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Parklane Plowden Employment Newsletter: Spring - 2019

Welcome along to the latest instalment of our Employment Newsletter.

In this edition:

- ***Unfair Dismissal in the EAT - Recent Misconduct Decisions***

  Robert Dunn examines two recent EAT unfair dismissal cases on recurrent topics.

  Beattie v Condorrat War Memorial & Social Club pertains to warnings. Restating the principles arising from cases such as ***Wincanton Group v Stone***, the EAT confirms that ETs considering *totting-up* dismissals should ask whether there was a prima face ground for issuing the warning and whether the warning was given for an oblique motive or in bad faith. An employer who surmounts these (arguably low) hurdles is entitled to rely upon an applicable warning which is live at the time of dismissal.

  Hargreaves v Governing Body of Manchester Grammar School concerns evidence collated during an investigation but not placed before the dismissing officer/panel. Whilst also reminding employers that a higher standard may well be expected in cases involving allegations of criminal conduct (and/or cases with wider implications for an employee's career) following ***A v B*** etc, the EAT in this case upheld the ET's decision that the employer's decision not to place the evidence of three witnesses (all of whom denied seeing the employee do anything wrong) before the disciplinary hearing did not vitiate the decision to dismiss. What is required is that employers, as Manchester Grammar did, take an even-handed approach when determining what evidence to place before the decision maker(s).

- ***Associative discrimination and the expression of protected characteristics***

  An interesting international perspective from **Gareth Price** on Lady Hale's judgment in the much-publicised case of ***Lee v Ashers Baking Company Ltd*** and the thorny central issues of competing protecting characteristics, associative discrimination and freedom of expression.

  Readers may also wish to take a look at ***Gan Menachem Hendon Ltd v De Groen [2019] UKEAT/0059/18/OO*** in which the EAT applied the decision in ***Lee*** in relation to a Jewish teacher in an ultra-orthodox nursery who was dismissed after her boyfriend revealed at a barbeque attended by parents that they lived together. The EAT overturned the ET's decision that an employer acting because of its own religion or belief discriminated against its employees (albeit the findings of direct sex discrimination and harassment were not disturbed on appeal).

- ***Discrimination arising from disability: no causal connection between employee's mistaken belief and her disability***

  Our pupil, **Jade Ferguson**, looks at causation in section 15 claims. In ***Sheikholeslami v University of Edinburgh*** the EAT underscored that when applying the something 'arising in consequence of' test, a looser connection involving more than one link in a chain of consequences can be enough. In ***iForce Ltd v Wood***, however, an employee's mistaken belief that her disability (osteoarthritis) was exacerbated by working close to loading bay doors which she wrongly perceived meant operating in colder/more humid conditions did not meet the test: there must been be some connection between the "something" (the refusal to work at benches near the loading doors) and the disability (osteoarthritis).

Your continued support is much appreciated. I hope that you enjoy reading.

ANDREW WEBSTER

As ever, we welcome feedback and any topics requests for future Employment Newsletters.

Please feel free to tweet us @parklaneplowden or email us at events@parklaneplowden.co.uk.

Robert Dunn

Unfair Dismissal in the EAT - Recent Misconduct Decisions

Robert Dunn examines two recent EAT decisions, both unfair dismissal cases where conduct was the reason for dismissal. The first deals with warnings. The second deals with investigations, and the evidence available to a disciplinary panel.

***Beattie v Condorrat War Memorial & Social Club* - UKEATS/0019/17/JW**

C worked for R as a Bar Steward. In May 2015, C was alleged to have taken (or negligently lost) 24 bottles of vodka, and 2 bottles of brandy. C could not explain where they had gone and was given a final written warning. C unsuccessfully appealed this warning, perhaps as she ultimately accepted some responsibility. In late 2015, C was asked to sell tickets for a Club function. C refused, citing worries about being accused again, should any money disappear. R brought disciplinary proceedings, alleging a failure to obey a reasonable instruction. Relying upon the written warning, R then dismissed C.

