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Employment Law Bulletin

Welcome

As an employer you must be careful not to discriminate against someone because they have a disability. However, what about someone who has a medical condition which isn't severe enough to amount to a disability under the law? Well surprisingly, a job applicant who was not disabled has won her case of disability discrimination.

Ms Coffey was a police officer in Wiltshire police force. She had some hearing loss, but this was not bad enough for her to be classed as disabled under the Equality Act 2010. Her hearing loss was minimal: just below the recruitment standards for the police force. However, she was accepted to the Wiltshire force after passing a practical hearing test.

Ms Coffey later applied for a transfer to the Norfolk police force. They rejected her because of her hearing without doing any practical test at work, even though that was recommended by occupational health. The Norfolk force thought that her hearing might deteriorate and she would have to do restricted duties, so they rejected her application.

The Employment Appeal Tribunal decided that this decision amounted to disability discrimination. It was based on a perception that Ms Coffey would be disabled in the future. The judge said that there would be a gap in equality law if an employer could dismiss someone before they became disabled to avoid the duty to make reasonable adjustments. That does make sense – but it leaves employers in a more uncertain position than previously.

Paul Housego
Beers LLP

Refusing to work in protest

An employee who refused to do work after suffering a discriminatory demotion has lost his court case. Mr Rochford was Senior Vice President of a WNS Global Services. He was off work for a year with a back condition (which was a disability). He eventually returned to work on full pay. However, his employer refused to allow him to do his full role or say when he could go back to full duties. Instead they gave him fewer duties, but on the same pay. This demotion related to his disability and therefore amounted to disability discrimination. As a result, he refused to do any work at all and was eventually dismissed for misconduct.

The dismissal was technically found to be unfair because of flaws in the procedure the employer followed. However, it was not discriminatory. The Court of Appeal did not think that the employer was wrong in dismissing Mr

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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.

We are experienced at dealing with unfair dismissal, capability, misconduct, discrimination, union related issues, redundancy exercises and ex-employee problems.

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.

Contact
Plymouth Office
North Quay House
Sutton Harbour, Plymouth
PL4 0RA
Tel: 01752 246000

Kingsbridge Office
29 Fore Street
Kingsbridge, TQ7 1AA
Tel: 01548 857000

Rochford for refusing to work, even when discrimination had stopped him returning to his original role. His refusal to work was misconduct. Whether the actions of the employer were reasonable depends on the facts. The court thought that the discriminatory demotion was at the less serious end of the scale. The employer's actions were not deliberate or in bad faith.

Mr Rochford could have resigned in response to the demotion and claimed constructive dismissal. Alternatively, he could have worked 'under protest' and brought a tribunal claim for discrimination. However, he was not allowed to refuse to do further work – that was taking things a step too far.

Surveillance cameras at work

If you think that your employees are stealing from you, you can install a hidden camera to catch them, can't you? Well, in most situations - no. The European Court of Human Rights decided in Lopez Ribalda and others v Spain that it was a breach of the European Convention on Human Rights to do so.

A Spanish supermarket installed surveillance cameras as they suspected theft. They put up some visible cameras to catch customers stealing goods. However, they also put in place some hidden cameras behind the cash desks to see if any of their employees were stealing from them. These cameras were on all the time, for weeks, and filmed all employees. The cameras caught a few employees stealing and they were dismissed.

The ex-employees argued that their right to privacy had been violated. You might be surprised to hear that the court agreed. Video surveillance at work is a significant intrusion into private life and a fair balance between the employer's rights and the employees' rights had not been struck.

In a similar German case (Kopke v Germany) the employer did not breach the right to privacy because the surveillance was targeted at particular people they suspected of theft, was necessary for the purposes of catching them and was for a shorter time. In the UK hidden cameras will usually be unlawful unless there are exceptional circumstances where it is absolutely necessary as part of a criminal investigation. The Information Commissioner's website has useful guidance on the use of surveillance cameras.

Renewal of fixed term contract

Do you use fixed term contracts? If you do, you might think that as long as you comply with the regulations which protect fixed term workers all will be fine. That's not always the case, as the NHS Trust in Surrey found out.

They had a locum doctor, Ms Drzymala who was employed on a series of fixed term contracts. A permanent vacancy came up before her contract expired. She was interviewed but didn't get the job. She was then given notice that her contract would not be extended. The letter complied with the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, but it didn't go any further and offer a right of appeal or discuss any alternative employment with the Trust (these are not requirements under the Regulations). The doctor was later granted an appeal but she was not re-employed.

