New Case Law Update for Employment Committee Meeting 07 October 2016

Kratzer v R + V Allgemeine Versicherung AG

In an unusual case, the ECJ held that a person is not protected by discrimination law if they are attempting to use it for abusive or fraudulent ends.

Mr Kratzer was a job applicant who, as it turned out, appeared to have only applied for the job in order to gain job applicant status and, therefore, eligibility to bring a claim for compensation.

After being turned down, he demanded €14,000 for age discrimination. The employer invited Mr Kratzer to an interview, saying that the rejection had been wrongly triggered by its automated system. Mr Kratzer didn't take up the offer, instead pursuing his claim and adding a sex discrimination element.

The question referred to the European Court of Justice (ECJ) by the German court was whether a person in that position is protected by discrimination legislation and, if so, is it an abuse of rights?

The ECJ held that, no, where a person makes a job application purely to entitle them to claim discrimination, they are not protected by discrimination law and they would not be entitled to compensation. That's because:

1. the Equal Treatment Directive protects people who are 'seeking employment';
2. someone in that position would not be a 'victim' of discrimination, nor could they be said to have been injured, or to have sustained damage or loss;
3. people must not use EU law for abusive or fraudulent ends.

Dronsfield v University of Reading

Legal and HR advice is routinely sought in disciplinary situations, and rightly so. But this case shows that employers and their advisors must tread carefully in supporting the investigating officer, whose decision and reasoning must stand up to scrutiny.

Doctor Dronsfield was dismissed by the University for failing to disclose his sexual relationship with a student. His unfair dismissal case brought into question the involvement of HR and legal teams in the disciplinary process. In particular, what was the effect of the investigation report having been altered after matters were discussed with them?

A case called *Ramphal v Department for Transport* had considered a similar point and emphasised that, ultimately, it's for the disciplining officer to make their own decision. The Employment Appeal Tribunal (EAT) echoed that in this case. The final version of the investigation report contained significant amendments – notably, opinions favourable to Dr Dronsfield were removed following discussions with HR and in-house legal teams. Although there was no reason to doubt that that final version represented the disciplining officer's genuine conclusions after receiving honest and unbiased advice, the simple removal of those opinions was problematic.

The tribunal ought to have asked whether or not the report included all conclusions reached as a result of the investigation and, if not, why not. It is now for a new tribunal to decide the fairness or otherwise of the dismissal.

The EAT made some important observations:

1. As set out in the Ramphal case, HR advice should only be about the law, procedure and process. It shouldn't stray into questions of culpability or of appropriate sanctions.
2. It would have been good practice for the person with whom Dr Dronsfield had had the sexual relationship to be contacted as part of the investigation and asked if they wished to contribute to it.

Bougnaoui v Micropole SA

The dismissal of a Muslim woman who refused to remove her headscarf following a customer complaint about her wearing it constituted direct discrimination according to the latest Advocate General opinion on the headscarf issue.

In *Achbita v G4S Secure Solutions NV* the Advocate General's opinion was that it was not direct discrimination for an employer to ban a Muslim employee from wearing a headscarf at work if that ban was not based on stereotypes or prejudice against a particular religion, or religions, or against religious beliefs in general. Any indirect discrimination may be justified by the legitimate need to enforce religious and ideological neutrality.

This month, there's a new case and a new Advocate General opinion that says something different. The French case of *Bougnaoui v Micropole SA* involved a Muslim woman who refused to remove her headscarf, following a customer complaint about her wearing it. She was dismissed.

She lost her claim for religious discrimination, but her appeal has led her to the European Court of Justice (ECJ). So far, we have the Advocate General's opinion (not a binding judgment) that there was direct discrimination. Ms Bougnaoui was dismissed because she had manifested her belief by refusing to remove her headscarf; a colleague who had not chosen to manifest their religion would not have been dismissed. It was less favourable treatment on religious grounds. And that direct discrimination could not be excused as a genuine occupational requirement – the headscarf didn't hinder her ability to do her job. Nor could financial loss justify the discrimination.