In the ET, C tried to challenge the written warning (See ***Wincanton***, below). The ET found that the warning was valid. The ET then considered s.98(4) ERA 1996. C's dismissal was imposed after a failure to offer an independent appeal manager, and so R's procedure was flawed. The ET found the dismissal to be unfair but found that a 100% Polkey reduction was appropriate. Had an appeal been offered, C would have still been dismissed, the final written warning being 'live' and 'valid' at the time.

C appealed, submitting the warning should have been disregarded in considering Polkey.

Judge Wise, sitting in the EAT, heard the Appeal. The EAT began by setting out the relevant law. In ***Wincanton Group v Stone* UKEATS/0011/12/LA,** it was held that the key issues were whether there was a prima facie ground for issuing the warning, whether the warning was issued for an oblique motive, and whether it was given in bad faith. Moreover, it was generally not part of the EAT's general function to reopen the appropriateness of a final warning; ***Bandara v BBC* UK/EATS/0335/15/JOJ**.

Ultimately therefore, Judge Wise found that:

- There was no oblique motive or bad faith – ***Wincanton***.

- Importantly, there was a 'prima facie ground for the warning'. The extent of the investigation, although focused more on the missing stock than C's conduct or fault, was enough to show a 'prima facie ground', particularly given C's partial acceptance of fault. Moreover, R's disciplinary policy just about covered C's conduct.
- The written warning was valid and live at the point of dismissal. Therefore, despite the procedural failings on appeal, the warning could still be considered in determining a Polkey deduction. 100% was appropriate.

Key Lessons

- Employers should take similar care with warnings, as they would with dismissals. If a dubious warning is relied upon to justify a later dismissal, even if there is no bad faith or oblique motive, R may still be called upon to show a 'prima facie ground' for the warning.
- Employers should therefore ensure that a final written warning can be at least be adequately justified by the extent of investigation and the disciplinary policy.
- For Respondents, when the ET looks at a previous warning, the standard is seemingly not as high as ***Burchell****;* there need only be a 'prima facie ground'. Respondents should therefore rely on ***Wincanton*** and ***Beattie*****.** This can be a big help.
- For Respondents, Polkey should, of course, always be considered

Hargreaves v Governing Body of Manchester Grammar School **- UKEAT/0048/18/DA**

Mr Hargreaves was an Art and Design Teacher at R's school and had been for 10 years. He was alleged to have pushed a particularly trying pupil against a wall and put his hand against his neck. C was subjected to an investigation, put before a disciplinary panel, and dismissed.

However, there was a twist. The investigating officer spoke to 3 witnesses, who all denied seeing C do anything wrong. This evidence was not placed before the disciplinary panel. C therefore alleged unfair dismissal, submitting this made the dismissal unfair. The ET determined that the dismissal was fair. C appealed to the EAT.

Judge Eady QC dismissed the appeal. In outline:

- The ET had properly focused upon s.98(4) ERA 1996, and applied ***Burchell***.
- The EAT noted the decision of ***A v B***, in which the EAT called for an 'even-handed approach to an investigation with serious consequences for C', with no less focus on exculpatory evidence, than inculpatory evidence.
- However, the ET had considered the extent of investigation required, particularly given the impact of the allegations on C's career. A higher standard of investigation may well be expected (***A v B***).
- R had to take a proportionate view of the evidence, which was relevant, and should be put before the disciplinary panel. In this matter, given the location of the alleged incident, there was no guarantee that nothing had happened, simply because the witnesses had seen nothing. On the facts, this was a reasonable consideration for R.
- At the time, C had not asked for any of the witnesses to be called to the disciplinary hearing, or to be investigated further. This went to C's view of the reasonableness of the procedure at the time.

- Correctly, the ET did not decide that the evidence would have made no difference, but rather that it was not reasonably relevant on its face.
- This was not a case in which proper lines of enquiry had not been pursued, or where R had failed to turn its mind to the relevance of the evidence.

