大成 DENTONS

UK People, Reward and Mobility Newsletter

MARCH 2020

IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: the fairness of a decision to dismiss an employee for a criminal offence where there is a risk to reputation; whether an employer is liable when rebutting whistleblowing allegations; and entitlement to paid annual leave between dismissal and reinstatement for unfair dismissal.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobilty Hub – www.ukemploymenthub.com

How to deal with employees convicted of a criminal offence in light of the decision in *Lafferty v. Nuffield Health*

The case of *Lafferty v. Nuffield Health* presents a number of interesting issues around whether an employee can be fairly dismissed on the basis of a criminal charge or conviction in light of the risks to the employer's reputation. This article explores these issues in the broader context of dealing with such employees before leaving you with some key points to consider.

Background

Mr Lafferty worked as a hospital porter for Nuffield Health (Nuffield) and was tasked with duties including the transport of anaesthetised patients to and from theatre. In February 2018, he was charged with assault with intent to rape. Mr Lafferty was bailed and ultimately a decision to prosecute was taken. On finding out about the charge, Nuffield suspended Mr Lafferty on full pay. In the weeks after his arrest, Nuffield carried out an investigation, which included two meetings with Mr Lafferty in which he was able to give his version of events and allow Nuffield to review the police and bail reports.

This investigation led to a disciplinary hearing that resulted in Mr Lafferty being dismissed on notice, given the reputational damage that his continued employment could cause Nuffield. At the time, there had been significant scrutiny of sexual misconduct in the sector and the Charities Commission had issued a reminder that charities needed to be mindful of the risk of reputational damage. Nuffield had considered suspending Mr Lafferty on full pay but, given that no trial date had been fixed, any suspension would have been open-ended. They considered that not to be a reasonable use of the charity's resources. Mr Lafferty was ultimately acquitted at trial and reinstated by Nuffield.

There are five grounds under which an employee can be dismissed, including "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".[1] This was the ground relied upon by Nuffield. For a dismissal to be fair, the employer must also have been acting reasonably in taking the decision to dismiss. Mr Lafferty brought a claim against Nuffield in the Employment Tribunal (ET), alleging that his dismissal had not been fair. The ET found in favour of Nuffield.

Mr Lafferty appealed the decision to the Employment Appeal Tribunal (EAT), citing two grounds for appeal. Firstly, Mr Lafferty argued that the ET had failed to consider whether Nuffield had undertaken an adequate investigation into the matter. Secondly, he submitted that the ET had failed to assess for itself all the relevant circumstances, including whether there was an objectively rational basis for considering that there was a risk of reputational damage.

Decision

The EAT rejected Mr Lafferty's appeal and upheld the ET's decision that Nuffield had acted reasonably in dismissing Mr Lafferty.

They decided that Nuffield had properly investigated the allegations against Mr Lafferty, had given him plenty of opportunities to present his side of events and had seriously considered alternatives to dismissal. The EAT noted that it was not necessary for Nuffield to carry out a full-scale investigation of the allegation as the events had occurred away from the workplace, or for Nuffield to determine Mr Lafferty's guilt. That being said, Nuffield still had critically to

1 Section 98(1)(b) Employment Rights Act 1996.

consider the allegations made by the police and would not have been able to dismiss Mr Lafferty on the police evidence alone. The EAT found that dismissal was within the range of reasonable responses open to Nuffield, given the significant risk of reputational damage and agreed that suspension was not a viable option because of the lack of clarity surrounding Mr Lafferty's trial date, meaning any suspension would have been indefinite. Dismissal in this case had not been a "knee jerk" reaction.

The EAT also considered the Court of Appeal's decision in *Leach v. Office of Communications*,[2] another case which considered dismissal on the grounds of risk to reputation. In *Leach*, the Court of Appeal listed the following factors, which employers should take into account in similar situations:

- the nature of the employer's organisation;
- the employee's role in it;
- the nature and scope of the allegations and the efforts made by the employer to obtain clarification and confirmation;
- the responses of the employee; and
- what courses of action were reasonably open to the employer.

The EAT's judgment clearly states that there "would need to be some relationship between the matters alleged and the potential for damage to reputation" for a dismissal on the basis of damage to reputation to be fair. Mr Lafferty had responsibility for vulnerable patients and it was reasonable to be concerned about the possibility that he might commit an act similar to the one with which he had been charged. If, on the other hand, he had been charged with a serious driving offence, it is unlikely that his dismissal would have been fair as driving was not one of his normal duties.

An employer cannot therefore rely on *Lafferty v. Nuffield Health* alone to justify the dismissal of any employee simply because they have been accused of a criminal offence.