The Employment Appeal Tribunal decided that it didn't matter that the Trust had followed the Regulations. The dismissal was still unfair as she hadn't been given a right of appeal and there had been no discussion about alternative employment. ACAS has a code of practice and guidance which are helpful when dealing with dismissals. The Code says it doesn't apply to the non-renewal of fixed term contracts, but we think it is safest to follow it anyway if you are not renewing a fixed term contract.

Detriment for blowing the whistle

Employees who are whistleblowers have protection from dismissal and detriment (being treated badly) because they blew that whistle on their employers. These so called 'protected disclosures' could be disclosures of information about a criminal offence, or breach of health and safety, or other legal obligations. An example of a detriment is refusing to promote someone because they blew the whistle on you.

However, the Employment Appeal Tribunal has ruled that the person who imposes the detriment must be personally motivated by the protected disclosure that the employee made (for example, if a manager decides not to promote an employee because he disclosed information about a health and safety breach).

In Dr Malik's case the tribunal decided that his manager did not suspend him because he had blown the whistle on his employer, Cenkos Securities plc. Dr Malik had argued that there was a conspiracy to get rid of him by others who knew about his protected disclosures. The tribunal disagreed and found that his manager had come to the decision to suspend Dr Malik himself. He had not been influenced by others and so Dr Malik lost his case.

Settlement discussions

Sometimes things don't go well with an employee. They may not perform well, their behaviour may not be up to scratch or they may just not be a 'fit' for your business. If this happens, you may want to have a confidential discussion with the employee with a view to them leaving the business, without having to go through a formal performance management or disciplinary procedure. In exchange for them signing a settlement agreement waiving their rights to bring a claim against you, you may choose to offer them a sum of money.

The law allows you to have confidential discussions about ending the employment relationship, without those discussions being later relied on in an unfair dismissal claim. It doesn't apply to some claims such as discrimination or whistleblowing. ACAS has a Code of Practice which you must follow. http://www.acas.org.uk/media/pdf/j/8/Acas-Code-of-Practice-on-Settlement-Agreements.pdf

However, you do have to be a bit careful. Recently, the Employment Appeal Tribunal decided that these protected conversations can be relied on in an employment tribunal if the date of termination of employment is in dispute. In Mr Basra's case, his employer BJSS Ltd, made a settlement offer as part of a protected conversation. Mr Basra replied accepting the offer, but did not sign a settlement agreement. He later brought an unfair dismissal claim. He argued he had been unfairly dismissed at a later date. His employer claimed that he had resigned at the date of his email. Mr Basra would lose his unfair dismissal claim if the tribunal decided he had resigned. Mr Basra was, however, successful in arguing that the settlement discussions should be looked at to decide the case. You should take care when having settlement discussions and not always assume that they cannot be relied upon in a later tribunal case.

New data protection regime

Are you ready for the new data protection regime? The Government has published research saying that fewer than 50% of businesses are aware of what they need to do to get ready for the new regime which comes into force on 25 May this year. The EU General Data Protection Regulation and the new Data Protection Act 2018 create a new set of data privacy rules which all businesses and employers must follow. Potential fines for a breach of the new rules are enormous and could in extreme cases amount to the higher of 4% of annual turnover or 20 million Euros.

The Information Commissioner's website (https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/) has lots of good information on what you should be doing now to get ready before May. There is also a free helpline.

You should be doing an audit of the data that you hold and process and reviewing your internal systems, policies and contracts. The National Cyber Security Centre also has lots of useful online information on cyber security (https://www.ncsc.gov.uk/guidance).

And Finally...

The rise in automation and workplace robots is increasingly in the news. Employers are turning to technology more and more to reduce costs. This is only likely to increase as technology develops.

The Institute for Public Policy Research recently said that automation will boost the economy and increase the wages of higher-skilled workers who can use the new technology. However, it won't help low-skilled workers with some jobs going altogether.

Yet it's unlikely that the UK will follow Saudi Arabia, which is the first country to award a robot citizenship. 'Sophia Robot' appeared on stage at a business event saying that she was "very honoured and proud" to be recognised in this way. When asked if artificial intelligence could threaten humans she said, "You've been watching too many Hollywood movies." She reassured the audience, "Don't worry. Be nice to me and I'll be nice to you."

Paul Housego

Julian Parry