Human Resources

Employment Law Update - October 2023

The employment law landscape has been relatively quiet, following Brexit and Covid, with many planned changes and updates, still in the 'pending' stage. Furthermore, several new employment laws have recently received Royal Assent and many of these will be expected to be implemented during 2024.

In the meantime, in this Employment Law Update we share with you some recent 'case law' which will act as a precedent for future employment tribunal decisions.

Case One - Lynskey 'v' Direct Line Insurance Services Limited (Disability Discrimination - Failure to make reasonable adjustments) Judgement - published August 2023

In this case, the Claimant (Lynskey) worked for the Respondent (Direct Line Insurance Services Limited) from 2016 to 2022, as a Telesales Consultant, after which she resigned from her employment, raising various claims against her employer, with the Employment Tribunal Service.

During her employment, the Claimant had various symptoms relating to the menopause, which the Respondent was aware of. These symptoms included low mood, anxiety, mood swings, memory loss and poor concentration. Despite this knowledge, she remained subject to the Respondent's normal performance standards, which she struggled to reach because of menopause symptoms.

Due to these ongoing difficulties, she was transferred to another job role which had fewer targets attached to it, but which meant that she lost out financially. She continued to struggle in this role, and her manager threatened to escalate the situation to formal disciplinary management, if improvements were not met. The manager described these struggles with her performance as a 'confidence issue'.

As the Claimant's performance continued to be criticised, she was denied a pay rise due to her performance rating being in 'need for improvement' and she was placed under formal performance management proceedings.

However, a round of refresher training recommended by Occupational Health was refused by the Respondent due to budgetary constraints. She also had her company sick pay stopped, because her absence levels had become 'unsustainable', despite the Claimant believing that only half of the sick pay entitlement had been used.

As a result of the situation, the Claimant felt she had no choice other than to resign. She then raised various claims against her employer, which included Constructive Dismissal and Disability Discrimination, alleging that the Respondent had failed to make reasonable adjustments and treated her unfavourably because of her disability.

The Employment Tribunal Decision

The Employment Tribunal (ET) found that there was no consideration for the impact that the menopause was having on her performance and no adjustments were made to support her in the workplace, despite there being around eight recommendations that had been suggested by Occupational Health, that could have helped the Claimant to be successful in her job role. The Claimant was successful in her claims for failure to make reasonable adjustments, and discrimination arising from a disability and was awarded £64,645.07.

The ET also found that the Respondent had been oppressive in their treatment of the Claimant, by failing to make a concession for the Claimant's disability much earlier in the process that ultimately led to her resigning from her employment. They found that the Respondent did not accept that the Claimant was doing enough to improve her performance rating, that they failed to accept that the performance level was due to the menopause/menopausal symptoms, and that these were 'mitigating factors' during the formal disciplinary process, and that they refused to pay her sick pay. The Claimant was therefore awarded £2,500 for aggravated damages due to the Respondent's failure concede that she was a disabled person.

Lessons Learnt

It is important for employers to give careful consideration to health-related factors (rather than being dismissive) which may underpin poor performance or poor conduct and employers should be open to considering what reasonable adjustments may be made to both the physical workplace and the relevant management processes.

In this case, reasonable adjustments could have included:

- A personal risk assessment to identify any specific areas which may be detrimental to the employee.
- Adjustments to the performance rating/expectations of the employee's job role.
- Adjustments to the formal management of the employee's absence record.
- Adjusting the physical location of the employee so that they were placed closer to toilet facilities or away from hot and cold spots.
- Implementing further temperature control, such as access to a fan.
- Allowing additional rest breaks.
- Considering flexible working hours or allowing the employee to work from home and attend necessary GP/Doctor appointments.
- Temporarily reducing working hours.
- Making allowances to the Company's dress code policy.

What is 'reasonable' will vary, depending upon specific personal factors and employer resources.

Case Two - Hewston 'v' Ofsted (Unfair Dismissal) - Judgement published August 2023

In this case the Claimant (Hewston) was employed as a Social Care Regulatory Inspector by the Respondent (Ofsted) from 2007 to 2019, after which he was dismissed for Gross Misconduct. The Claimant subsequently claimed Unfair Dismissal with the Employment Tribunal Service.