Broader context

Employers do not have an automatic right to dismiss employees who are charged with, or even convicted of, a criminal offence. There must be a sufficiently close connection between the offence and the employee's role within the organisation. Employers must still investigate the issue fairly and be able to explain reasonably why the individual is not suitable for the relevant role as a result of the allegation or conviction. Factors that may reasonably be taken into account include the publicity related to the offence or whether other employees would feel comfortable continuing to work with the individual.

If an employee has an unspent criminal conviction and lies to their employer about it, the employer may have grounds for dismissal as a result of a breakdown in trust and confidence.

Key takeaways

While dealing with an employee who is charged with a criminal offence is a less common disciplinary issue, it is important that employers are prepared and act appropriately if this situation does arise. Employers should consider the following:

- critically consider any information provided by the police or other investigative body and ensure that the investigation into the allegations is well documented;
- focus any investigation on the risk to the organisation suffering reputational damage and not on trying to determine whether the employee is guilty of the offence;
- give the employee sufficient opportunities to present their side before deciding whether to dismiss them (for example, through investigation and disciplinary hearings);
- think about alternatives to dismissal, including suspension on full pay or reallocating the individual to a different role within the organisation – if this is not possible, document why it is not possible; and
- only use a criminal charge as a ground for dismissal if there is a clear connection between the alleged offence and the employee's duties and responsibilities.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- Scottish Grocer, Dress code and discrimination rules, Laura Morrison

2 *Leach v. Office of Communications* (OFCOM) [2012] IRLR 839.

Is an employer liable when rebutting whistleblowing allegations?

In both cases, the first step is to establish whether there has been a protected disclosure. In order to qualify:

1. there must have been disclosure(s) of information which, in the reasonable belief of the person making the disclosure, is made in the public interest and tends to show one or more of certain types of wrongdoing or failure; and
2. the disclosure(s) must have been made to one of the categories of recipient listed in the legislation. Disclosure to the employer is the first port of call. After that, protection is subject to additional conditions which vary according to the category of recipient.

In practice, most cases involve disclosure to the employer. The battleground is usually therefore focused on the elements in point one above. However, the recent case of *Jesudason v Alder Hey Children's NHS Foundation Trust* serves as a reminder that disclosures can sometimes be made to external parties other than the employer.

What happened?

Mr Jesudason was a consultant surgeon in the paediatrics department of a children's hospital run by an NHS Trust (the Trust). He made complaints to the Trust regarding, what he considered to be, fundamental failings in the paediatrics department and clinical misjudgments. Mr Jesudason also contacted the media, which led to a critical article appearing in the *Independent* on Sunday.

The Trust ultimately asked the Royal College of Surgeons (RCS) to review Mr Jesudason's complaints. The resulting RCS report concluded that the overall care in the department did not fall below the general standard of acceptable practice. It did, however, make some suggestions for improvements and identified some failings in the way that the Trust had managed Mr Jesudason's whistleblowing. Some criticisms of Mr Jesudason were also made.

In the meantime, the relationship between Mr Jesudason and his colleagues had wholly broken down. The Trust decided that a panel should be convened to consider whether his contract should be terminated. In response,

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- Government postpones off-payroll working/ IR35 changes
- What does "return to work" mean in the context of long-term disability benefits
- New Equality Bill...is this the next DSAR?
- COVID-19: global advice for businesses

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobilty Hub – www.ukemploymenthub.com

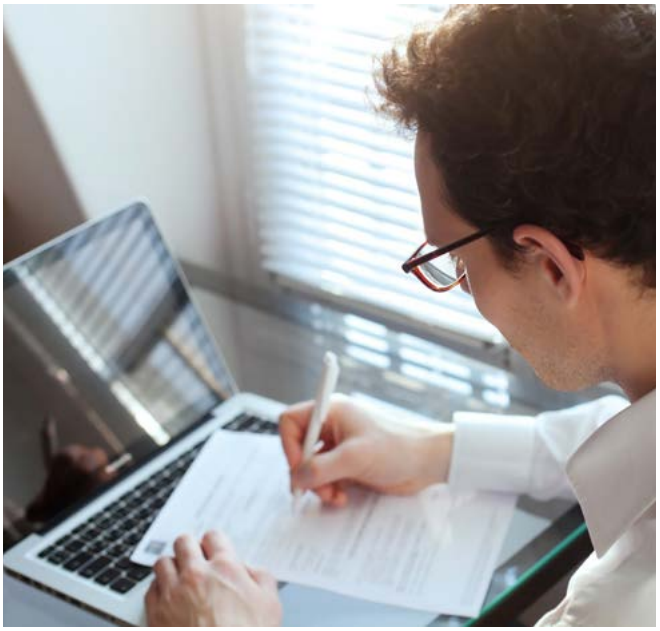
Mr Jesudason obtained an injunction in the High Court preventing the Trust from terminating his contract pending trial. He then made further disclosures to the Care Quality Commission (CQC).

