Know your law - March cases of interest

"Employment Law Round-Up - March 2021"

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From Covid-19 safety to sex discrimination, from Cabinet Minister bullying to whistleblowing – March's stand-out employment law cases are a revealing reflection of human relations and interaction in the workplace…are you up to speed on the latest employment law?

Click the links below to view the case:

- one of the first cases to address a claim for automatic unfair dismissal on health and safety grounds during the pandemic…

Mr D Rodgers v Leeds Laser Cutting Limited

- a discrimination appeal for a father seeking the same rights as women on Shared Parental Leave

Mr B Price v Powys County Council

- a Whistleblowing appeal case - factors for employees who make a protected disclosure claim

Twist DX Limited and others v Dr Niall

- Priti Patel bullying case ends in settlement - Will the claim value set a precedent?

Mr P Rutnam v Home Secretary

- Supreme Court considers if Asda's store and depot workers are on unequal pay? See the 'North hypothetical test' in action

Asda Stores Ltd v Brierley and others

Cases of Interest - pandemic

Mr D Rodgers v Leeds Laser Cutting Limited

This will be of interest to many employment lawyers, as it is one of the first cases to address a claim for automatic unfair dismissal for health and safety reasons during the Covid-19 pandemic.

In this case, the Claimant, Mr Rodgers, worked in a large warehouse-type workplace, where there were typically five people working on the shop floor. Prior to 23 March 2020 (lockdown day), the Respondent, Leeds Laser Cutting Limited, had commissioned a risk assessment and implemented some recommended Covid-19 safety measures. These included: staggered start, break, and finish times, social distancing, mask wearing, and wiping surfaces.

At the hearing, Mr Rodgers accepted that these precautions had been implemented, and the Employment Judge believed that it was possible for Mr Rodgers to follow these precautionary measures. On 16 March 2020, one of Mr Rodgers' colleagues started displaying symptoms of Covid-19 and was sent home to self-isolate. In his original claim form, Mr Rodgers said he had been working with this colleague and had developed a cough himself on the day that the colleague was sent home to self-isolate. However, his claim was later amended to say that his cough did not develop until 27 March 2020.

Mr Rodgers left work on 27 March 2020 and was asked to self-isolate until 3 April 2020. On 29 March 2020, Mr Rodgers sent a text to his employer, in which he wrote that he had no alternative but to stay off work 'until the lockdown has eased' (emphasis added). At the hearing, Mr Rodgers was not able to clearly state his concerns about the pandemic. One the one hand, he said that, if the above precautionary measures had been implemented, his employer's workplace would be as safe as possible, and on the other hand, he said that he was not sure that any measures would have made him feel safe enough to return to work. The Employment Judge also found that Mr Rodgers was not very clear about how he had raised concerns with his employer and what he had said, and they believed that Mr Rodgers did not make any meaningful concerns or complaints that would have let the employer know that there were 'circumstances of imminent danger' in the workplace.

The Judgment

Ultimately, the Employment Judge decided that, while Mr Rodgers had genuine concerns about the pandemic, he did not believe that there were circumstances of serious and imminent danger within his employer's workplace. Instead, Mr Rodgers simply believed that there were circumstances of serious and imminent danger all around. The Employment Judge also had to look at what the guidance was at the time when Mr Rodgers refused to return to the workplace, which was to socially distance, use PPE where possible, and to regularly wash hands.

The Impact

All of these were possible at Mr Rodgers' employer's workplace. Importantly for future cases on this topic, the Employment Judge was not persuaded, in the context of the pandemic, that there could be a reasonable belief in serious and imminent danger which could not be averted when there were safety measures in place. The Employment Judge decided that, if they were to accept this principle, they would have to accept that the very existence of the virus would enable all employees to refuse to work.

The Case

Mr D Rodgers v Leeds Laser Cutting Limited
ET/1803829/2020

Cases of Interest - discrimination

Mr B Price v Powys County Council

In this case, the Employment Appeal Tribunal (EAT), heard an appeal about a claim in which Mr Price, the Claimant, said that he had been discriminated against because of Powys County Council, the Respondent's, policy on Shared Parental Leave. He believed the policy to be discriminatory because he was only able to get pay equivalent to statutory maternity pay (SMP), whereas a female employee on adoption leave (under a different policy) would receive full pay.

To summarise his claim, which was for direct discrimination based on sex, Mr Powys compared himself to a female employee who was on adoption leave under the Respondent's 'Supporting Working Parents' policy. When an employee makes this kind of comparison, the person they are comparing themselves with is called a comparator. A comparator can be either real – meaning that they actually exist – or hypothetical – meaning that they do not exist. It is a requirement of a direct sex discrimination claim for the claimant to identify comparators.

The Judgment

When deciding whether Mr Powys' appeal could be allowed, the EAT had to consider whether there was a material difference between Mr Powys on shared parental leave and his comparator, a female employee on adoption leave. In this case, the EAT decided that there was a material difference, which it described as a difference that is significant and relevant, namely that the predominant purpose of adoption leave was not simply to facilitate childcare, so it was not the same as shared parental leave. The EAT concluded that a more appropriate comparator to Mr Powys would be a female employee on shared parental leave, who would be entitled to the same pay as Mr Powys, so the policy is not discriminatory.