The incident that led to the dismissal happened during an inspection of a school, during which a pupil entered the building wet (it was raining outside at the time). The Claimant touched the child's head and back. Following a complaint from the school about this, the Claimant was suspended pending investigation and a report was also made to the Local Authority Designated Officer (LADO). In response, the LADO left it to the Respondent to deal with the matter and decided it was not a safeguarding concern.

During the investigation, documents were gathered, including the report to the LADO, a statement from the child and a complaint letter from the school. It was decided that the matter should progress to a formal disciplinary hearing, and an investigative report was provided to the Claimant. The school's complaint, the child's statement, and an email confirming the view of the LADO Officer however were not shared with the Claimant.

In the disciplinary hearing, the Claimant accepted that he had done as alleged, but denied that this was an unprofessional way to act. In fact, the Claimant argued that this was a caring gesture and not excessive. The Claimant felt that the matter had been 'blown out of proportion' and argued that the behaviour was in line with the content of lectures at previous Ofsted conferences where touch was encouraged as a 'positive tool to use in social care'. Nevertheless, he was dismissed for Gross Misconduct as the disciplinary chair felt that the behaviour was uninvited and made the child feel uncomfortable and was therefore unprofessional.

The Claimant appealed the decision, raising the lack of guidance from the Respondent on physical contact with children, and its failure to consider his exemplary record, contrition, and willingness to abide by guidance from senior managers. This appeal was rejected on the basis that the appeal chair also felt that the Claimant lacked professional judgment.

The Employment Tribunal Decision

The Employment Tribunal (ET) found that the dismissal was fair and within the 'band of reasonable responses', and that the Claimant's actions undermined the trust and confidence of the Respondent to perform his job role effectively. It also found that a fair and reasonable investigation had taken place, and that was the basis for the decision to dismiss.

It was acknowledged that there was no 'no touch' policy in place at the time of the incident, and that no harm was intended towards the child. However, in the ETs view, this was not an issue of safeguarding but instead of professional standards. In his role as an Inspector, the ET felt that the Claimant should have exemplified the 'highest standards' when conducting inspections, and that his actions in this matter fell short of those standards. Going on to use a 'common man' example, it was felt by the ET that anyone witnessing an incident such as this, which was unnecessary and uninvited, would feel uneasy about it.

Appeal

This decision was appealed by the Claimant, on the basis that the ET had erred in finding that the dismissal was within the band of reasonable responses, in particular in light of the Claimant's clean disciplinary record and length of service, the Respondents failure to inform its employees that it expected them to refrain from almost all physical touch during their work, and failure to follow the ACAS code in providing all of the evidence.

The Employment Appeal Tribunal Decision

The Employment Appeal Tribunal (EAT) upheld the Claimants appeal on all of the above grounds. In particular, the EAT highlighted the ETs failure to:

- Give adequate consideration of the fact that the Respondent had not forewarned the Claimant that a single incident of this type (bearing in mind, this was not a safeguarding matter) could lead to dismissal. Instead, the EAT held, this should have been clear in a written policy, training or otherwise.
- Recognise that by not giving the Claimant all the documents relied on by the disciplining officer, the Respondent had acted not only contrary to the ACAS code of practice, but also failed to provide the Claimant with what they needed to defend themselves, which went against the basic principles of natural justice. The EAT found that contrary to the opinion of the ET, this rendered the dismissal unfair.

Lessons Learnt

- It is important for employers to follow a full and robust process for every misconduct allegation.
- All documentation gathered during an investigation, which is relied upon to make a disciplinary decision, should be provided to an employee, to enable them to respond and defend themselves appropriately. This is a basic employee right, and a basic principle of employment law.
- The case also highlights the need to have clear guidelines on appropriate conduct in the workplace and where any ambiguity arises, it may be better instead, to use the situation as an opportunity to provide a disciplinary warning and/or clarity and training, rather than to dismiss.

How Can We Help?

If you have any queries relating to the content of this newsletter, or any other HR related topic, please do not hesitate to contact us at hradvice@hasslefreehr.co.uk.