Key Lessons

- Employers should be alive to the higher standards of investigation required in cases of 'serious allegations of criminal behaviour' as compared to 'standard' ***Burchell*** cases.
- Following a reasonable investigation, employers should consider what evidence should reasonably be put before a disciplinary panel. Relevant evident should be placed, not necessarily all evidence, considering the 'even-handed' approach required by ***A v B***.
- For Respondents, ***Hargreaves,*** whilst a crucial reminder as to the standard of investigation and disclosure required, is also a reminder that a criminal-esque trial is not needed. This should be some relief. R should need only conduct a reasonable and proportionate enquiry into what information is relevant.
- Tactically, if the evidence would have made no difference to the disciplinary panel's findings, it being seemingly irrelevant on its face, R could perhaps have simply chosen to adduce it. Speculating, whilst C did have other qualms, this could maybe have been enough to prevent C bringing an unfair dismissal claim at all, saving R significant costs.

ROBERT DUNN

Gareth Price

Associative discrimination and the expression of protected characteristics

Following on from Tariq Sadiq's talk regarding religion in the workplace, held in conjunction with the Industrial Law Society, Gareth Price considers the approach other jurisdictions have taken on competing equality rights in the marketplace.

Introduction

The facts of *Lee (Respondent) v Ashers Baking Company Ltd* [2018] UKSC 49 ("*Lee*"), are well known. In short, Ashers Baking Company refused to provide their baking services to Mr Lee when he requested that they ice a cake, depicting the words "Support Gay Marriage".

The courts in Northern Ireland found this constituted direct discrimination. On appeal to the Supreme Court, Lady Hale (with whom the other justices agreed) held that the bakery had not discriminated on grounds of sexual orientation.

Applicable Law

The principal law applicable to the claim that Mr Lee had been discriminated against on the grounds of his sexual orientation was:

> *"a person (A) discriminates against another person (B) if (a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons"*

This prohibition extended to provision of services.

Message, not personal characteristic

Lady Hale accepted the submission that the bakery's reason for not providing the service was the message, not the personal characteristics of Mr. Lee. The message itself was not 'indissociable' from the personal characteristic. As her Ladyship stated:

> *"People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation."*

Consequently, the bakery would have refused to supply this service to whomever asked for it, irrespective of that person's sexual orientation.

Importantly, it was further held that there was no evidence of 'associative' discrimination – i.e. that the bakery's reason was not Mr. Lee's sexual orientation, but rather the sexual orientation of other people more generally.

In a detailed part of her judgment, Lady Hale carefully considered the arguments on both sides. Noting *Lee* was a case of 'associative discrimination or nothing', her Ladyship went on to state that "[i]t would be unwise in the context of this particular case to attempt to define the closeness of the association which justifies such a finding."

US Postscript

Lady Hale ended her judgment by referring to a US Supreme Court case in which a Christian Colorado baker refused to create a wedding cake for a gay couple because of his opposition to same sex marriage. The relevance of that decision was the similar issue of distinguishing between refusing a service because of the message the service would help to support and refusing the service because of the personal characteristics of the person requesting the service.

Canadian jurisprudence

In ***Owens v Post Media Network Inc***, the Saskatchewan Supreme Court (equivalent to the English High Court) found that a newspaper's refusal to publish an advertisement advocating against homosexuality during Gay Pride week was not discriminatory.

It was accepted that both Mr Owen's rights to freedom of religion and the newspaper's right to freedom of expression were engaged.

However, the Saskatchewan court found that:

> *"…the service which is offered to the public here is to have one's advertisement considered for publication and screened not based on the personal characteristics or beliefs of the proponent but appropriately and objectively evaluated on the basis of the content of the advertisement…"*

Integral to the decision was the civic role the press played:

> *"Freedom of expression and freedom of the press are both intimately connected to each other. Both are essential in our society…. while Mr Owens has the right to hold the beliefs he does, including the right to engage others so as to have them come to share those beliefs, he does not have the right to require the LP to communicate those notwithstanding their difference of perspective."*

In ***Brockie v Brillinger (No. 2),*** the Ontario Supreme Court considered a printing company's refusal to print marketing material for an organisation (called Archives) that promoted homosexual rights and interests. The owner of the printing company was a Christian who held a sincere religious belief that homosexual conduct is sinful and that he should not promote or assist activity which promoted that activity.

