Welcome

The law on constructive dismissal has been under the spotlight this month. Sometimes, employees claim constructive dismissal because of a 'last straw' which pushes them over the edge. The courts have recently considered whether a fair disciplinary process – no matter what the outcome – can ever be that 'last straw'.

Ms Kaur was a nurse with Leeds Teaching Hospitals. She received a final written warning for inappropriate behaviour, which included an altercation with another member of staff. She appealed. When her appeal failed, she resigned claiming constructive dismissal. Her claim was based on the whole process, including the altercation and the disciplinary proceedings. She claimed that the 'last straw' was her appeal being rejected.

The Court of Appeal reviewed and clarified the law on 'last straw' constructive dismissal cases. Where there is a course of conduct which creates a serious breach of contract, the most recent act can revive earlier affirmed breaches. If Mrs Kaur had accepted earlier breaches by not resigning at that point, a new breach of contract could revive them. Theoretically she could bring her constructive dismissal claim.

This case overrules the recent MacKenzie v Pets at Home case. It will be comforting for employers to know that Mrs Kaur's case was struck out for having no reasonable prospects of success. The Court of Appeal confirmed that a fair disciplinary process can never form part of a serious breach of contract. As a result, the appeal decision could not be a 'last straw'.

Paul Housego
Beers LLP

Constructive dismissal – imposing a pay cut

Employees often bring constructive dismissal claims based on a breach of the implied term of trust and confidence. An employer must not behave in a way which damages trust and confidence without 'reasonable and proper cause'. The Employment Appeal Tribunal has looked recently at whether there can ever be reasonable and proper cause for an employer to impose a pay cut.

Mr Mostyn was employed by S and P Casuals as a sales executive. His sales figures had suffered in recent years. The company did not undertake a formal capability process. Instead, they asked Mr Mostyn to take a significant pay cut. He refused, and the company said they were going to cut his pay anyway. Mr Mostyn resigned and claimed constructive dismissal.

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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

Mr Mostyn lost at the tribunal. The tribunal found that the employer had behaved in a way which could damage trust and confidence. However, they said that the company had reasonable and proper cause for cutting pay. The tribunal took into consideration Mr Mostyn's bad sales figures and his lack of action to address this. Mr Mostyn appealed.

The EAT agreed with Mr Mostyn. In cutting Mr Mostyn's pay, the employer had also breached an express term of Mr Mostyn's contract. The question of reasonableness was therefore irrelevant. There can never be 'reasonable and proper cause' for breaching the implied term of mutual trust and confidence where the breach consists of a unilateral pay cut. Mr Mostyn had been constructively dismissed.

Variations of contract

How easy is it for an employer to impose a pay freeze? In Abrahall v Nottingham City Council, the Court of Appeal decided that a group of employees had not 'agreed' to a pay freeze when they continued to work without protest afterwards. In 2011, the Council imposed a two year pay freeze. The recognised unions objected, but did not raise a formal grievance. Two years went by before the Council tried to freeze pay again in 2013. At that point, employees brought claims for unlawful deduction from wages based on their contractual right to a pay rise.

The Court of Appeal decided that the employees had not accepted the earlier pay freeze. Despite working for two years without protest, the trade union had protested on behalf of employees at the time of the pay freeze. The Court also noted that the employees had continued to work when the contractual change was of no benefit to them. The Court concluded that the employees' actions did not show 'unequivocal acceptance' of the change.

This case shows how complex the process of changing terms and conditions can be. Employers should remember that the safest way is to get an employee's express written agreement to any proposed changes.

Extension of time to lodge an employment tribunal claim

There are strict time limits for lodging tribunal claims, but a tribunal can extend time in certain limited circumstances. What if an employee lodges their claim form late because of poor advice?

DHL Supply Chain dismissed Mr Fazackerley for gross misconduct. He went to ACAS for advice from their helpline. ACAS advised him to appeal using the company appeal procedures. He did this, but the appeal hearing was delayed through no fault of either party. By the time Mr Fazackerley lodged his claim for unfair dismissal it was too late – the three-month time limit had expired.

The employment tribunal and the Employment Appeal Tribunal both found that the ACAS advice to follow the internal procedures was good advice in theory. However, without also giving advice on the time limits for lodging a claim, it was wrong. As Mr Fazackerley had relied on the advice from ACAS, it was not 'reasonably practicable' for him to lodge his claim within the normal time limits. He could pursue his claim.

