UK Employment Law Round-up

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In this issue, we review a raft of discrimination decisions tackling a range of thorny considerations in relation to both direct and indirect discrimination, look at an insurer's ability to pursue claims directly against a fraudulent employee, and lastly, report on a case which considers the extent to which procedural defects in a dismissal process can be cured at the appeal stage.

Proving unlawful discrimination – lackadaisical attitude of investigator may not amount to discrimination

Evidencing discrimination can be difficult, usually because there is often no way of proving why a person has acted in the way that they have. The law recognises this difficulty and reflects it in its rules relating to the burden of proof i.e. who needs to prove what in order for claims to proceed. Where an allegation of unlawful discrimination is made, it is the claimant's responsibility to provide sufficient evidence from which an inference of unlawful discrimination can be made by the Tribunal. It is then for the respondent to show that the reason for the treatment was not discriminatory.

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The facts

In *The Chief Constable of Kent Constabulary v. Bowler*, PC Bowler brought claims of race discrimination and victimisation against the Chief Constable of Kent Constabulary (Kent Police), complaining about the way in which his grievance was handled by Kent Police. Mr Bowler, of Asian descent, had served as a police officer for 25 years and his grievance stemmed from his attempts to gain promotion. The Employment Tribunal held that Mr Bowler's grievance was dealt with in an incompetent manner and that the investigator displayed a lackadaisical approach. As a result, the Tribunal found that there was a case of less favourable treatment on the grounds of race. Kent Police appealed on the grounds that the failings highlighted by the Tribunal were not sufficient to transfer the burden of proof to it as the employer.

The issue

The EAT had to determine whether there was an error in law in how the Employment Tribunal had approached the complaints and whether, as disputed by Kent Police, the correct burden of proof test had been applied.

The court's decision

Unlawful direct discrimination can occur when an individual makes stereotypical assumptions about another; however, there must be some evidence that allows the Tribunal to infer that an alleged discriminator held a stereotypical assumption which affected the way they treated the complainant. Here, the EAT looked at the evidence that was before the Tribunal in relation to the failure to investigate Mr Bowler's grievance. The Tribunal found that the individual who heard the grievance had not previously heard a grievance, nor had he had any training in dealing with grievances. Instead, the individual did not take the case seriously and asked the relevant officers if they were "racist", based on the Oxford Dictionary definition of racism.

As a result, in this case, the EAT held that the Tribunal failed to establish that the individual who heard the grievance had a stereotypical assumption which led him to treat Mr Bowler less favourably. Instead, the EAT found that this was an "incompetently handled grievance" which was handled with a "lackadaisical approach". Though it was critical of the apathetic and incompetent approach in handling Mr Bowler's grievance, it found this did not, in itself, amount to discrimination. While it recognised that this was unreasonable, it could not agree with the Employment Tribunal's finding that this constituted less favourable treatment.

The Tribunal's decision was an error in law because there was no obvious or logical link between a careless grievance process and discrimination in these circumstances. Therefore, the EAT overturned the Employment Tribunal's finding of unlawful race discrimination and remitted the case back to the Tribunal for reconsideration.

Comment

This case confirms that a poorly handled grievance will not, in itself, indicate that an individual has been discriminated against. A claimant must present a set of facts giving rise to an inference that there was discrimination before the burden of proof can shift on to the respondent to qualify its actions and show that it did not act in a certain way as a result of a protected characteristic, but that it was for another non-discriminatory reason.

Supreme Court rules in two indirect discrimination cases

For a claimant to prove indirect discrimination, he or she has to show that there is a provision, criterion or practice which puts him or her (and others who share the protected characteristic) at a disadvantage against those who do not have that protected characteristic. Common scenarios in the modern workplace include the barriers to career progression faced by working mothers who cannot meet an expectation of long working hours, or who suffer from a lack of flexible working arrangements. In the following combined cases, the Supreme Court reaffirmed that claimants do not need to prove a causal link between a protected characteristic and the treatment suffered.