The applicable law in that case was:

> *"Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of... sexual orientation".*

The court found that the decision to refuse to provide the service did constitute discrimination by association. As the Court noted:

> *"Mr Brillinger was refused the services not because of his particular orientation but because of his association with Archives and the gays and lesbians as a group whom Archives represents and who are its members…. Individuals who are discriminated against because of their human characteristics should not be discouraged from acting in concert by association with others suffering from discrimination to achieve the human worth and dignity to which they are individually entitled under the law."*

Instrumental to the Court's decision was the context of the clash – the provision of a commercial service:

> *"The Appellants are engaged in the commercial marketplace by offering their printing services in exchange for payment. The Code's prohibition of discrimination on specified grounds is merely one of the many federal, provincial and municipal laws restraining their conduct in carrying on business with the public and employing people in that activity…*

> *The further the activity is from the core elements of the freedom, the more likely the activity is to impact on others and the less deserving the activity is of protection. Service of the public in a commercial service must be considered at the periphery of activities protected by freedom of religion."*

Interestingly, given the facts of ***Lee***, the court in ***Brockie*** noted that:

> *"If any particular printing project ordered by Mr Brillinger (or any gay or lesbian person, or organization/entity comprising gay or lesbian persons) contained material that conveyed a message proselytizing and promoting the gay and lesbian lifestyle or ridiculed his religious beliefs, such material might reasonably be held to be in direct conflict with the core elements of Mr Brockie's religious beliefs."*

It did not state if such facts would have in fact given rise to a different decision.

Comment

Lee is undoubtedly a very difficult case. It causes our society to face the inherent conflict in equality law – that in an effort to avoid discriminating against one group or person, another may be so affected.

The request for a cake to be iced with a message that promoted both a change in the law and an act that was contrary to one's religious beliefs could, indeed, be made by any person, irrespective of their own personal characteristics. That is the essential reasoning behind Lady Hale's judgment. That is not wrong, provided the law is to be interpreted so as to limit the scope of the law to the *fact* of the personal characteristic, rather than its expression. Should the law should be interpreted that way – or should a broader interpretation be given?

Although not identical, the law under the Equality Act 2010 and the Regulations applicable in ***Lee*** prevent discrimination on grounds of/because of a protected characteristic. It is not controversial that the protected characteristic need not be that of the person treated less favourably. Discrimination by association with the characteristic of another satisfies the test. Further, (and, again, not applicable in ***Lee***) the Equality Act 2010 has as part of its preamble the need to have regard to the 'desirability of reducing socio-economic inequalities'.

The rights of minority groups for equal treatment, equality of opportunity and full participation in social and economic activity requires protection from the legislation in more than only a narrow sense. It requires the legislation to be given a liberal and purposive interpretation, protecting the expression of a characteristic, not merely the holding of it.

Deciding that any person could have requested the message, irrespective of their personal characteristics, arguably emasculates the right and fails to give sufficient weight to the right not to be discriminated by association. If a heterosexual person requested the message be iced on the cake, they would be doing so in order to lend support to those who do have a protected personal characteristic and to lend support to the expression of that protected personal characteristic. Could it not be said they were associating with, or should be considered as being associated with, those who hold the protected characteristic? Lady Hale did not opine conclusively on this, despite giving careful consideration to the ambit of associative discrimination.

Further, the above approach need not weight the balance unduly against those who hold competing rights, provided the approaches of the Saskatchewan and Ontario Supreme Courts were also adopted.

Those decisions identify that where rights are competing, two important considerations must be borne in mind.

First, what is the context for the clash? Where it is pure commerce, into which parties have chosen to engage, is the limiting or promotion of either right toward the 'periphery' of it? In ***Brockie***, printing the literature was held to be so. If the service is integral to the competing right (such as with the press, and freedom of expression, in ***Owens***), the balance may be struck differently.

Should people be required to suspend certain rights at the door of the marketplace? Possibly.

Recall that in ***Eweida***, the ECHR the stated that:

> *"On one side of the scales was Ms Eweida's desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image."*

Although concerning an employee's rights rather than the provision of a commercial service, the theme of identifying whose rights prevail when in the course of delivering a commercial service can be discerned.

