Ruth Seddon HR

Employment Law Update June 2021

It's been several months since we have had any new cases which are worthy of note in employment law, but, just like buses, a few have come along at once.

Discrimination – Mental Health

Oakley v EE is a case which, memorably, centres around an employee being told to "get a grip" by her line manager. EE was found guilty of disability discrimination, disability-related harassment, constructive dismissal and wrongful dismissal. The compensation has not yet been decided but it is likely to be considerable.

Key Learning Points

The manager knew explicitly about the employee's mental health conditions but not only treated her unfavourably and unreasonably in the circumstances but carried on treating her badly even when she exhibited clear signs of distress (panic attack). He told her to "get a grip" and "come on" (my advice is don't ever do this!).

Some of the conversations and events took place in front of others, leaving her feeling humiliated. It is really important to deal with sensitive issues privately and in confidence.

She was unable to complete her shift and left work – an employee walking out is a red flag situation for any employer that something has gone badly wrong and the whole situation could and should have been picked up by HR at that point.

She resigned and raised a grievance. She did retract her resignation but resigned again after the grievance outcome, complaining that she had not been given the opportunity to rebut the evidence given by the manager. This is something I do sometimes have to carefully consider when handling grievances – if something surprising comes up, do we go back to complainants to ask further questions? In some cases, where the substance of the grievance in writing is really clear, I interview the complainant last for this reason.

Not all her claims succeeded, it should be said, but the price tag for the actions of this one manager is likely to be hefty.

Views on Biological Sex

Forstater v CGD Europe

This was all over the news yesterday, so you may well have seen it. It is important to remember that discrimination against people undergoing gender reassignment is unlawful under the Equality Act. In my training for managers I always point out that this protection applies only to those who have undergone, are undergoing, or are proposing to undergo sex reassignment. It does not automatically mean medical treatment to change sex, though that is how it was interpreted initially in many

places. However it does not (yet) automatically cover gender identity where a person "self-identifies" as a different sex to what was recorded at birth – there has to be a "process" of reassignment. Confused? Well this case threw up a lot of issues which are now resolved.

In 2018 the Government announced a consultation on a Gender Recognition Act, and Maya Forstater tweeted various comments, including: *"I don't think people should be compelled to play along with literal delusions like 'trans-women are women'",* and *"radically expanding the legal definition of 'women' so that it can include both males and females makes it a meaningless concept, and will undermine women's rights and protection for vulnerable women and girls".*

Staff complained about her being transphobic. Her contract was not renewed. She lodged a claim saying that her views should be protected under the Equality Act as a "philosophical belief". The Employment Tribunal rejected her claim, somewhat controversially pronouncing that her views were *"not worthy of respect in a democratic society".*

The Employment Appeal Tribunal overturned that decision yesterday, saying that the tribunal should have considered whether it was a philosophical belief under the law, not whether they or other parts of society agreed with it. Her view was detailed and nuanced and the EAT summed up her view as follows:

> She believes it is not "incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender'… That is not, on any view, a statement of a belief that seeks to destroy the rights of trans persons. It is a belief that might in some circumstances cause offence to trans persons, but the potential for offence cannot be a reason to exclude a belief from protection altogether."

Key Learning Point

Belief in two biological sexes and an inability to change sex is a protected belief – however this does not allow discrimination against transgender people. In the same way people may believe homosexuality to be wrong, but that does not allow them to treat homosexuals less favourably.

This is an issue for free speech – having views which some may find offensive does not allow a dismissal as long as it is a philosophical belief in the legal sense.

The key issue here for wider society is that women who object to having men who self-identify as women (while still being anatomically male) sharing facilities such as toilets and changing rooms with women have been boosted by this case. It means their beliefs may also have to be taken into account.

And finally – going to the pub while off sick

I have had many conversations with employers over the years about what an employee gets up to while off sick. Unless they have Covid-19 or are under quarantine, they are not required to stay at home.

Ruth Seddon HR

A case featured yesterday discussed going to the pub while sick. There were aggravating factors here but a dismissal for this kind of thing will never stick in court. If you have concerns about why someone is going sick and what they do when they are sick, there are ways to handle it which will not land you with a hefty fine, so give me a call instead!

Ruth Seddon

11th June 2021