Essop and ors v. Home Office (UK Border Agency)

In Essop and ors v. Home Office, there were 49 claimants employed by the Home Office. The employees were required to pass a generic Core Skills Assessment (the Assessment) in order to gain promotion to a higher Civil Service grade. The 49 claimants all failed to pass the Assessment and were not promoted. A report

revealed that the older candidates had lower pass rates than the younger candidates, and the black and minority ethnic candidates had lower pass rates than the white candidates. These results were not explicable.
The claimants took their case to the Court of Appeal (CA) but failed in their appeal as they were unable to show that the reason they failed the Assessment was because of their protected characteristic, despite the fact that the results of the report revealed a correlation between age and race and success rates.

The Supreme Court unanimously held that the employees were not required to explain the reason why a protected characteristic caused an individual, or group, disadvantage. The Supreme Court concluded that it was sufficient for the claimants to simply demonstrate that they had suffered a disadvantage at all, and that the disadvantage suffered by the group and individuals was the same.

Despite this, it remains open for a respondent to show that there is no causal link between the provision, criterion or practice and the disadvantage suffered on an individual or group level. For example, a respondent would be free to show that an individual failed the Assessment because he or she did not complete the exam, rather than as a result of a provision, criterion or practice.

Naeem v. Secretary of State for Justice

In this case, before 2002, Muslim prison chaplains were engaged on a sessional basis, until they moved to a salaried basis in 2004. The Prison Service pay for chaplains (of any religious denomination) in relation to their length of service as salaried employees. As Muslim prison chaplains only became salaried employees in 2004 and had a lower length of recognised service as a result, Christian prison chaplains were paid more than them on average. Therefore, in this case, the pay scheme operated by the Prison Service was the provision, criterion or practice that was causing the disadvantage.

The CA concluded that indirect discrimination was not present in this case as the reason for the disadvantage (the length of service) was cursorily unconnected to the protected characteristic.

However, the Supreme Court rejected this and held that, on the simplest analysis, the very fact that Muslim chaplains were paid less than Christian chaplains (on average) meant that there was a link between religion or race and lower pay. The Supreme Court reasoned that this amounted to indirect discrimination requiring justification. In addition to its conclusions in *Essop*, the Supreme Court held that is not necessary for the reason for the disadvantage to be related to the protected characteristic. In the same way that women undertaking greater responsibility for childcare is not intrinsic to being a woman, the perceived lack of need for Muslim prison chaplains before 2002 was also a result of social conditions.

As a result, the Supreme Court considered that the main issue to be determined was whether the pool of employees to be analysed should be all chaplains, or only chaplains whose employment started after 2002. It concluded that the pool should include everyone affected by the provision, criterion or practice. A failure to look at the whole pool would go against the very nature of indirect discrimination claims as it would disregard seemingly neutral practices that create barriers for certain groups. In any event, the claimants were unsuccessful as the Prison Service was able to demonstrate that its pay structure pursued a legitimate aim of rewarding service through an intermediate pay system.

Comment

Despite the clarification offered by these decisions, it is important that employers remember that they still have the ability to justify indirect discrimination by showing that the provision, criterion or practice was a proportionate means of achieving a legitimate aim. Only where an employer fails to show this justification will a claimant succeed with its claim. Although it remains difficult for claimants to succeed in indirect discrimination cases, it is still important that employers assess whether there are any less discriminatory means by which they can achieve the same aim.

The sky does have a limit when it comes to the age of commercial pilots

The default retirement age in the UK was abolished on 6 April 2011. Since then, some employers have set their own fixed retirement age. However, in order to implement a fixed retirement age, and avoid successful claims of direct age discrimination, employers must be able to show that the limit is objectively justified. The limit must be intended to meet a legitimate aim and having that retirement age must be a proportionate means of achieving that aim. Another way to defend an age discrimination claim might be to rely on the occupational requirement defence under the Equality Act 2010.

