhancing maternity rights for pregnant and returning employees will come into force around 24 July 2023;
- *The Carer's Leave Act 2023* – provides for day one unpaid leave rights for employees who have care responsibilities for a dependent such as a parent, child, spouse or sibling. It is unlikely to come into force, however, before April 2024;
- *The Neonatal Care (Leave and Pay) Act 2023* – which provides for enhanced day one leave and after 26 weeks' continuous service, pay rights for parents of babies admitted to neonatal care for 7 continuous days or more up to the age of 28 days. The Act is not expected to come into force before April 2025.

We will update you with further details as these Acts transition into active law but employers may wish to consider reviewing current policies and how these may need to be revised or redrafted.

PROPOSED CHANGES TO NON-COMPETE CLAUSES IN EMPLOYMENT CONTRACTS

Another area we reported on in a previous issue of Maxlaw Global Employment news (Issue 30) was on the Government's consultation paper specifically relating to non-compete provisions in employment contracts. At the time, there was some discussion around the proposals to either ban them entirely or introduce some mandatory payment requirement for the duration of the restriction which is commonly seen in other European countries such as Germany. The consultation closed back in 2021 and it is only now that the Government has announced that it will consider introducing a restriction on the duration of non-compete clauses in contracts of employment for an employee or a worker.

The restriction would be to permit a non-compete clause but for no more than a maximum of 3 months. The introduction will require statutory changes and is subject to parliamentary time during the current Government term. As time is now getting short it is unclear if the Government will be able to make the necessary changes to law before the next election in time for it to get on the statute books. A few issues employers should be aware of in relation to this change should it become law:

- The 3-month restriction limit will only apply to non-competition restrictions. It will not therefore affect other types of restrictions commonly seen in the employment context such as non-solicitation or non-dealing provisions;
- The purpose of introducing this limit is to encourage competition and stimulate a sluggish economy, it will only therefore apply to employment contracts not other types of agreements used in a work context whether they are shareholder agreements, partnership agreements or settlement agreements;
- While the limit will be for 3 months the normal rules of enforceability will still apply in that the restriction should be for no longer than necessary to protect the employer's legitimate

business interests and is reasonable in the drafting. As the current duration of non-compete restrictions for very senior executives is anything up to 12 months, it is likely that a 3-month restriction for this level of employee will, for the most part, be reasonable.

- While 3 months may end up being the maximum amount of time post-termination that an employer may prevent a former employee competing, other usual tools to keep an employee who is a genuine threat to its business out of the market through use of longer notice periods or garden leave provisions will still be available albeit at a cost.

MANAGING MENSTRUATION AND MENOPAUSE IN THE WORKPLACE – A NEW STANDARD

The British Standards Institute (BSI), a national body which shares knowledge, fosters innovation and instils best practice in the UK has published a new BSI standard, BS 30416. This Standard is a workplace guide to assist employers in effectively managing and dealing with menstruation, peri-menopausal and menopausal issues suffered by women including non-binary and transexual employees that may suffer from the broad range of symptoms that can manifest during any of these normal and natural stages of life. These can be anything from chronic back pain, abdominal cramps, hot flashes and sweats to severe bleeding, depression, memory loss/brain fog and insomnia. All symptoms that can seriously impact an employee's ability to function normally in the workplace and can affect productivity.

Research has shown that as a result of the sometimes serious and debilitating impact that these symptoms can have on a person's day-to-day activity means many employees struggle in silence and often feel they have no choice but to leave the workforce entirely. The Standard is designed to help employers retain this valuable part of the workforce by encouraging healthy conversation about workplace struggles, removing the stigma and discomfort felt by employees surrounding these topics and introducing healthy work practices that can help employees better navigate these experiences. This includes:

- Introduce awareness and manager training on these topics;
- Appropriate use of non-stigmatising language and encourage open discussion about the challenges faced by employees to "normalise" what is a regular part of life for half the world population;
- Allowing flexible working arrangements which is more commonplace since the Covid 19 pandemic anyway;
- Providing suitable facilities, equipment (e.g., sanitary bins, desk fans, back rests etc.,) and support for any of these issues at work.

Full details of British Standard 30416 can be found here: https://www.bsigroup.com/en-GB/blog/healthcare-blog/bs-30416-menstrual-and-menopausal-health-in-the-workplace/

UPDATED ICO GUIDANCE ON DATA SUBJECT ACCESS REQUESTS IN EMPLOYMENT

The Information Commissioner's Office (ICO) recently published revised guidance in the form of Q&As to assist employers navigate employee data subject access requests (DSARs) under the Data Protection Act 2018 and the UK GDPR. ICO statistics showed a sharp rise in complaints made against employers for the failure to comply with DSARs in the correct way. The guidance is intended to further clarify and build on the guidance that already exists. It is common for employees to use DSARs in the

context of an ongoing grievance or disciplinary process but also where the employee may be contemplating litigation in situations such as a belief of unfair redundancy selection or an employer's refusal to a flexible working request are just two examples. These kinds of reasons will not be acceptable grounds for employers to refuse a DSAR. While the updated guidance is useful it is by no means complete but should assist the employer on the limitations of what it can and cannot do once a request has been made. A few things to be mindful of and that have been flagged in the new updated guidance.

- There is no formal process that needs to be followed by the employee in order to make a DSAR, but it should be clear to the employer that an information request is being made;
- While the employer does have certain grounds to refuse providing data such as the request being "manifestly unfounded" (i.e., the employee is leveraging the DSAR as a bargaining chip); or "excessive" in nature (i.e., designed to cause disruption for the employer) and it is not a genuine request; there are specific parameters around this. In most cases the employer will have a high threshold to meet before it can show the request falls into such categories;
- That said, there are grounds where data could be withheld such as disclosure of a third parties' personal data without consent could be unreasonable and will always be a balancing exercise for the employer or, disclosure of sensitive company data embedded with some personal data which could compromise or prejudice the company commercially or in some other way;
- While employers must act in most cases on a DSAR, it does have the right to clarify and request a narrowing of the scope of the request. The ICO makes clear that the employee is not entitled to receive every email or piece of data he or she has ever created or sent since being employed by the employer. The context must be one of personal data relating to the employee making the request.

Employers should consider reviewing policies about devices, social media and IT use in the work context which may ease the burden of carrying out searches and gathering or indeed redacting data once the request is made.

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