Employment Case Law Update June 2018

Employment Committee

Forbes v LHR Airport Ltd UKEAT/0174/18 – Employment Appeal Tribunal (28 February 2019)

Offensive image posted on Facebook by work colleague was not done in the course of employment

The EAT has held that an employer was not vicariously liable for harassment under the Equality Act 2010 (EqA 2010) when an employee posted a racially offensive image on Facebook and shared it with a colleague. The employee was not at work at the time and did not mention any colleagues or the employer in the post. The EAT held that, on the facts of this case, an employment tribunal had been right to conclude that the posting of the image was not done "in the course of employment", which is an essential element of employer liability under section 109 of the EqA 2010.

The EAT noted that it was not possible or even desirable to lay down any hard and fast guidance as to when such conduct should incur employer liability under the EqA 2010, especially as the extent to which social media platforms are used continues to increase. Just as is the case with the physical work environment, whether something is done in the course of employment when done in the virtual landscape will be a question of fact for the tribunal in each case, having regard to all the circumstances. In this case, a lay person would not consider that the sharing of an image on a private non-work-related Facebook page, with a list of friends that largely did not include work colleagues, was an act done in the course of employment.

A Ltd v Z UKEAT/0273/18 – Employment Appeal Tribunal (28th March 2019)

Employer did not have constructive knowledge of employee's disability

The EAT has held that a tribunal erred in finding that an employer had constructive knowledge of an employee's disability. It was accepted that the employee was disabled by reason of mental impairments (stress, depression, low mood and schizophrenia). However, the employer had not known about these conditions as the employee had concealed them, explaining sickness absences by reference to physical ailments.

When she was dismissed the employee claimed discrimination arising from disability. The tribunal held that the circumstances in which the employee had been off work posed a question about her psychiatric health and the employer's failure to make enquiries precluded it from denying that it

ought to have known that the employee was disabled. The EAT held that the tribunal had erred because it had not asked what the employer might have reasonably been expected to know had it made enquiries. The tribunal had found that the employee would have continued to suppress information about her mental health problems, would have insisted that she was able to work normally and would not have agreed to any medical examination that might have exposed her psychiatric history. Therefore, the employer could not have reasonably been expected to have known that the employee was disabled and, as a result, the EAT dismissed the employee's discrimination claim.

Ali v Capita Customer Management Ltd; Hextall v Chief Constable of Leicestershire Police [2019] EWCA Civ 900 – Court of Appeal (Judgement - June 2019)

Failure to pay male employee enhanced shared parental pay was not direct or indirect sex discrimination or breach of equal pay sex equality clause

The Court of Appeal has held that it was neither direct or indirect discrimination, nor a breach of the equal pay sex equality clause for two employers in two separate cases not to pay male employees enhanced shared parental pay of an amount equivalent to the enhanced maternity pay available to female employees.

The direct discrimination claim failed because the correct comparator was a female colleague on shared parental leave, not a woman on maternity leave. The purpose of statutory maternity leave related to matters exclusive to the birth mother resulting from pregnancy and childbirth, and that purpose had not been altered by the introduction of shared parental leave. A woman on maternity leave could not therefore be the correct comparator.

The second claimant was also precluded from bringing an indirect sex discrimination claim because of the effect of section 70(2)(a) of the EqA 2010, which provides that the inclusion of a less favourable term in an employee's terms of work could not be regarded as sex discrimination for the purposes of section 39(2) where that term was inserted because of section 66 (the sex equality clause). In any event the indirect sex discrimination claim would have failed because the correct pool for comparison could only consist of employees on shared parental leave and any disadvantage to the claimant would have been justified as being a proportionate means of achieving the legitimate aim of the special treatment of mothers in connection with pregnancy or childbirth.

Phoenix House v Stockman – Employment Appeal Tribunal (Judgement 5th July 2019)

Employees who covertly record Meetings - Is it misconduct for an employee to make a covert recording at work?

Yes, except in the most pressing of circumstances, held the EAT in Phoenix House v Stockman.

The Claimant disclosed, during her successful unfair dismissal claim, a covert recording she had made during employment. The employer contended that her compensation for unfair dismissal should be reduced on 'just and equitable' grounds and under the Polkey principle, to reflect her pre-dismissal conduct in making a covert recording, as doing so without pressing justification was misconduct.

The EAT's reasons contain observations on the varied circumstances in which covert recordings might be misconduct. It is good employment practice for an employee or employer to say if there is any intention to record a meeting, and it is generally misconduct not to do so, except in the most pressing of circumstances.

Practitioners may note the EAT's observation that employers rarely list covert recording as an example of gross misconduct in disciplinary procedures.

Employers given guidelines in a bid to end Britain's obesity crisis

The National Institute for Health and Care Excellence (NICE) has published guidelines suggesting various ways that employers can encourage workers to get active.

The national medical director of the NHS welcomes the guidelines published by NICE as another initiative to reduce the worrying statistic that 'almost two thirds of people fall within the overweight or obese category in the UK' NHS Digital. This is in comparison to just over 50% in 1993.

It is also hoped that encouraging workers to engage in physical activity will improve their mental and physical wellbeing. Long term, the suggestions made by NICE could reduce the amount of sick days taken by workers as a result of health issues related to obesity whilst also reducing the amount of sick days taken due to mental health, a figure that was 13million working days in 2017. The plans will also encourage a more positive work environment.

The Royal College of GPs is set to launch its own scheme to tackle sedentary behaviour in the workplace. It commended the guidelines published by NICE.

Government consultation on sexual harassment in the workplace

On 11 July 2019, a week after the publication of its gender equality roadmap, the Government Equalities Office launched a consultation on how best to tackle workplace sexual harassment. Significant proposals include introducing a duty to prevent harassment in the workplace, introducing protection against third-party harassment, and extending the three-month time limit for bringing discrimination and harassment claims to six months. Consideration will also be given to extending protection for volunteers and interns, as well as looking at non-legislative solutions to tackle the issue of harassment. The consultation closes on 2 October 2019.

Councils given power to deduct debt directly from employees' wages

In a governmental bid to reduce the reliance of councils on bailiffs, an *HMRC-led trial* starting on 8 July 2019 will give 29 councils the ability to deduct tax debts directly from employees' wages. Giving local authorities access to HMRC employment and income information, this is the first use of the debt information sharing powers introduced by the Digital Economy Act 2017. Although similar reductions are already made from wages to reclaim student loans, the move has proved controversial. Experts fear it has the potential to magnify employees' financial distress and create a dilemma for employers who may, on the one hand, be reclaiming employee debt while, on the other hand, be promoting a financial wellbeing agenda.

A review will take place in a year's time to consider whether the scheme should be rolled out to all councils in England and Wales on a permanent basis.