In the historic UK case of *Seldon v. Clarkson Wright & Jakes,* an employment tribunal decided that a law firm's compulsory retirement of a partner at the age of 65 was objectively justified. The tribunal highlighted the requirements for justifying an age restriction on partners at a law firm. The tribunal looked at various factors in coming to its decision, including the firm's aims of retention and workforce planning, the partners' consent to the retirement age when signing the partnership deed, collegiality, the state pension age at the time and case law coming from the European Court of Justice which upheld a mandatory retirement age of 65 in respect of a variety of aims.

In the recent German case of *Fries v. Lufthansa CityLine GmbH C-190/16*, the Advocate General gave an opinion on the latest challenge to the imposition of an age limit in employment. This dealt with the age restrictions imposed on commercial airline pilots and reaffirmed the requirements courts will look to in order to justify direct age discrimination.

Relevant legislation

The Advocate General's opinion in this case was considered in light of the EU Regulation on Civil Aviation Aircrew (the Regulations). The Regulations provide that when a pilot reaches the age of 65 he or she can no longer undertake "commercial air transport" by flying commercial aircraft. Furthermore, a pilot between the ages of 60 and 65 is only permitted to pilot a commercial aircraft where he or she is part of a multi-pilot group in which all other pilots are below the age of 60. The Advocate General considered whether the Regulations were compatible with reference to the EU Charter of Fundamental Rights (EU Charter), which states that:

- under article 15, everyone has the right to engage in work and pursue a freely chosen occupation; and
- under article 21, any discrimination on the grounds of age (amongst other things) shall be prohibited.

The facts

Mr Fries was a pilot for Lufthansa in Germany. His employment was subject to a collective agreement which provided that his employment would terminate two months after his 65th birthday, when he reached the retirement age provided for in the pension scheme. However, on turning 65, Mr Fries was dismissed. Lufthansa relied on the Regulations to explain his dismissal. Mr Fries countered Lufthansa's position by arguing that he could have continued with his employment, restricting his duties to training other pilots, acting as an examiner and flying non-commercial flights (without passengers, cargo or mail) (the Alternative Duties). Mr Fries contended that this would have been excluded from the ambit of the duties that the age restrictions were intended to protect. As a result, Mr Fries pursued a claim in relation to the pay he would have received had Lufthansa continued to employ him for a further two months (in accordance with the collective agreement).

The issues

It was mutually agreed that Mr Fries could not rely on the EU Equal Treatment Directive (2000/78) (the Directive) to pursue his case as this essentially amounted to a judicial review of the Regulations. The case was referred to the European Court of Justice to clarify the position with regard to the interaction between this secondary and primary legislation.

The European Court of Justice was asked to determine two main points:

- whether the Regulations were compatible with articles 15 and 21 of the EU Charter; and
- whether the Alternative Duties were included in the definition of "commercial air transport" under the Regulations.

The Advocate General's opinion

The Advocate General determined, in favour of Lufthansa, that the restriction on pilots to cease flying commercial aircraft is a valid limitation and does not circumvent the requirements under articles 15 and 21 of the EU Charter. In particular, the Advocate General reflected on the provisions relating to genuine occupational requirements within the Directive. Despite the fact that Mr Fries could not rely on the Directive here, the Advocate General accepted that the concept of genuine occupational requirements within the Directive can be applied to article 21 of the EU Charter. As a result, he acknowledged that physical capabilities that diminish with age are clearly a characteristic that relates to age and has the potential to fall within a genuine occupational requirement in the context of the safety-critical environment pilots operate in. Therefore, it was considered that the concept of this restriction as a genuine occupational requirement might suffice in justifying the decision to dismiss Mr Fries on the grounds of his age.

Furthermore, the Advocate General accepted that Lufthansa's objective of maintaining air traffic safety was the legitimate aim being pursued here. He also determined that imposing the age limit of 65 was an appropriate measure in the circumstances taking into account the high risk involved with commercial flights as opposed to flying other categories of aircraft. In addition, Lufthansa's age limit was aligned with international civil aviation standards. It was not necessary to undertake individual assessments of employees' physical capabilities as long as the rules on age limits could be properly applied and objectively justified in the majority of circumstances. Using age as the only criterion reflected a legitimate regulatory choice here.

