EMPLOYMENT LAW CASE UPDATE

A summary of six employment law cases that have determined important issues that would be beneficial for employees and employers to know.

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1. Clare Jackson v University Hospitals North Midlands NHS Trust [2023] EAT 102

Contract Variation

Clare Jackson was employed at University Hospitals North Midlands (UHNM) as a band 6 specialist research nurse. The UHNM decided unilaterally to restructure the nurses in the research department. Ms Jackson was slotted into a band 5 general role. She refused to sign the contract for the new role and resigned a few months later.

Ms Jackson then brought a claim against her employer for unfair dismissal, statutory redundancy pay, and breach of contract. Her employer submitted that she continued to work when she was slotted into the band 5 role and therefore accepted the new terms imposed. The Employment Tribunal agreed.

On appeal, the Employment Appeal Tribunal found that the principle in *Hogg v. Dover College*, applied. An employee can work in their new role under protest and still bring a claim for unfair dismissal under the old contract. The EAT determined that the variation unilaterally imposed in this case had the effect of terminating the band 6 contract as opposed to continuing it on new terms. Thus, the Claimant could not be said to affirm the new terms imposed, she was, therefore, unfairly dismissed and entitled to redundancy pay.

2. Joseph De Bank Haycocks v ADP RPO UK Ltd [2023] EAT 129

Redundancy Consultation

Joseph De Bank Haycocks was employed as a recruiter in a team of 16. During the coronavirus pandemic, demand for employees diminished and the decision was made to reduce the number of recruiters. Each recruiter was scored on a subjective selection matrix. Joseph was scored the lowest. After the scoring, the redundancy process began, and consultation meetings were held.

Mr De Bank Haycocks was informed that he was being made redundant at the third meeting. He appealed the redundancy decision but was unsuccessful. He then brought a claim for unfair dismissal which the ET rejected on the basis that he did not demonstrate

that he should have scored higher than any of the other recruiters. Mr De Bank Haycocks appealed the ET's decision for failing to consider the issue with the consultation process.

On appeal, the Employment Appeal Tribunal determined that there was no consultation at the formative stage when scoring occurred; consultation should take place at a time when it can make a difference to outcomes unless it would be futile; there was no good reason for consultation not to take place in this case. The matter was then remitted to the same ET tribunal to decide on remedy.

3. Clark and others v Sainsbury's Supermarkets Limited [2023] EWCA Civ 386

ACAS Reference Number

Multiple employees brought equal pay claims against their employer Sainsbury's. Early conciliation was unsuccessful. An EC certificate was issued naming the lead claimant with the other claimants attached and each Claimant issued their claim. Sainsbury's applied for four categories of claims to be rejected for failure to comply with Rule 10 of the Employment Tribunals Rules and Procedure 2013.

On the ET1 forms some Claimants did not include the EC certificate number or any numbers for that matter from the EC certificate. These were category 4 Claimants. The Employment Tribunal struck out the category 4 claims as their forms did not refer in any way to their corresponding EC certificate.

On appeal, the EAT reinstated the claims and the CA upheld the decision. The court applied a purposive rather than literal interpretation of the regulations. The purpose of the regulations was fulfilled because the Claimants contacted ACAS and obtained an EC certificate before the claims were issued. Sainsbury's raised a technical reason for excluding the claim and the court would not be fulfilling the overriding objective if the claims were allowed to be struck out for a technical error.

4. Independent Workers Union of Great Britain v Central Arbitration Committee and another [2023] UKSC 43

Recognising Trade Unions

A group of Deliveroo riders in London joined an independent trade union and requested that the Union negotiate on their behalf for better working conditions. Deliveroo refused to recognise the Union as representatives for the riders. The Union applied to the Central Arbitration Committee for an order to be recognised pursuant to the Trade Union and Labour Relations Act.

Deliveroo challenged the jurisdiction of the CAC, that the riders did not fall within the definition of "workers" in the Act. The CAC agreed. The Union applied for judicial review of the decision of the CAC. The Union argued that the riders enjoyed Article 11 rights to freedom of assembly and association and the definition of "workers" in the Act should be read to include them.

The High Court dismissed the Union's judicial review application. The Court of Appeal and supreme court upheld that decision. The Supreme Court found that there was no employment relationship between Deliveroo and the riders for the purposes of Article 11. The riders were not required to provide personal service as they could be substituted by another rider at any stage of the delivery process.

5. Dr Paul Leaney v Loughborough University [2023] EAT 155

Affirming Contracts

Dr Leaney was a teacher and warden at the respondent university. An incident occurred on one of the wards overseen by Dr Leaney. Some students raised a complaint regarding his handling of the incident. Dr Leaney was investigated. He then raised a grievance which was rejected. Dr Leaney appealed against the outcome of the grievance.

No steps were taken to organise an appeal panel. Dr Leaney resigned after receiving an email that suggested the university would do nothing further about his grievance. He then brought a claim for constructive unfair dismissal. The university argued that he had affirmed the contract by continuing to work for 3 months after the date of the last act that triggered his resignation.

The ET agreed with the university and dismissed Dr Leaney's claim. On appeal to the EAT, the tribunal determined that the ET erred on the law by examining the missing features that

would point to affirmation as opposed to examining what features were present that would also point to affirmation. These included the negotiation period, sick leave, summer holidays, and his length of service. The matter was remitted to the ET tribunal to re-visit the question of affirmation.

6. Sean Pong Tyres Ltd v Mr Barry Moore [2024] EAT 1

Liability After TUPE

Mr Moore was employed by Sean Pong Tyres Ltd during which period he was subject to harassment by another employee Mr Owusu which led him to resign. Mr Moore brought a claim in the ET for unfair constructive dismissal, harassment, and age and race related discrimination. The case management proceedings were held, and a date set for final hearing.

At the final hearing the Respondent applied to amend their response. They wished to argue that the liability for the claims had passed to another employer after a TUPE transfer. The tribunal refused the application because there was no real explanation for the failure to raise the issue earlier, the application involved a fundamental change in position, and it would cause a major delay.

On appeal, the EAT upheld the decision. The tribunal determined that Mr Moore resigned before the TUPE transfer, he was never employed by the new employer, liability for unfair dismissal lay with the Claimant's employer, hence liability remained with the Respondent even when the actions were by an employee that had been transferred in the TUPE.

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