Welcome

Love it or loathe it, the intensity of this summer's spell of sunshine and high temperatures took many by surprise.

And let's assume that summer is not over. Are you set up to handle yet more hot days, sunny rays, and a distracted workforce? Employers are expected to be 'reasonable'. That might simply mean adjusting the air con or installing a set of fans. It might also mean relaxing your dress code to make workers feel more comfortable – something that needs careful thought so as to avoid problems around health and safety, your professional image, and discrimination.

It's safe to say that the heat won't last for very long. So, while it does, you'll probably find that staff will appreciate a dash of empathy. And that doesn't need to be at the expense of taking a firm approach where workers step out of line. The key is to be clear about what is expected, and about what the consequences of rule breaches might be.

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Disability-related absence didn't cause redundancy

Charlesworth v Dransfields Engineering Services Ltd

Mr Charlesworth, a branch manager, took a period of sick leave after developing cancer. His employer had been looking to make cost savings, and during Mr Charlesworth's absence the business identified the possibility of a restructure that would delete his job and save the business up to £40,000 a year.

Mr Charlesworth was made redundant and he brought a claim for disability discrimination and unfair dismissal. The tribunal found that there was no discrimination. The desire to make cost savings was the reason for Mr Charlesworth's treatment; disability wasn't the motivating factor. In fact, the reason for the redundancy wasn't connected to the disability, the tribunal said. It also rejected the unfair dismissal claim.

The Employment Appeal Tribunal (EAT) upheld that decision. It was a conclusion that the tribunal was entitled to have reached. And one of the really interesting points argued at the EAT was to do with the connection between Mr Charlesworth's absence and the employer's realisation that his was a role that could be coped without.

About Us

Beers LLP has a national reputation and is recognised and named in the Chambers and Partners and Legal 500 directories for expertise in employment law. From our offices in the South West of England our specialist solicitors provide advice, representation and training on all aspects of employment law.

We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

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We will represent you cost effectively in the Employment tribunals and the County Court.

We will provide you with up to date employment contracts for your staff; update your policies and procedures handbook and provide training for your managers to help you maintain best practice throughout your organisation.

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The tribunal had accepted that there was a link between the absence and the dismissal in that the employer had found that it could manage without Mr Charlesworth. But that wasn't the same as saying that he was dismissed because of his absence (which would be the requirement of a successful discrimination claim in this context). The disability would need to have been an effective cause of the detrimental treatment, and here it was not. Absence was just part of the overall context; it gave the employer the opportunity to identify something that it may very well have identified in other ways and in other circumstances. Ultimately, the absence wasn't an operative cause.

Although this may be seen as a pro-employer decision, it should be treated with a little caution. The EAT was very clear in pointing out that each case will depend on its own particular facts.

Failure to call appeal officer wasn't fatal

Elmore v The Governors of Darland High School

In most unfair dismissal cases, an employer will put its dismissing officer and its appeal officer in the witness box. It makes sense to give the tribunal a full account of what happened at each stage and why. But this case shows that a fair dismissal may be found even where the appeal officer does not give evidence.

Ms Elmore was a maths teacher, dismissed on capability grounds. She had failed to meet the standards expected by the school. The tribunal found that her dismissal was fair, and she appealed to the Employment Appeal Tribunal (EAT). Her employer's appeal panel hadn't given reasons for dismissing her appeal, she said. And no member of the appeal panel had given evidence at the tribunal hearing – so she hadn't had an opportunity to test the reasonableness of the panel's thought process and analysis.

She lost. The EAT held that the tribunal was entitled to find that the dismissal was fair. Firstly, there was no doubt that Ms Elmore's teaching was below the standard set by the school. Secondly, the capability hearing was robust and fair and the panel's decision was reached in an objective, impartial and balanced way. Thirdly, Ms Elmore hadn't put forward any fresh evidence or new arguments at the appeal stage. The tribunal was permitted to draw the inference that the appeal panel dismissed the appeal on the same grounds and for the same reasons as those identified by the capability hearing.