Notwithstanding this analysis, the Advocate General opined that Mr Fries should have been permitted to continue in his employment for a further two months, carrying out the Alternative Duties and giving up his role of flying commercial aircraft. It was not accepted that the definition of "commercial air transport" could extend to circumstances where an employee was not physically flying commercial aircraft, but only carrying out the Alternative Duties.

Comment

This case highlights that the EU Charter has force in employment law and shows how the notion of a genuine occupational requirement in the Directive can be used to assist in clarifying the EU Charter's principle of non-discrimination. It also helps to show how claimants can call upon the EU Charter when they are unable to rely on the direct effect of secondary legislation or provisions of national law. In the context of UK employment law, employers should use this case to remind themselves of the factors courts will look to in order to clarify whether direct age discrimination can be justified, both within the scope of national legislation and in light of European law.

Insurer fails to ensure it can recover losses from an insured employee

Employees have an implied duty of care toward their employers to exercise reasonable care and skill when performing their duties. Where employees fail to act in this way, and it leads to a breach of contract, employers will often sue the employee for that breach. It is not as common for employers, or indeed insurers, to pursue employees for their negligent acts. However, the case of *Pemberton Greenish LLP v. Jane Margaret Henry* demonstrates that insurers have the ability to bring a subrogated claim against an insured organisation's employee.

The facts

Ms Henry was engaged by Pemberton Greenish LLP (Pemberton) as a consultant. She acted for a couple who wanted to mortgage an investment property in order to fund a business loan. This progressed to a deferred sale agreement whereby £500,000 was received and distributed by Ms Henry to the third parties directed by the clients. Following receipt of correspondence from

the Land Registry, it emerged that this transaction was fraudulent and the registered owners of the property knew nothing about it.

Upon discovering the fraudulent nature of the transaction, Ms Henry realised that the written authority to complete the transaction had not been returned. Instead of drawing this to the relevant person's attention, she forged the clients' signatures and deleted all emails that referred to the individual who had introduced the clients to her.

Following a police investigation, Ms Henry's engagement at Pemberton was terminated and she was issued with a police caution. The Solicitor's Disciplinary Tribunal found that Ms Henry's failures amounted to a breach of the Money Laundering Regulations 2007 and she was struck off the roll of solicitors as a result of her dishonesty.

The defrauded lender managed to recover some of the money, but the insurer had to pay out £370,000. The insurers brought a subrogated claim against Ms Henry to recover the loss suffered by her professional negligence.

The issue

The issue for the court to decide was whether the insurer could establish that the losses it suffered were a direct result of a dishonest, fraudulent, intentional, criminal or malicious act or omission of Ms Henry. It was only in one of those circumstances that the insurer could exercise its right of subrogation against Ms Henry directly under the professional indemnity policy.

The court's decision

The court found that Ms Henry breached the Money Laundering Regulations 2007.

However, the court also recognised that these failures were a result of the urgency in which the transaction had to be completed. Furthermore, the court appreciated that, while Ms Henry's actions were negligent, her involvement in the transaction up to the point of the fraud being discovered did not amount to dishonest behaviour. In relation to the period following the discovery, the judge considered that Ms Henry had acted out of genuine fear when forging the clients' signatures and deleted the emails in order to protect the very fragile mental health of the individual who had introduced the clients to her. Therefore, the insurer was unable to successfully demonstrate that its losses were caused by Ms Henry's dishonest acts or omissions and it was unable to recover the subrogated damages from her.

Comment

Although this case reaffirMs the long-standing position that there might be a right of employers and/or their insurers to pursue employees for damages arising from an employee's negligence, this is not something that is regularly pursued. However, notwithstanding this, the moral of the story here is that, often, the consequences of trying to cover something up can be worse than the acts or omissions being covered up.

