

# Employment Law Update

by Lynsey Howes

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In this month's newsletter we have issued two pieces of guidance, we discuss harassment related to religion and discrimination arising from disability. As always we hope that you will find the information useful and informative.

## Disability

There is case law to suggest that an employer needs to be aware of a disability prior to being able to discriminate on the grounds of that disability. However, where knowledge of the disability is apparent but not that the disability was connected to the misconduct, can that still amount to unfavourable treatment and therefore discrimination in accordance with Section 15 of the Equality Act? In the case of *City of York Council v Grosset* the Court of Appeal held that yes it could.

This was because dismissal was plainly an act of unfavourable treatment and as long as a Claimant could prove a causal link between the unfavourable treatment and the disability, the dismissal could be discriminatory.

The Claimant was suffering from stress caused by his workload in a school. As a consequence of that, he said he had made an error of judgment in showing an 18 rated film to vulnerable teenagers. He said that the stress was linked to his disability of cystic fibrosis and his workload and as a consequence he should not have been dismissed.

The Court of Appeal held that whilst the employee could be fairly dismissed as a consequence of that type of misconduct, there could still be discrimination because the test applied by law in discrimination claims was different to that applied in unfair dismissal claims. By looking at the different tests the Court of Appeal asserted that a dismissal for showing an 18 rated film to vulnerable teenagers could amount to gross misconduct and therefore dismissal could be within the band of reasonable responses of a reasonable employer.

On the other hand, a discrimination dismissal linked to a disability was a different type of judicial test and the Tribunal was entitled to make its own assessment as to whether dismissal in those circumstances was reasonable and proportionate. They found that the dismissal was related to the disability and therefore was discriminatory.

This is an important case because it shows that when you are dealing with someone who has any protected characteristic, if they can link that protected characteristic to the reason for dismissal they may succeed in bringing a discrimination claim, even where the dismissal itself may have been fair if there had not been a link with a protected characteristic.

## Guidance

ACAS have delivered new guidance to prevent discrimination at work on the grounds of religion or belief, which can be found on the ACAS website [www.acas.org.uk](http://www.acas.org.uk).

It also gives an accompanying document talking about the top 10 myths associated with religion and belief discrimination which makes interesting reading.

## Religion

In the case of *Bakkali v GMB (South) Limited* the Employment Appeal Tribunal was asked to consider whether asking a Moroccan Muslim whether he still supported Islamic State amounted to direct discrimination or harassment, related to his race or religion.

The Employment Appeal Tribunal confirmed that in this context it did not.

The Claimant was a bus driver and he got into a discussion about Islamic State fighters. He made a comment to a journalist that “the Islamic state were good fighters and were managing to run the country”. Another driver then approached the Claimant and asked whether he was still promoting IS.

The Employment Tribunal concluded that the claims of direct discrimination and harassment on the grounds of race and/or religion did not stand. This was because the remark was made following the previous conversation and was not “because of” nor “related to” the religion or race of the Claimant.

The Employment Appeal Tribunal made it clear that in terms of claims of harassment the conduct has to be related to the protected characteristic. On that basis, any broader enquiry would require the Employment Tribunal to look more closely at the mental process of the harasser.

The Employment Tribunal in the first instance had therefore not erred in applying the law by finding that the Claimant had not been harassed or discriminated against.

## Unfair Dismissal

The Employment Appeal Tribunal was asked in the case of *Mbubaegbu v Homerton University Hospital* whether a dismissal for misconduct even where there were no previous warnings and where none of the multiple issues were gross misconduct in themselves could still amount to a fair dismissal.

Reading the facts, the Employment Appeal Tribunal considered that a series of acts and a pattern of conduct can be sufficient to undermine the relationship of trust and confidence and it saw no reason why the employer would be acting outside of the range of reasonable responses test to dismiss an employee in whom they had lost trust and confidence.

This is an interesting case because there will be frequent examples of someone who hasn't done anything so wrong as to amount to gross misconduct but has done multiple smaller acts of misconduct which cause difficulties with the employment relationship and the trust an employer has in that employee. This Employment Appeal Tribunal decision assists with the idea that multiple acts of misconduct can be a dismissible offence and that that dismissal in those circumstances can be within the range of reasonable responses of a reasonable employer and therefore fair.

## Dress Code

The Equalities Office has issued some guidance this time in relation to dress codes and sex discrimination.

Whilst it is a useful read, it does make obvious statements for example not requiring women to wear high heels or paint their nails.

Dress codes therefore whilst not illegal, must ensure that they are consistently applied between men and women.

And finally.....

We hope that you have found the newsletter useful. Please may we remind you that GDPR came into force last Friday, 25th May 2018, as always if you require any assistance with your policies, procedures and notices give us a call and we can provide the necessary assistance.

Bye for now.

Lynsey and the team.

Lynsey Howes

Direct: (01482) 639674

Email: [lhowes@hamers.com](mailto:lhowes@hamers.com)

5 Earls Court, Priory Park East,  
Kingston upon Hull, HU4 7DY

Switch: (01482) 326666

[www.hamers.com](http://www.hamers.com)

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