What about indirect discrimination? The Advocate General thought it unlikely that the employer's ban would be proportionate.

Royal Mail Group v Jhuti

The EAT held that it is automatically unfair to dismiss an employee for making a protected disclosure, regardless of the dismissing officers ignorance of the facts, if the decision to dismiss was influenced by an individual who knew the true situation.

It is automatically unfair to dismiss an employee for making a protected disclosure (known as a 'whistleblowing' dismissal). This case looked at the knowledge element of that. In particular, what if the person who makes the decision to dismiss doesn't know all the facts about the disclosure or about the bigger picture?

Ms Jhuti had been working for Royal Mail for a year when she was dismissed. In the lead-up to that, she had suspected that a colleague had breached rules. But when she had given details of

the suspected breach to her team leader, he had advised her to retract the allegation. She did that, fearing that she would otherwise lose her job.

From that point on, Ms Jhuti came under increased pressure at work. Unachievable goals were set, for example. She complained of harassment and bullying and went on sick leave.

Another manager took control of her case, but not her grievance. That manager – the dismissing officer – wasn't given all the information about what had gone on; in particular, she wasn't shown any of the emails relating to the disclosures Ms Jhuti had made. The manager accepted the team leader's explanation that Ms Jhuti had made an allegation of misconduct but had retracted it because she had misunderstood the situation.

The tribunal held that, although Ms Jhuti had made protected disclosures and had suffered detriments, she had not been automatically unfairly dismissed. The dismissing officer was not motivated by the protected disclosures; they weren't the reason for the dismissal. Ms Jhuti was genuinely believed to be a poor performer.

That was overturned on appeal. The Employment Appeal Tribunal held that the team leader's motivation was relevant. It was significant, for example, that he was in a managerial position responsible for Ms Jhuti. He had realised that the protected disclosures made to him were serious and significant, and had lied to the dismissing officer about them. It was also relevant that he had set up a 'paper trail which set her to fail'.

This should sound warning bells for employers. It won't be enough to plead a dismissing officer's ignorance of the facts. If their decision was manipulated by, as here, a manager who knew the true situation, employer liability will surely follow.

General Employment News/updates

1. Gender Pay gap

The Institute for Fiscal Studies (IFS) has found that women's pay is, on average, 18% less than men's – and it gets worse after childbirth.

Fast-forward 12 years from the date a woman has her first child and her hourly wages will be (on average) a third less than a man's. The gradual widening of the pay gap post-children may be related to the accumulation of labour market experience, the report says. By the time the first child is 20, women have been in paid work for, on average, four fewer years than men and they have spent nine years less than men in paid work of 20 hours per week or more.

When women return to work after taking time out, they get on average 2% lower hourly wages for each year they have been away. It's a different picture for the lowest-educated women, however. Their wage progression is generally less and so they don't suffer a similar percentage drop, and they have fewer skills to depreciate. In fact, it is only among the lowest-educated that the gender wage gap has continued to fall over the last 20 years. For graduates and women with A-levels, the gap has not shrunk.

We'll soon see the introduction of gender pay gap reporting. It's an obligation on certain large employers to publish annual information about the amount they pay their employees, from April 2017

2. Sexual Harassment

A report by the TUC, in collaboration with the Everyday Sexism project, has revealed that more than half of women surveyed said that they had experienced sexual harassment at work.

The study showed that in nearly one in five cases, the harassment was said to have been carried out by the woman's line manager or someone with direct authority over them. Worryingly for businesses, of those who said they had been sexually harassed, four out of five didn't tell their employer. Reasons for this included:

- they thought it would impact negatively on their relationships at work or on their career prospects;
- they were too embarrassed to talk about it;
- they felt they wouldn't be believed or taken seriously.

The report highlights the various forms that this sort of harassment may take, from sexual jokes, to comments about body or clothes, to unwanted touching and sexual advances. And it can extend, for example, to overhearing comments of a sexual nature being made about colleagues.

For employers, the message is to be alert to the signs of harassment. Prevention being better than cure, there is no substitute for educating staff and having a robust policy on a zero-tolerance approach to harassment in all its forms.