

# Employment Law Update

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This month we look at injury to feelings, knowledge of disability, bumping and discrimination in respect of cancer.

## Injury to Feelings

The Court of Appeal was asked to consider whether injury to feelings could be awarded in Working Time Regulation Claims. The case of *Gomes v Higher Level Care Limited* looked at whether injury to feelings should be awarded when there has been a breach of the regulations.

Under Regulation 30 of the Working Time Regulations compensation is to be determined as to what is just and equitable in the opinion of the Judge hearing the case. It does not however explicitly refer to injury to feelings.

In this regard it is different to the legislation which governs discrimination cases. The Court of Appeal therefore decided that injury to feelings should not be awarded in Working Time Regulation Claims.

In making this decision the Court of Appeal agreed with both the Employment Tribunal at first instance and the Employment Appeal Tribunal.

This is reassuring, otherwise given the significant number of Working Time Regulation Claims that are being heard currently by the Courts, costs and compensation could have escalated.

## Bumping

Bumping is a long-established process that can be considered by employers during a redundancy process.

It involves a situation where somebody in a higher position is made redundant. However, rather than making that individual redundant he is redeployed to a different role.

The previous incumbent of that role is then made redundant in his place. The Employment Appeal Tribunal in the case of *Mirab v Mentor Graphics (UK) Ltd* was asked to consider whether the employee or the Claimant was required to raise bumping before it was considered by the employer?

The Employment Appeal Tribunal made a finding that no, an employee need not specifically raise bumping during a redundancy process, rather it was the responsibility of the employer to consider whether bumping was appropriate on the grounds that it was within the range of reasonable responses for it to do so.

This is something that employers should therefore consider when making redundancies.

It is not necessarily that bumping will always be appropriate or that an employer always has to adopt bumping when making redundancies, but it is important to have given it full consideration and not to wait for it to be raised by the employee.

## Knowledge of a Disability

In order to discriminate against a disabled person, an employer must have knowledge of the disability or be reasonably expected to have known about the disability.

In the case of *Toy v Chief Constable of Leicestershire*, the Employment Appeal Tribunal was asked to consider whether a Claimant's strong belief that he had a disability was enough to have given the employer knowledge or at least that the employer should reasonably have expected to know about the disability. The Employment Appeal Tribunal heard evidence about the Claimant who was a probationary police constable with the Leicestershire Police. The Claimant was not successful in his probationary period and he had his position terminated under the police regulations. The reasons given were due to his performance.

During that process for termination, the Claimant raised the possibility of dyslexia. He had not previously raised any concern about dyslexia during his work or the academic training.

The Respondent alleged that it did not know of the Claimant's disability and could not have reasonably have been expected to know about the disability. However, the case went further because upon evidence it was not clear or certain that the Claimant himself was dyslexic.

Based on these facts the Employment Tribunal dismissed the Claim and the Employment Appeal Tribunal agreed that having a strong belief you may be disabled is not enough to provide knowledge or a reasonable expectation of knowledge for an employer.

This is an extremely sensible decision dealing with what can be a murky area of law, particularly when dealing with a reasonable expectation of knowledge and also deals with the diplomatic area of a Claimant who believes they are disabled without providing realistic evidence to support that contention.

## Cancer and Disability Discrimination

It has been accepted for some time that a diagnosis of cancer will automatically be regarded as a disability within the meaning of the Equality Act. The requirements therefore that the condition is long term or has substantial adverse effect of a person's ability to carry out normal day to day activities is removed. From the point of diagnosis, a person with cancer satisfies the requirements for disability.

However, in the case of *Lofty v Hamis* the Employment Appeal Tribunal was asked whether a pre-cancerous lesion would also fall within the definition of cancer for the purposes of the Equality Act 2010.

Yes, held the Employment Appeal Tribunal. A pre-cancerous lesion could amount to a disability within the meaning of the Equality Act 2010. The Claimant in the case had suffered with a pre-cancerous lesion of a malignant melanoma, pre-skin cancer having had surgery to remove the pre-cancerous cells.

During the hearing in the Employment Tribunal, the Tribunal made a finding that because the surgery had been successful in removing the pre-cancerous cells from the Claimant's face, she did not have cancer and therefore did not satisfy the definition. The Employment Appeal Tribunal however made a finding that there was no distinction within the legislation which distinguished between a pre-cancerous condition and a cancerous condition. In other words, it was sufficient that the Claimant stood a risk of developing cancer from the pre-cancerous cells and it was an error of law for the Tribunal to grade the Claimants condition based on the stage the cancer had developed too.

In finding she was a disabled person the Claimant received the full protection of not being discriminated against as a consequence of her condition.

It is important not to be too prescriptive in relation to illnesses, but rather to take a broad view as this is the approach that the Employment Appeal Tribunal has suggested.

And finally.....

We hope that you all have an enjoyable Easter break and should any of the articles in here have raised any questions please do not hesitate to contact me.

Bye for now.

Lynsey and the team.

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