Second, does the promotion of one right over another help to reduce or entrench socio-economic inequality? It could be that it results in a neutral impact (possibly with both competing rights being affected depending on which defers to the other), but it is an important aspect to consider in light of the legislation's aims.

The Supreme Court is both familiar with, and often shows an appetite for, considering jurisprudence of other countries. It did so expressly in ***Lee***. That is to be encouraged as the difficult and complex issues such as conflicts between religion and sexual orientation are not confined to these shores. There is wisdom to be had by learning from – and with – other jurisdictions.

GARETH PRICE

Jade Ferguson

Discrimination arising from disability: no causal connection between employee's mistaken belief and her disability.

Jade Ferguson considers the EAT's decision in *iForce Ltd v Wood UKEAT/0167/18* where it was found that a Claimant cannot establish unfavourable treatment under Section 15 of the Equality Act 2010 in consequence of a mistaken belief.

The Facts

The Claimant was employed as a packer by the Respondent in its warehouse. She suffered from osteoarthritis and was a disabled person for the purposes of the Equality Act 2010. The Claimant complained that her symptoms worsened in cold and damp weather.

The Claimant worked at a fixed workstation however due to a change in work practice, she and other warehouse workers were asked to move between benches, some of which were near the loading doors. The Claimant refused because she believed this would require her to work in colder, damper conditions and thus exacerbate the symptoms of her osteoarthritis.

The Respondent carried out an investigation which revealed the Claimant's contention to be an erroneous belief. The temperature and humidity levels throughout the warehouse were not materially different, including the areas near the loading doors. The Respondent considered the Claimant's refusal to move between benches unreasonable and issued her with a written warning.

The Claimant brought ET proceedings, asserting that the written warning amounted to disability discrimination contrary to Section 15 of the Equality Act 2010. The Tribunal found that, although the Claimant's belief in the temperature and humidity differences in the warehouse was mistaken, her

refusal to accept the Respondent's instruction was because she believed compliance would adversely impact on her disability. The Tribunal therefore found that the essential components of Section 15 were established. The Respondent appealed.

The Relevant Legal Principles

Section 15 of the Equality Act 2010 provides as follows:

> *"15. Discrimination arising from disability*
>
> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

On causation, the approach to Section 15 is now well established. In short, the provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously the reason for any unfavourable treatment found was. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.

As recently confirmed in the case of ***Sheikholeslami v The University of Edinburgh*** *UKEATS/0014/17/JW*, the critical question in satisfying stage (ii) is whether, on the objective facts, the "something" arose in consequence of (rather than being caused by) the disability. This is a looser connection that might involve more than one link in the chain of consequences.

Judgment

The EAT allowed the appeal.

The EAT acknowledged that a broad approach applies when establishing whether there exists a causal connection between the "something" and the underlying disability for the purposes of Section 15. As in ***Sheikholeslami***, the connection may involve several links as opposed to an immediate nexus.

Nevertheless, there had to be some connection between the "something" (the refusal to work at benches near the loading doors) and the disability (osteoarthritis). That connection had not been established.

At first instance, the Tribunal had not found that the Respondent was asking the Claimant to work in colder and damper conditions that might impact upon her disability. Instead, it had found that the Claimant was mistaken in her belief that this was the case. Critically, the Tribunal had failed to explain how it had then concluded that this mistaken belief arose in consequence of the Claimant's disability.

The EAT found that a Tribunal might find that an employee's judgement was impaired in consequence of a disability (e.g. due to stress or anxiety), however that was not how the Claimant had pleaded her case. The EAT found that there was no basis for finding a causal connection between the Claimant's disability and the mistaken belief that had led her to refuse to accept the Respondent's instruction. In the circumstances, the Section 15 claim was not established and the EAT set aside the Tribunal's decision.

Comment

Although a broad approach is applied when establishing whether there is a causal connection between the "something" and the underlying disability for the purposes of Section 15, there still has to be connection.

JADE FERGUSON

Pupil Barrister