During the subsequent High Court trial, it transpired that Mr Jesudason had improperly provided *Private Eye* magazine with documents obtained as a result of disclosure in the High Court proceedings. As a result of this, he entered into a compromise agreement under which he discontinued the High Court proceedings, paid a substantial sum towards the Trust's legal costs, resigned from his post and discontinued whistleblowing claims that he had initiated separately in the Employment Tribunal (the Tribunal).

Mr Jesudason continued to make allegations of malpractice to third parties (including the press and a committee of the House of Commons). In return, the Trust issued correspondence seeking to rebut his allegations.

Mr Jesudason then brought a new Tribunal claim for whistleblowing detriment (and race discrimination). He alleged that the Trust's correspondence was a detriment on the ground of protected disclosures made by him, on the basis that the correspondence incorrectly stated that the allegations he had made were wholly unsubstantiated.

The Tribunal found that several of Mr Jesudason's disclosures (such as those to the media) were not protected as they did not meet the additional reasonableness test for wider disclosure which applies



to disclosures to that type of recipient. Other disclosures, such as those to the Trust (as his employer), the CQC (as regulator) and two MPs were protected.

However, the Tribunal went on to determine that the letters sent by the Trust did not in fact amount to a detriment. Mr Jesudason's claim therefore failed on that basis. Mr Jesudason appealed to the Employment Appeal Tribunal (EAT) which upheld the Tribunal's decision. He then appealed to the Court of Appeal (CA).

What did the Court of Appeal decide?

Several of the letters sent by the Trust had stated that *"each of Mr Jesudason's allegations have been thoroughly and independently investigated by different professional bodies on a number of occasions and found to be completely without foundation"*. This overstated the position. In particular, the RCS report had in fact identified some areas of concern. The letters also stated that Mr Jesudason's actions were *"weakening genuine whistleblowing"*.

The Tribunal had originally concluded that no reasonable employee would have considered the comments in the Trust's letters to be detriments. The EAT had agreed. The CA, however, did not. It held that the analysis was flawed and incorrect.

The Tribunal's conclusion suggested that Mr Jesudason's standing could not be affected if the Trust's only purpose was to *"put the record straight"*. In the CA's judgment, that was wrong. A detrimental statement does not cease to be detrimental because its purpose is to tell the employer's side of the story. The employer's purpose is relevant at a later stage (when determining whether the detriment was by reason of the protected disclosure) but it is not relevant to the question of whether a detriment is suffered in the first place.

In the CA's view, there had clearly been a detriment to Mr Jesudason, given the way the letters were framed. The only sensible inference *"from the offending passages"* was that Mr Jesudason *"had made specious, unjustified and unsubstantiated complaints, with perhaps some suggestion of bad faith"*. Any person might reasonably treat the Trust's comments as damaging to their reputation and integrity. It was a detriment.

However, Mr Jesudason's appeal failed at the next hurdle – the CA went on to hold that the detriment was not made against him on the grounds of his protected disclosures. The Trust had not issued the statements as retaliation for those disclosures. Rather, its objective was to try to mitigate against the adverse, and in part misleading, information that Mr Jesudason had himself chosen to put in the public domain. The Trust was seeking to protect its staff, reassure its patients and the wider public, and to calm media attention. It was also *"intrinsically unlikely"* that the Trust would have been retaliating against the protected disclosures themselves – not least since they were all (save for one) made some years earlier.

Mr Jesudason's appeal therefore failed.

Conclusion

This decision can on one level be taken as suggesting that employers are entitled to respond, in fairly robust terms, in order to rebut allegations against them. Even when the allegations being rebutted amount to protected disclosures.

However, it would be wise to approach this with an abundance of caution. The Trust's comments in its letters were a detriment to Mr Jesudason. The Trust was only saved from liability on the basis that the letters, and therefore the detriment, were not issued in retaliation to Mr Jesudason's disclosures but, rather, in a bid to mitigate the consequences of those disclosures. This is a very fine line, and one that would be very easy to fall on the wrong side of in less extreme cases. Employer rebuttals remain fairly perilous territory and are usually best avoided wherever possible. Where a public rebuttal is being considered for any reason, advance advice is highly recommended.

