Employment law Dispatches

Willans LLP | solicitors

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Welcome...

...to the latest issue of Dispatches, which is jam-packed with recent case news from the world of employment law and business immigration.

Recently, we sadly bid farewell to Hayley Ainsworth but we are pleased to welcome associate, solicitor **Hifsa O'Kelly** to the team.

Should you and your business need our support, please get in touch.

At a glance

Case news covering:

- Sponsor licences
- Unfair dismissal
- Protected disclosures

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Sponsor licences: surge in suspensions and revocations

A sponsor licence is a special permission granted by the Home Office, allowing employers in the UK to hire from a wider global recruitment pool, providing them with a competitive advantage. However, this advantage comes with strict compliance duties and obligations, as UKVI considers sponsorship a privilege rather than a right.

Sponsor licence holders are held to a high standard, and the consequences of non-compliance are severe. Recent efforts to cut migration and prevent abuse of the immigration system have led to intensified compliance actions, resulting in a recent significant surge in sponsor licence suspensions and revocations. Between January and March 2024 alone, UKVI suspended 309, and revoked 210 sponsor licences.

This should serve as a timely reminder to sponsors to put compliance at the forefront of their minds and take proactive steps to prepare for potential compliance audits. Sponsors are advised to:

- Familiarise themselves with their sponsorship obligations
- Have the correct systems in place to manage these obligations
- Ensure that key personnel are well-trained and up to date on their reporting and record-keeping duties
- Have robust right-to-work check procedures in place.

This is especially important as sponsors falling short of the requirements may not only face significant fines, but also lose the ability to hire migrant workers or retain existing sponsored employees.

What should sponsor licence holders do?

The recent developments send an important reminder to sponsors to intensify focus on immigration compliance to eliminate any potential misuse of the immigration system by focusing on continued enforcement actions. Here at Willans, we offer an extensive suite of compliance services for sponsors, including comprehensive training for key personnel and mock audits. Please get in touch. ■

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Unfair dismissal: failure to consider redeployment as an alternative to dismissal

Mr. Bugden (the 'claimant') was employed by Royal Mail Group (the 'respondent') from 15 August 1994 until 10 December 2019 as an operational postal grade worker. Between 2015 and 2019, he had 32 periods of absence, totalling 297 days, some of which were related to long-term medical conditions.

The respondent made several attempts to resolve the absences, but ultimately dismissed the claimant with notice in 2019. Subsequently, the claimant brought tribunal claims for unfair dismissal, breach of duty to make reasonable adjustments and disability discrimination.

He was unsuccessful in the first instance and appealed to the Employment Appeal Tribunal (EAT), stating that the Employment Tribunal (ET) failed to consider potential redeployment in that:

1. Redeployment should have been considered by the ET as a potential reasonable adjustment that the respondent could have made, despite this not being pleaded or raised at the hearing by either party; and

2. The ET failed to consider the potential for redeployment as an alternative to dismissal when determining whether his dismissal was fair.

The first ground of the appeal failed as the EAT stated that the ET did not err in failing to consider redeployment as a reasonable adjustment. This was mainly because it was not raised by the claimant or Occupational Health prior to his dismissal, nor was it clear from the evidence what effect his redeployment would have had on his absence.

However, the EAT allowed the appeal on the second ground, stating that the ET should have addressed the issue of redeployment as an alternative to dismissal as a "matter of course" when considering whether the decision to dismiss was reasonable in the circumstances. The case was then remitted back to the ET for further consideration.

What should employers do?

This decision serves as a reminder that employers should always consider all potential alternatives, including an alternative role, before dismissing an employee, especially when health issues are involved.

The label of the dismissal – whether related to capability or otherwise – does not stop the tribunal from considering the fairness of the dismissal. Based on this decision, it's immaterial whether redeployment is raised by the employee as a potential adjustment or otherwise; the issue must be considered by the ET as a "matter of course". ■

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Watch our business immigration webinar

In case you missed it, our recent webinar is available to watch on demand. The session sees our team guiding employers through the key points to consider when hiring non-UK workers; from right-to-work checks and sponsoring workers, to business visit visas and more.

This webinar is ideal for directors, senior executives, business owners, HR professionals and in-house legal advisors. You can **watch it here.**

Employee faces detriment after being outed for past protected disclosures

Mr Moussa was employed by First Greater Western Ltd (FGW) at Ealing station. In 2012, he submitted a written complaint about a manager, alleging that they had threatened and abused staff members. In 2013, the situation escalated, and Mr Moussa was dismissed for acting intimidatingly towards a representative.

Mr Moussa brought unfair dismissal and discrimination claims, and won. He was reinstated to his role, but transferred to Paddington station.

