3 HARE COURT

Employment Law Update

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to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or would like further information then please do not hesitate to contact our marketing manager, Carolyn Harris.

Conferences

We are often invited to speak at conferences in the UK and abroad. If you have a query concerning a conference then please get in touch with our marketing manager, Carolyn Harris.

Clerks

We have an experienced and approachable clerking team who will be happy to assist with recommendations, fees, our service protocol or general enquiries. Please contact the clerks on 0207 415 7800. Alternatively please contact the Senior Clerk, James Donovan.

Feedback

As always at 3 Hare Court we welcome your feedback. In particular, any feedback or suggestions on this and forthcoming updates will be gratefully received.

Please contact our marketing manager, Carolyn Harris with any queries.

Employment Law and 3 Hare Court

We regularly appear in the employment tribunals and EAT. Silks in chambers have

High Court which prevented the disciplinary panel from considering whether the allegations amounted to gross misconduct. The Court of Appeal upheld the Trust's appeal and set aside the order made at first instance.

Lord Hodge JSC (giving the only judgment) held that the evidence against Dr Chhabra was not "capable when taken at [its] highest of supporting a charge of gross misconduct". He further found that the involvement of Mr Wishart in the investigatory process was a breach of the implied contractual right to a fair process.

It was noted that as a general rule it is inappropriate for the courts to intervene in minor irregularities in the course of disciplinary proceedings as this would amount to a micro-management of those proceedings. However, the categorisation of Dr Chhabra's conduct as gross misconduct in of itself was a sufficient ground for an injunction. This was irrespective of the fact that any common law damages to which Dr Chhabra may obtain based on the irregularities was likely to be very small.

This claim is a salutary warning to employers to ensure that disciplinary proceedings are properly and fairly conducted if they are to avoid the time and expense of proceedings for injunctive relief.

Equal Pay claims under the Equality Act 2010

In ***Calmac Ferries v Wallace*** the EAT has considered the equal terms provisions (ss64-80) the Equality Act. This is one of the first times these provisions have been considered at this level. This is important. As Mr Justice Langstaff noted in his judgment, that the Equality Act is not merely a consolidating act.

The two Claimants were female port assistants who claimed that they ought to be paid the same as two outport clerks. It was accepted by the Respondent that the work of port assistants and outport clerks was comparable. Initially the claim forms were drafted by the Claimants in person and it appeared that the complaint was one of fairness in pay rather than equality as between the sexes in pay and terms and conditions. Despite this the claim was treated as one made under the Equal Terms Provisions of the Equality Act.

On obtaining legal advice, further particulars were served alleging that the Claimants were indirectly discriminated against due to sex with specific reference made to the outport clerks. The Respondent was put to proof that the difference in pay arrangements between the port assistants and outport clerks could be explained by a genuine material factor. In the ET3 it was stated that the genuine material factor was that the two roles historically had different duties and responsibilities and pay arrangements.

experience of employment and discrimination issues in the High Court and Court of Appeal.

Members deal with a range of work from straightforward issues of unfair dismissal and redundancy to issues of equal opportunities, discrimination and human rights. This includes the seminal case of Bull & Bull v Preddy & Hall [2013] UKSC 73 where the Supreme Court determined whether it was discrimination not to provide goods and services on the grounds of sexual orientation.

Additionally, members regularly deal with the full range of discrimination claims under the Equality Act 2010 including direct and indirect discrimination, whistleblowing, victimisation and harassment in multi-day hearings for both Claimants and Respondents.

For more information and examples of cases, please visit our Employment Law page.

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The Respondent applied for the Claimants' claims to be struck out and relied on *Nelson v Carillion* [2003] ICR 1256, namely that the Claimants had failed to establish a *prima facie* case of indirect discrimination. Their application was refused.

On appeal, it was held that the burden of proof was set out in s69(2) Equality Act and that *Nelson* did not have to be relied on. The starting point is therefore for an employer to show that the difference in pay between the sexes was because of a material factor. Although the Respondent has alleged there was a material factor defence in the ET3, it had not been conceded by the Claimants. It could therefore be considered that there was a *prima facie* case of discrimination as set out in ss65 and 66 of the Equality Act.

No dividing line between holding and manifesting a religious belief

In *Grace v Places for Children* UKEAT/0217/13/GE the EAT considered whether there could be a distinction drawn between holding a religious belief and manifesting it.

The Claimant was a nursery manager who was dismissed by her employer for gross misconduct. She alleged that she had been subject to unlawful discrimination because of her religion including but not limited to her dismissal. When the employment tribunal gave their reasons, they equated the case with the case of *Chondal v Liverpool CC* [2009] UKEAT 0298/08/1102 where the Claimant was dismissed because it was held that he had improperly foisted his religious beliefs on service users.

On hearing the appeal, the EAT determined that any attempt to draw a distinction in principle between holding a religious belief and manifesting it would not be a sound one. Employment Tribunals were advised to take into account paragraphs 2.50 to 2.61 of the Code of Practice on Employment 2011 issued by the Equality and Human Rights Commission. The Code states there is no clear dividing line between holding and manifesting a belief and that an unjustified unfavourable treatment because of manifesting religious belief may amount to unlawful discrimination. In this claim, the EAT held that it was because of the inappropriate manner in which the Claimant had manifested her religion rather than the manifestation itself which led to the dismissal. Accordingly the dismissal was not for an impermissible reason.

Get in touch

We hope you have enjoyed this issue of the Employment Law Update. If you are dealing with a similar case or wish to discuss any area of employment law, please **get in touch** to arrange a short informal discussion.

The next edition of the Employment Law Update is due in February.

Until then!

Chambers of Peter Knox QC

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