Employment law Dispatches

Willans LLP | solicitors

October | 2024

Welcome...

...to the latest issue of Dispatches, covering the most recent updates & case news in employment law.

If you'd like more in-depth insight into what current legislation means for you and your business, or a closer look at what the new government has planned for the year ahead, register for our free webinar on Thursday 15 October, where we'll be homing in the most important topics of the moment. Read on for more details.

Should you need our support, please get in touch with our team.

At a glance

- Fire & rehire
- Unfair dismissal
- Discrimination
- Sexual harrassment

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New duty on employers to take reasonable steps to prevent the sexual harassment of employees

Just over 14 years since the Equality Act 2010 was first introduced, The Worker Protection (Amendment of Equality Act 2010) Act 2023 (Worker Protection Act) is due to come into force on 26 October 2024. This amendment introduces:

- a duty on employers to take reasonable steps to prevent the sexual harassment of their employees
- giving employment tribunals the power to uplift discrimination compensation by up to 25% where an employer is found to have breached this new duty.

For further details on this and other employment law updates, sign up to our webinar.

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Free webinar: autumn 2024 employment law update

Tuesday 15 October 2024 | 10-11.30am including Q&A

Suitable for directors, senior executives, business owners, HR professionals and in-house legal advisors, this free online session will cover the new government's proposals for employment law, as well as the latest legislation, case law and immigration updates. To book your place, **click here.**

Fire & rehire: *Tesco Stores Ltd v USDAW and others*

In the practice of fire and rehire, many businesses may be wondering if there are limitations to be mindful of.

In the case of *Tesco Stores Ltd v USDAW and others*, Tesco undertook a reorganisation of its distribution sites in 2007, which resulted closures and therefore a redundancy situation. To avoid the redundancies, Tesco negotiated with the union USDAW to make enhanced payments known as 'retained pay', which was described as 'guaranteed for life' as long as employees remained in their current roles. In 2010, it was descried in a collective agreement as a 'permanent feature' and was incorporated into contract of employment and could only be altered by mutual agreement.

In 2021, Tesco announced that it would remove the retained pay and would enforce the change via dismissal and re-engagement on new terms. USDAW commenced proceedings against Tesco, seeking an injunction to stop the fire and rehire practice.

The Supreme Court enforced an injunction against Tesco, preventing the fire and rehire practice on the basis that the retained pay was confirmed to be a permanent feature of the contracts of employment which could not be changed, other than through mutual agreement. Tesco could not simply serve notice to avoid paying the retained pay.

What should employers do?

This case demonstrates the limits on the practice of fire and rehire and that caution should always be exercised when considering using this tactic. ■

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Employee facing criminal prosecution unfairly dismissed

Recently, the BBC faced widespread criticism for what many perceived as a slow and inadequate response to the criminal investigation of one of its former newsreaders. However, the reality of such situations for employers is often far more complex than it may appear to the wider public.

This was highlighted in the recent case by *Difolco v. Care UK Community Partnerships*. In October 2022, Ms Difolco (the claimant) was arrested and charged with murder, spending 30 hours in custody. Initially, her daughter informed Care UK (the respondent) that her mother would be absent with covid, but shortly after, the incident was reported in a local newspaper and the claimant informed her employer of the charges. She was suspended on full pay pending investigation.

Following the investigation, the respondent found that the claimant's failure to disclose the true reason for her absence caused a breakdown in trust and confidence. Additionally, they concluded that being named in a local newspaper could bring the company into disrepute. The claimant was dismissed for gross misconduct and the claimant brought a claim for unfair dismissal.

The claimant succeeded in her claim as the employment tribunal found that the respondent had failed to follow a fair process in that:

- they did not assess the actual risk of reputational damage
- the potential reputational damage was not discussed with the claimant during her disciplinary or appeal meetings
- alternatives to dismissal were not considered.

What should employers do?

Many employers may believe that criminal proceedings or conviction provide sufficient grounds for dismissing an employee. However, hasty or disproportionate action could result in a tribunal claim. Employers should carefully assess the impact of a charge or conviction on the employment relationship.

Additionally, they must ensure that any claims of reputational damage are fully supported by evidence.

This case serves as a reminder that steps must still be taken, and a fair procedure followed, despite scrutiny from other employees or the public. ■

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Disability discrimination: *Bradley v The Royal Mint Ltd*

Ms Bradley was employed by the Royal Mint and was diagnosed with anxiety and depression in 2013.

On two occasions, once in 2019 and once in 2021, Ms Bradley impulsively resigned, while displaying emotions/behaviours of a manic nature. She subsequently sought to rescind both resignations. On both occasions her manager agreed to this on the basis that Ms Bradley was evidently unwell.