In 2018, Mr Moussa and his colleague Mr Larkin alleged a passenger had assaulted Mr Larkin. Both men were suspended pending an investigation into whether the allegations raised were false. Mr Larkin retracted his statement and returned to work, but Mr Moussa's suspension was not lifted, in breach of FGW's disciplinary policy.

Mr Moussa's solicitors raised a grievance. FGW's HR representative told colleagues that Mr Moussa raised various complaints twice a year and that he was a "confident individual" who had a "strong influence" on his colleagues. At the disciplinary hearing, Mr Moussa was issued with a first written warning.

Mr Moussa made claims for whistleblowing detriment, which he claimed arose from him bringing a tribunal claim in 2013, and complaints made about a manager in 2012. The Employment Tribunal (ET) agreed, finding that FGW held a negative "collective memory" towards Mr Moussa, and labelled him an "agitator" and "malign influence". FGW appealed, arguing that the tribunal should have found that, as the decision-maker in the investigation did not have personal knowledge of a protected disclosure, they could not be materially influenced by it when making their decision.

The Employment Appeal Tribunal (EAT) did not agree with FGW. It found that the tribunal were entitled to find the employer had labelled Moussa as an "agitator" and a "malign influence" and perpetuated a "culture of prejudice and ill will" towards him which encouraged the decision maker to treat Mr Moussa unfairly in a disciplinary investigation in 2018, leading ultimately to a written warning in 2019.

What should employers do?

This case highlights that detrimental treatment following a protected disclosure can occur a significant time after the disclosure itself (in this case six years). It's also a reminder to be cautious of language when discussing employees. ■

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Valimulla v Al-Khair foundation

Mr Valimulla worked for a faith-based charity, as a Masjid Liaison Officer ('MLO'), fundraising in the community, at the Bolton branch, but based at home. Four other MLOs were employed nationally in other parts of the country; however, Mr Valimulla was the only one who worked from home.

During the Covid-19 pandemic, due to places of worship being closed, charitable donations decreased, and Mr Valimulla was furloughed. He was placed in a redundancy pool of one, then made redundant and subsequently, he brought a claim for unfair dismissal.

At the Employment Tribunal (ET), it was found that the respondent's decision to dismiss by reason of redundancy was fair. The judge accepted that the claimant's role was "unique" and that the claimant was in a self-selecting pool of one.

Mr Valimulla appealed to the Employment Appeal Tribunal (EAT), arguing that the ET had failed to deal adequately with two questions, namely: the employer's decision not to pool him with the other four liaison officers and the failure to consult with him about the proposed pool of one. The appeal was successful, finding that the tribunal had accepted the employer's case that Mr Valimulla role was unique, notwithstanding the evidence that other employees performed the same role, albeit at different locations. Further, it did not appear to consider the reasonableness of the approach to put Mr Valimulla into a pool of one.

What should employers do?

This case emphasises two essential steps an employer must take to ensure a fair redundancy dismissal. Firstly, an employer must genuinely consider the question of the appropriate pool of employees and whether the pool selected is reasonable. Secondly, employers must meaningfully consult with affected employees about the provisional pool for selection, before making the final decision. ■

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Bodis v Lindfield Christian care home

Ms Bodis suffered from depression and anxiety and was dismissed as the result of an investigation into her conduct. The investigation found that she was responsible for several unusual and frequent incidents including:

- defacing photographs of female members of staff
- turning off a boiler which was clearly marked "please do not touch"
- destroying CQC reports
- destroying displays
- spilling water and reed diffusers
- intentionally blocking staff toilets.

Additionally, it was observed that during the interview stages of the investigation, Ms Bodis's answers were brief and evasive, which contributed towards the care home's rationale for disciplinary action.

Ms Bodis lodged a claim for unfair dismissal and discrimination arising from disability; fundamentally claiming that her behaviour and answers during those interviews were because of her disability.

The Employment Tribunal (ET) rejected both claims, acknowledging that her disability would have some impact on her conduct/answers but only a "trivial influence," therefore her dismissal could not be based on something which arose from her disability. The ET also found that the treatment was a proportionate means of achieving a legitimate aim, and the employer's objective justification defence was successful.

However, on appeal, the Employment Appeal Tribunal (EAT) disagreed on the basis that despite its minor nature, her conduct during those interviews was clearly a factor in the care home's decision making. Therefore, it amounted to being an "effective cause" of her dismissal and that while the events were "trivial", they could still have arisen because of her disability.

The EAT also upheld the ET's finding that the treatment was a proportionate means of achieving a legitimate aim.

What does this mean for employers?

As an employer, any decisions made which are motivated (even slightly) by an employee's disability could amount to an "effective cause" and be considered discriminatory. Therefore, it's important to keep a paper trail of all decision-making processes, containing all factors which were considered prior to any decisions being made. ■

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More news on our website **www.willans.co.uk**

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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