A useful reminder: curing procedural defects on appeal

The CA's decision in *Adeshina v. St George's University Hospitals NHS Foundation Trust and ors* serves as a useful reminder to employers of the possibility that an internal appeal can cure procedural defects in an original decision to dismiss.

Background

Allegations of misconduct were raised against Ms Adeshina (a pharmacist in the Prison Service) including for unprofessional and inappropriate behaviour in relation to the institution of a Central Pharmacy Unit at HMP Wandsworth and the related organisational change. Ms Adeshina had a leading role to play in this project. However, complaints were subsequently made by colleagues about her attitude towards it. A disciplinary process commenced, which led to Ms Adeshina's eventual dismissal for gross misconduct. However, there were a number of procedural failings throughout the disciplinary process. For example, part

of the decision to dismiss for gross misconduct was based on the employee's unprofessional behaviour during a two-day senior management meeting. However, allegations relating to her behaviour on the second day of the meeting had not been put to the employee during the disciplinary process.

Ms Adeshina appealed the decision. The appeal was a full rehearing of the matter. However, contrary to the Acas Code, one of the members of the appeal panel was more junior than the manager who had conducted the initial disciplinary process; in addition the appeal panel was comprised of a senior manager who had been a mentor to a victim of one of Ms Adeshina's alleged acts of unprofessional and inappropriate behaviour and had also been involved in a policy document which formed part of the case against her.

According to the non-statutory Acas Code, so far as is possible, an appeal should be dealt with impartially by someone not previously involved in the case. The Acas Code also recommends that the person conducting an appeal should be more senior than the person responsible for imposing the disciplinary sanction in the first instance. It should certainly not be someone less senior, who might simply defer to the decision of his/her superior.

The appeal panel upheld Ms Adeshina's dismissal. Soon after, Ms Adeshina brought a number of claiMs (unfair dismissal, race discrimination and wrongful dismissal) against her employer. The Employment Tribunal dismissed the claiMs and held that, although there were defects in the initial disciplinary process, these flaws had been corrected by the employer on appeal.

The EAT's decision

Ms Adeshina appealed the decision, but the EAT found that:

- the failure to put all allegations to the employee in the first stage of the disciplinary process had been cured by the appeal, which was a rehearing, rather than a review;
- the appeal panel contained two other members who were senior, as well as an independent adviser; and
- the involvement of the panel member in a previous issue had been minor and had taken place 18 months previously.

Further, in relation to the last bullet point, the EAT acknowledged the reality that senior managers will have involvement in the management of a number of employees and may also sit on disciplinary panels in which those employees might be involved. It would be both unworkable and undesirable for senior managers to avoid these connections. Prior dealings with an employee, without something more which suggested bias, could not render the dismissal unfair.

The CA's decision

Ms Adeshina appealed to the CA and her appeal was dismissed. The CA upheld the EAT's finding that Ms Adeshina's poor attitude to organisational change in the workplace was sufficient to result in dismissal for gross misconduct.

What does this mean for employers?

The points arising out of the CA decision are largely fact sensitive. However, the points of principle arising from the EAT's decision remain good law as they were not challenged before the CA. The EAT's decision in *Adeshina* demonstrated that procedural defects in an initial hearing may be remedied on appeal, provided that the appeal is sufficiently comprehensive. Whether this requires the appeal to be in the form of a rehearing, rather than just a review of the original decision, has not been entirely clear. Following *Adeshina*, if an employer is seeking to remedy any procedural defects or omissions, it would be prudent to conduct an appeal as a rehearing.

The case also highlights a practical difficulty that some employers may encounter: the question of who should hear an appeal. It is good news for employers that the EAT adopted a pragmatic approach, which took into account this challenge, rather than a strict interpretation of the Acas Code. Nonetheless, we recommend that employers should consider who should hear an appeal from an early stage and ensure that – if at all possible – these individuals are not involved in any way in the disciplinary process beforehand and are of a more senior level than the original decision maker. Alternatives may be to involve an independent external person in the appeal. Note that this in itself can lead to challenges over their precise remit, but it can work successfully if carefully and properly framed.

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