In respect of the lack of an appeal panel witness at the tribunal hearing, the EAT did not accept that there is a legal requirement in every unfair dismissal case where reasons for dismissing an appeal aren't given, for the appeal officer to give evidence at a tribunal hearing. A tribunal can still find that there was a fair dismissal procedure. But where new evidence or new arguments had been introduced at the appeal stage (and there hadn't been a reasoned appeal outcome decision, and an appeal panel witness hadn't appeared at tribunal) then an employer might not have discharged its evidential burden.

So, it will come down to the facts of the case. Employers would be best advised to avoid getting into this territory by, at the very least, making sure that dismissal and appeal panel decisions are communicated clearly and fully so that there is no doubt about the outcome and the reasons for it.

Conduct and culpability

JP Morgan Securities plc v Ktorza

This case centered on the question of whether or not an employer has to prove culpability in a conduct dismissal case.

Mr Ktorza was an executive director on the foreign exchange desk of the bank. He had received two final written warnings, the second of which was still live at the time he was disciplined for a practice called 'short-filling' or 'partial-filling', which means not (initially, at least) carrying out a client's order in full. He claimed to have not been aware of the employer's instruction to refrain from that practice, but went on to be dismissed. The tribunal found that that was unfair.

The Employment Appeal Tribunal (EAT) was critical of the decision of the employment tribunal that for someone to be fairly dismissed for conduct, their conduct has to have been in some way culpable (negligent, dishonest or reckless, for example). The EAT made it clear that an employer who has identified conduct as the potentially fair reason for dismissal doesn't need to go on and establish that the conduct in question was culpable. The tribunal should simply ask: did the employer act reasonably in treating the reason as sufficient for dismissal?

So it is the thought-process and the reasonableness of the employer at the time they took the decision to dismiss that is under scrutiny. And of course the fairness of the procedure – including a proper investigation – carried out.

The case has been sent to a fresh tribunal for a re-hearing.

Share sale didn't trigger TUPE

ICAP Management Services Ltd v Berry

The Transfer of Undertakings (Protection of Employment) Regulations, known as TUPE, take care of employees' rights when, broadly speaking, ownership of the business they work for, or the service they provide, changes hands. An employee can object to the transfer, which will have the effect of terminating their employment contract on the transfer date. That termination will not count as 'dismissal' for employment law purposes.

In the *ICAP Management Services* case the High Court was asked to determine whether or not an employee who objected to his employer's share sale remained employed and therefore subject to the garden leave provision in his contract.

Mr Berry resigned from ICAP on 12 months' notice, with the intention of going to work for one of ICAP's competitors as soon as he was lawfully able to do so. He was put on garden leave, during which time a company share sale was being formalised. Mr Berry considered that that would amount to a TUPE transfer, and he wrote to ICAP objecting to the transfer. The sale went through and a few weeks later Mr Berry told ICAP that his employment had ended and that he was accordingly no longer bound by his garden leave provisions, and thus free to go and work for the competitor. That was met by ICAP's application for an injunction to enforce Mr Berry's garden leave, which still had some months to run.

The High Court held that TUPE didn't apply to this share sale. There was no change in employer; no new owner had stepped into ICAP's shoes. The contractual position was unchanged. Mr Berry had remained a party to the employment contract with ICAP. He did the same job, in the same role, for the same organisation and from the same premises. He had the same clients. He was responsible for the same staff, and answered to the same immediate management. A simple acquisition of control of shares doesn't constitute a transfer within TUPE.

So, no TUPE transfer meant there was nothing for Mr Berry to object to, and thus no automatic termination of his contract. The garden leave clause was enforced via the injunction that ICAP sought.

Employees' duty to reveal intention to compete

MPT Group Ltd v Peel

Mr Peel and Mr Birtwistle were the Technical Manager and the Technical Sales Manager respectively at MPT Group (MPT). They resigned. Almost immediately after their six-month restrictive covenants expired, they and some others incorporated a company called MattressTek Limited – a business that would be in direct competition with MPT.