Advocate General opinion on entitlement to paid annual leave between dismissal and reinstatement for unfair dismissal

Background

In both cases, the local courts made a request for a preliminary ruling to ECJ on whether there is an entitlement on the part of a worker to paid annual leave in respect of the period from the date of dismissal to the date of reinstatement where it is established that such a worker has been unlawfully dismissed. In essence, their request concerned the interpretation of Article 7 of the Working Time Directive 2003/88/EC and of Article 31 of the Charter of Fundamental Rights of the European Union on working hours.

Article 7 (1) of the Directive states that: *"Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice."*

Article 31 (1) of the Charter provides that: *"Every worker has the right to working conditions which respect his or her health, safety and dignity."*

Decisions of national courts

QH v. Varhoven kasatsionen sad na Republika Bulgaria

In this Bulgarian case, a teacher brought a claim against the school for compensation for loss of paid annual leave for the period between her unlawful dismissal and reinstatement. The Bulgarian Regional Court held that under Bulgarian law a worker was not entitled to paid annual leave if they did not carry out work under the employment relationship. QH, who represented the teacher, appealed this decision to the District Court relying on the provisions of Article 7 of the Directive. The District Court referred the case for a preliminary ruling to the ECJ.

CV v. Iccrea Banca SpA Istituto Centrale del Credito Cooperativo

In this Italian case, the employee was dismissed as a result of a collective redundancy procedure. The dismissal was later held to be unlawful and the employee was reinstated. She brought a claim before Italian courts for an allowance from her employer to cover the paid annual leave and leave for "abolished public holidays" accrued in the period when she was not working. The Italian Court of Appeal held that no allowance was payable in lieu of leave accrued but not taken between dismissal and reinstatement because the allowance was necessarily linked to "missed rest". That did not apply because the employee had not worked during that period. The employee appealed to the Supreme Court which then referred the question for a preliminary ruling.

Opinion of the Advocate General

The Advocate General pointed out that, as the entitlement to paid annual leave is an important principle of EU law, it should not be given a restrictive interpretation. This entitlement must, in principle, be determined by reference to the period of actual work. Interestingly, the Advocate General considered the previous decisions of the ECJ where the link between the provision of actual work and the right to paid annual leave had been broken. He noted that there are certain unforeseeable circumstances outwith the control of the employee and that the right to paid annual leave cannot therefore be subject to the condition that work is actually carried out.

On that basis, the Advocate General considered sick leave and maternity leave to be fundamentally similar to the cases where a worker has been absent from work as a result of unlawful dismissal. He argued that the employee must be put into a position comparable to that in which they would have been had they been able to exercise their right during their employment.

The Advocate General concluded that a worker unlawfully dismissed then reinstated must be entitled to paid annual leave from the date of dismissal to the date of reinstatement as it would be unfair for an employee to suffer as a result of his employer's wrongful act. This is subject to an exception where the employee worked for another employer. In that situation the employee may not recover payment in lieu of holiday for any time when they were working for that alternative employer.

Comment

Although the opinion of the Advocate General is not formally binding, such opinions are normally followed by the ECJ. If that happens, it will have a significant impact on some of the member states but it does not fundamentally change the position under UK law. The Employment Rights Act 1996 already requires that employees be compensated for benefits which would have accrued in the period between dismissal and reinstatement or re-engagement. This includes their right to paid annual leave. In any event, the opinion provides helpful clarification that both UK and EU laws are compatible with their approach towards annual leave in the circumstances where a person's absence before reinstatement or re-engagement results from an unlawful act of the employer.

Key contacts

Virginia Allen
Head of People, Reward and Mobility UK, London
D +44 20 7246 7659
virginia.allen@dentons.com

Sarah Beeby
Partner, Milton Keynes
D +44 20 7320 4096
sarah.beeby@dentons.com

Ryan Carthew
Partner, London
D +44 20 7320 6132
ryan.carthew@dentons.com

Purvis Ghani
Partner, London
D +44 20 7320 6133
purvis.ghani@dentons.com

Mark Hamilton
Partner, Glasgow
D +44 141 271 5721
mark.hamilton@dentons.com

Alison Weatherhead
Partner, Glasgow
D +44 141 271 5725
alison.weatherhead@dentons.com

Jessica Pattinson
Head of Immigration, London
D +44 20 7246 7518
jessica.pattinson@dentons.com

ABOUT DENTONS

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Enterprise, Dentons' wholly owned subsidiary of innovation, advisory and technology operating units. Dentons' polycentric approach, commitment to inclusion and diversity and world-class talent challenge the status quo to advance client interests in the communities in which we live and work.

dentons.com

CSBrand-24471-UK-People-Reward-and-Mobility-Newsletter-March-2020-02 — 25/03/2020