The Impact

This case highlights the importance of choosing appropriate comparators when bringing a claim for discrimination, especially when the discrimination is based on the operation of a policy. It is also important as an err in law (in other words, a mistake) in the employment tribunal's original decision was found not to have affected the validity of its findings as a whole.

The Case

Mr B Price v Powys County Council
UKEAT/0133/20/LA

Cases of Interest - store or depot worker?

Asda Stores Ltd v Brierley and others

In this case, the Supreme Court was asked to consider whether Asda store workers can compare themselves with Asda depot workers, where each group works in mutually exclusive establishments. To greatly summarise this case, the Supreme Court said 'yes'.

The key test that the Supreme Court had to consider was, if depot workers were moved to work in Asda stores, would they remain on common (i.e., broadly similar) terms to those employed in depots? This test is referred to as the North hypothetical.

The Judgment

The Supreme Court asked itself what would happen to the depot workers' terms if Asda depot workers started working at the same establishment as Asda store workers. It found that, if this were to happen, the depot workers' terms would be the same as other depot workers' terms who were not employed at the same establishment as Asda store workers.

It did not believe that depot workers would be employed on the same terms as a retail worker even where their place of work was an Asda store.

The Impact

This judgment is important for two reasons: first, it hopes to simplify the process by which future cases involving similar issues are determined. Second, it is very significant for Asda, who employs approximately 133,000 hourly-paid retail employees.

However, all that has been determined is that Asda store workers can compare themselves with depot workers.

It has not yet been determined whether Asda store workers performed work of equal value to depot workers, so this judgment does not mean that the Asda workers' claims for equal pay are bound to succeed.

The Case

Asda Stores Ltd v Brierley and others
[2021] UKSC 10

Cases of Interest - whistleblowing

Twist DX Limited and others v Dr Niall Armes and another

This was an appeal about a whistleblowing case, the details of which are not necessarily relevant to the importance of this case. Rather, this case sets out useful information for employees who might be considering blowing the whistle or – more properly – making a protected disclosure.

Whistleblowing is an incredibly complex area of law, with claimants expected to clear multiple hurdles before achieving success. Helpfully, this case seems to make the job slightly easier for employees by removing some of the stricter conditions.

Whistleblowing - issues to consider

To understand these conditions, the case also confirm that the list of issues which an Employment Tribunal should consider when determining whether something amounts to a protected disclosure. These are:

1 There must be a disclosure of information

2 The worker must believe that the disclosure is in the public interest

3 If the worker does hold such a belief, it must be reasonably held

4 The worker must believe that the disclosure tends to show one or more of the matters listed in the legislation

5 If the worker does hold such a belief, it must be reasonably be held.

The Impact

This case adds to this by providing that the above factors should be read broadly and interpreted so as not to place too great a burden on employees. It also adds that it is possible to consider not only what was disclosed but also the context within which the information was disclosed. Further, when considering the reasonable belief in the public interest, the case acknowledges that there can be more than one reasonable view and that a belief can be reasonable even if it is wrong.

While the hurdles that employees have to clear have not been removed, they have hopefully been lowered slightly by this case.

The Case

Twist DX Limited and others v Dr Niall Armes and another, UKEAT/0030/20/JOJ

Cases of Interest - bullying & settlements

Mr P Rutnam v Home Secretary

Admittedly, there is no judgment to write about here. This is the well-known case brought by the former Permanent Secretary concerning bulling allegations against Priti Patel. It was reported on 4 March 2021 that this case was settled for £340,000.

A condition of that settlement almost certainly means that we may never know exactly what was alleged by Mr Rutnam, but we know that he brought a claim of constructive unfair dismissal, possibly among other things. In fact, it is quite likely that he also brought claims for whistleblowing given the allegations that Ms Patel had broken the Ministerial Code and that there was a statutory cap for unfair dismissal cases brought in the Employment Tribunal of 52 weeks' gross pay or £104,659 (whichever is lower).

This cap does not apply however, when the claimant was carrying out health and safety activities, had made a protected disclosure, or was selected for redundancy for one of those reasons.

The Impact

The high value of this settlement, however, is why I have included this case, as I think it is worth considering whether all claimants or prospective claimants should expect their cases to settle for a figure within the same ballpark. In most circumstances, the response will be 'no'. As above, the vast majority of unfair dismissal cases are subject to a cap of 52 weeks' gross pay. Additionally, very few cases will have such a substantial risk of negative publicity for the employer as Mr Rutnam's.

However, it is reasonable for most claimants or prospective claimants to expect their case to settle, or to at least to expect the opportunity for their case to settle. While many claimants are rightfully motivated by principle, and similarly many respondents are motivated by righteous conviction in their actions, litigation is unfortunately costly, time consuming, and uncertain.

Settlements provide an efficient way for both parties to draw a line in the sand and part ways on the best terms possible, and they can also achieve many things that Employment Tribunals simply cannot offer. While the value of Mr Rutnam's settlement certainly suggests that the Home Secretary did not have great confidence that her defence to his claims would succeed, it is not always correct that a settlement or an offer of settlement is an admission of liability or weakness by either side. Often, they are just eminently practical.

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