Employment Law Newsletter

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Constructive Dismissal

The Court of Appeal has recently reviewed the law on constructive dismissal and given useful guidance on the approach to various case scenarios.

An individual needs to have resigned in response to a repudiatory (fundamental) breach of contract by the employer.

Fundamental breach can be caused by breach of contract (e.g. reducing an employee's salary by 50% unilaterally) or can be due to the employer's breach of its duty not to behave in such a way as to destroy or seriously damage the trust and confidence between the parties

It also recognised that, in trust and confidence cases, a breach could be immediate e.g. the employer being unexpectedly physically violent to the employee. This is not a "last straw" or cumulative type case.

Other trust and confidence breaches could be gradual and cumulative. The resignation would be triggered by what can be referred to as the "last straw", or the final, triggering act in a series of acts that the individual argues together evidence a destruction of trust and confidence between the parties. The last straw does not itself have to be a fundamental breach but it must be more than just a trivial matter. In a case where the employee has not resigned, the last straw needs to be more significant if it is to form part of a case showing cumulative historic ill treatment by the employer.

References

It is well known law that an employer who chooses to give a reference must ensure that it is fair, true and accurate. The High Court has clarified general components of this duty. It nonetheless emphasised that each case would depend on its own set of facts.

An employer must:

- conduct an objective and rigorous appraisal of facts and opinion, particularly negative opinion, whether those facts and opinions emerge from earlier investigations or otherwise;

- take reasonable care to be satisfied that the facts set out in the reference are accurate and true and that, where an opinion is expressed, there is a proper and legitimate basis for the opinion;

- where an opinion is derived from an earlier investigation, take reasonable care in considering and reviewing the underlying material so that the reference writer is able to understand the basis for the opinion and be satisfied that there is a proper and legitimate basis for the opinion; and

- take reasonable care to ensure that the reference is fair, and not misleading either by reason of what is not included or by implication, nuance or innuendo.

If you are unsure, please seek advice as careless references can often result in substantial damages (at least 5 figures).

Disability

The Court of Appeal, in an important ruling, has confirmed that a dismissal can be unfavourable treatment under Section 15 of the Equality Act 2010 even if the employer did not know that the disability was connected to the misconduct. It also flagged up that upholding a Section 15 claim was not inconsistent where an unfair dismissal claim based on the same facts was unsuccessful. That is because the two tests are different and the range of reasonable responses test for unfair dismissal allows the employer significant latitude.

To succeed an employee will have to show a causal link between dismissal and the disability, and demonstrate that the employer's treatment of him/her by the act of dismissal was not justified.

On the facts in this case, a teacher with cystic fibrosis was suffering from stress due to his workload. He was dismissed for showing an 18 rated film to students aged 15 and 16 and argued that this error of judgment arose from stress linked to his disability. The Court of Appeal found that the employment tribunal was correct in assessing the stress as being caused by the Claimant's disability, that the Claimant's apology was sincere and that the Claimant should have only received a final warning as opposed to a dismissal.

The learning on this case is that the medical evidence needed to be much more extensive during the school's disciplinary procedures and that any disciplinary action must be proportionate to the offence. In cases like this one, it doesn't always follow that dismissal will be merited. A tribunal is entitled to have its own view and disagree under the Equality Act, which is something that it cannot do in unfair dismissal cases.

When does notice take effect ?

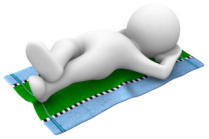
The Supreme Court has confirmed that notice will take effect when it has been received by an individual and they have either read it or had a reasonable opportunity to do so. This can be quite important in employment cases, particularly on time limits to bring a claim and on the facts, pension entitlements.

Consequently, several practical points need to be looked at:

1) Contracts should specify how notice is to be given (oral/written?) and when it is deemed to be served.

2) It is worth reviewing procedures. Should a notice be sent by recorded post or even by email? Ideally, things should be done in person as that minimises the ability to argue points about service and notice periods.

Inadequate rest breaks- no entitlement to injury to feelings



The Court of Appeal has confirmed that where an employer has breached the Working Time Regulations (WTR) by not providing adequate rest breaks, a tribunal cannot award injury to feelings to employees as part of their claim for damages.

Although the WTR allows tribunals to award compensation they consider 'just and equitable' for non-compliance, it should be limited to the extent of the employer's default and the worker's loss. In other words, loss is likely to reflect the amount of additional time worked. It will be interesting to see if this is appealed to the Supreme Court.

DBS Checks

The Home Office and the Disclosure and Barring Service have updated their guidance for employers on requesting DBS checks for potential employees. There is plenty of practical advice including guidance on the DBS's online application form for basic checks. www.gov.uk has all the details.

Disability Discrimination- working long hours can be a PCP

Under the Equality Act 2010 an employer must make reasonable adjustments when there is a provision criterion or practice (PCP) which puts a disabled person at a substantial disadvantage compared with a non-disabled person.

The Court of Appeal has confirmed that a PCP can exist where an employee is required to work long hours. It advised that in these types of cases, a broad analysis should be done on hours, employer's expectations and how the employee viewed matters rather than focusing on the degree of compulsion to work late.

Consequently, employers need to think very carefully about these matters as this ruling does make it easier to succeed with claims under the Equality Act for stress.

Consent under the GPDR

The Information Commission has just published its final version of its guidance on Consent under the GPDR. (see website: www.ico.org.uk)

The guidance confirms that GDPR sets a higher standard for consent than was previously the case under the DPA 1998 and the changes should give people genuine choice and control over how their data is used. Key points include:

- Making pre-ticked opt-in boxes invalid.
- Giving individuals options to consent separately
- Requiring organisations and third-party controllers who will be relying on the consent to be specifically named in any consent request.
- Requiring adequate records to be kept of what has been consented to and where consent has been withdrawn.
- Making it easy to withdraw consent at any time.

The GDPR also includes specific provisions relating to Children's consent for online services and new accountability and transparency requirements concerning the lawful basis for processing being relied on and retention of data after consent is withdrawn.

Contact details

If you have any queries relating to this newsletter or wish to seek employment law advice or discuss training needs, please contact: **andrew.brett@norfolk.gov.uk, 01603 223101**

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