MPT brought a High Court claim based on a number of allegations, including that the men had breached their contracts by failing to answer questions truthfully about their future intentions. One had said that he wanted to work freelance; the other said he'd been offered other work. Both had denied any intention of going into partnership together.

Did that lack of candour breach their duty of good faith? Were these employees under a duty to disclose their true intentions?

It seems not. The High Court said that it would be reluctant to hold that a departing employee is under a contractual obligation to explain his own confidential plans to set up in lawful competition. The law will step in to prevent unfair competition, or to protect confidential information, or to hold employees to restrictive covenants (as long as they are reasonable). But employees are otherwise free to make their own way in the world. The Court was *'far from satisfied that these employees were under a duty to disclose their true intentions to MPT'.*

It's a decision that might have been different had the employees been company directors, for example. The fiduciary duties owed by the most senior individuals within a company could often include disclosing an intention to compete.

Expectations relevant to covenant enforceability

Egon Zehnder Ltd v Mary Caroline Tillman

A restrictive covenant is only as useful as it is enforceable. Where there is disagreement over the validity of this type of clause, it is often left to the courts to decide whether or not an employee should be prevented from doing certain things – working with clients, or competing with their former employer, for example - after their employment has ended.

In Ms Tillman's case, the question was whether a non-compete clause in her contract was valid. To be valid, these types of clauses need to be no wider than necessary in order to protect the employer's legitimate business interests.

She had joined Egon Zehnder ('Egon') as a consultant on a higher-than-normal salary and it had been expected that she would rise quickly through the ranks – which she did. But despite her significant promotions, she hadn't signed new contracts. She remained on the contract she had entered into when her employment began, and that contract contained a restrictive covenant preventing her from working for a competitor of Egon's for six months after termination.

After resigning, Ms Tillman told Egon that she intended taking up a new job with a competitor before her six-month restraint period was up. Egon applied for an injunction to enforce the non-compete covenant. But was that clause enforceable?

Yes, was the High Court's answer. The clause was reasonable when Ms Tillman joined Egon as a consultant and signed the contract (which is the appropriate time at which to judge reasonableness), even though very many other consultants didn't have the same sort of restraint in their contracts. It was relevant that, from the outset, Ms Tillman was expected to be promoted pretty quickly. Given her experience, she had more client engagement, and made much more of a contribution to strategic matters, than would have been expected of a consultant. She became steeped in client affairs more often and to a deeper extent, and that level of engagement was in anticipation of her promotion. Her particular circumstances meant that the non-compete clause was reasonable and enforceable.

The key message is that a restrictive covenant must, at the time the contract is entered into, be tightly suited to the employee's role and to the employer's protectable interests. And it seems that evidence of an expectation of likely promotion – and of how that expectation manifested itself - may well help an employer's enforceability arguments. But it's important to keep these clauses under review and to update them where necessary as people progress through the business.

And Finally...

Take health and safety rules on the chin?

A construction company has been in the news for reportedly requiring workers to be clean-shaven.

Of course, beards can be far more than a fashion statement. They can also have deep religious significance. And it's this potential conflict between a worker's right to freely express their religious beliefs, and company or other rules, which can sometimes present a particular challenge for employers.

Here the employer's motivation was its belief that beards prevented dust masks from doing their job because the masks need to form a seal against the skin. According to reports, the company had said that exceptions could be made for those who had medical or religious reasons for not shaving (or not wearing a dust mask), but they would need to back that up with a medical certificate or a letter from their place of worship.

It's rarely an easy route for employers to navigate. An employment law risk for those who want to introduce rules that would be likely to affect a protected group (those with particular religious requirements, for example) more than others is a claim for indirect discrimination. The employer would need to objectively justify its rule. Carving out appropriate exceptions from a particular policy would reduce the discrimination risk, but there is also a careful balance to be struck between relaxing certain rules in certain ways and maintaining a safe working environment.

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