In January 2022, Ms Bradley was diagnosed with ADHD, and was receiving support from a private psychiatrist. In May 2022, Ms Bradley received confirmation from her doctor that she was given an incorrect dose of medication which may have been the result of her feeling unwell.

In June 2022, Ms Bradley resigned without displaying symptoms of mental impairment. She outlined that:

- her personal financial situation had changed and she required a higher salary
- she no longer felt motivated by her current role.

As a result, her manager accepted her resignation, which was later confirmed via email. Ms Bradley also announced personally to staff that she was leaving and an internal announcement was made.

During July 2022, Ms Bradley requested to rescind her resignation, on grounds of mental impairment. However, on this occasion, her employer declined as:

- she had not shown symptoms of mental impairment at that time
- her departure had been announced
- she wanted a higher salary which was not feasible and, therefore, could resign again on this basis.

Ms Bradley made a claim for discrimination arising from her disability. Ms Bradley's claim was upheld on the basis that the Royal Mint had "closed its mind" to the possibility of medical impairment and should have sought medical help during their decision making in order to be in a postion to truly assess the impact.

What should you do?

As an employer, it is important to seek medical advice prior to any decision making regarding the impact of a disability on an employee's intention to resign.

Having medical advice and support that is tailored to the workplace ensures you are doing everything you can to support and manage your employees and protect the business. ■

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Unfair dismissal: *Cairns v The Royal Mail Group Ltd*

Mr Cairns was employed by Royal Mail in a post-delivery role with outdoor duties. He suffered a knee injury and osteoarthritis, a disability which meant he could no longer undertake work outdoors. As a result, he was temporarily moved to an indoor role.

Royal Mail began a consultation to dismiss him on grounds of ill-health retirement because he could no longer fulfil the outdoor job duties, and there were not any indoor vacancies available. Subsequently, he was dismissed.

Mr Cairns made a claim for unfair dismissal and argued that Royal Mail had failed to wait for an imminent merger of that postal centre (with another postal centre), which more than likely would have created indoor roles. He also claimed this was a failure to make a reasonable adjustment, which amounted to discrimination arising from disability.

Initially, the employment tribunal (ET) dismissed Mr Cairns' claim with the view that there must come a time when a surplus job must end.

However, the employment appeal tribunal held that the ET had used the circumstances at the time of the dismissal as the focal point for their reasoning, and by doing this, failed to consider an essential element of his claim - that Royal Mail ought to have kept him employed to then assign him an indoor role, following the merger. It would have been a reasonable adjustment to keep him in employment for this short period of time.

What should employers do?

It is important that you consider all alternative options, including those in the near future, when examining possible reasonable adjustments that can be made instead of focusing purely on the possibilities at that specific moment. ■

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Discrimination: rescinded job offer over social media views

In *Ngola v Touchstone Leeds,* the ET recently found that the employer had discriminated against Mr Ngola by rescinding his job offer after discovering Facebook posts in which he expressed his views on homosexuality and same-sex marriage.

Mr Ngola, a Christian social worker, applied for a position as a mental health support worker with Touchstone Leeds in May 2022. The role involved providing support for patients discharged from hospital, some of whom were members of the LGBTQ+ community.

He was successful in his application and received a conditional offer, subject to background checks and satisfactory references. The employer obtained two factual references and one that did not comply with their internal policy. As a result, they conducted a Google search, which uncovered a previous High Court case Mr Ngola had brought against his university after being removed from his course due to Facebook posts expressing his views on homosexuality and same-sex marriage.

The employer withdrew the offer without further discussion, saying that additional background checks had raised "significant concerns" and that the information found about Mr Ngola did not match the employer's values. Mr Ngola offered further references and an explanation, and so the parties met once more. Nevertheless, he wasn't re-offered the job.

Mr Ngola eventually brought tribunal claims of direct and indirect discrimination and harassment due to his religion or belief. However, only his claim for direct discrimination was successful.

The ET found that Mr Ngola's offer was withdrawn because of his public expression of views rooted in his religious beliefs, which concerned the employer. The tribunal ruled that the employer had wrongly assumed that expressing these views meant that Mr Ngola would discriminate against members of the LGBTQ+ community.

What should employers do?

Although this is only a first-instance decision, it serves as an important reminder to employers to carefully consider any steps taken after discovering problematic social media posts. The case law in this area is complex and constantly evolving. We are still awaiting the Court of Appeal's decision in *Higgs v Farmor's School*, which will hopefully provide further guidance on the matter, so watch this space. ■

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

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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