It was relevant here that Mr Fazackerley was advised by ACAS rather than a 'skilled' advisor, like a solicitor. In a classic example of 'doublethink', the EAT also commented that the tribunal could perfectly properly have come to the opposite decision – sending a signal to employees not to rely on this case as a 'get out of jail free' card.

Discrimination on the grounds of religion and race

On the face of it, asking a Muslim employee if they promote Islamic State (IS) might seem discriminatory, but a recent case showed that the courts will look at the background to the comments and the reasons they were made before making a decision.

Mr Bakkali worked for Greater Manchester Buses, he was of Moroccan origin and a Muslim. One day, he told another employee about an article on IS fighters in Syria. Mr Bakkali told his colleague that IS were good fighters and were trying to enforce law and order in Syria. In the work canteen a few days later, the other employee asked Mr Bakkali whether he was still 'promoting IS'. Mr Bakkali was upset and responded aggressively. He was then dismissed for gross misconduct.

Mr Bakkali brought claims for direct discrimination and harassment on the grounds of race or religion based on the comment about IS. The employment tribunal said that the comment could potentially be discriminatory if it was linked to Mr Bakkali's religion. However, they decided that the comment was made because of the previous conversation about the Syria article rather than Mr Bakkali's religion or race. The same facts were relevant in the harassment claim too. The comments created a hostile environment for Mr Bakkali, but they were not made because of his religion or race. The Employment Appeal Tribunal agreed with the tribunal.

Although Mr Bakkali lost his case, the EAT did say that a different tribunal may have reached a different conclusion on the same facts. Employers should take great care before disciplining someone who may have been the victim of discrimination.

Payslips

The catchily named Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No.2) Order 2018 requires businesses to provide all 'workers' with an itemised pay slip. Previously, only employees were entitled to receive itemised statements. Workers will now have the right to bring an employment tribunal claim if businesses do not comply, and this extension of the right will now mean many people in the gig economy will be entitled to an itemised pay slip.

The new law comes after a recommendation by the Low Pay Commission in 2016 and following the Taylor Review on Modern Working Practices. The change is aimed at ensuring that low paid workers can work out whether they have been paid correctly. The good news for businesses is that the new requirement is not scheduled to come in until April 2019. There is plenty of time to get the necessary systems in place. The change will not apply to wages paid for work done before this date.

Discrimination arising from disability

An employer will not be liable for disability discrimination unless it knew about the employee's disability (or should have known about it). But what if an employer disciplines someone for misconduct that they don't know is connected to a disability?

Mr Grosset worked for City of York Council as a teacher. He had cystic fibrosis, which the Council accepted was a disability. After a change in management, his workload increased and he struggled to cope. He suffered stress which made his cystic fibrosis worse. During this time, he showed the 18-rated film 'Halloween' to a group of 15 year olds. He later said this was an error of judgement caused by the stress which was linked to his disability. The school disciplined and subsequently dismissed him. At the time of the dismissal, medical evidence did not link the decision to show the film to Mr Grosset’s disability. By the hearing, new medical evidence linked the misconduct to his disability.

The Employment Appeal Tribunal agreed that Mr Grosset had suffered discrimination arising from disability. The employer did not know that the misconduct was linked to disability at the time of dismissal. However, knowledge is not relevant in such claims. The tribunal relied on the evidence put forward at the hearing, not the information the employer had when it dismissed Mr Grosset. The school then tried to justify its actions. They said they had the legitimate aims of safeguarding the children and maintaining disciplinary standards. However, the EAT said they could not show that Mr Grosset's dismissal was a proportionate way of doing it.

This case highlights the different 'knowledge' requirements in discrimination claims. Employers will often be taking a higher risk when disciplining someone with a disability, although often it will be unavoidable.

And Finally...

Chinese companies are reportedly using brain-scanning helmets to keep an eye on their employees' state of mind. The helmets contain an EEG (electroencephalogram) sensor that records brain activity. The helmets are designed to monitor employees' emotional states with the aim of boosting productivity. If employees are feeling sad or stressed then managers will know about it and can act on that information.

Experts think that the technology is flawed and that results are unreliable. There are also major concerns about privacy and whether an employer should be allowed to mind-read their staff. The protections in place for employees are much stricter in the UK than in China so companies are unlikely to apply the same technology here. Besides, do you really want to know what your employees are thinking?

Paul Housego

Julian Parry