Employment Law Update

by Lynsey Howes Issue 142 – October 2018

Employment matters have been hitting the headlines this month with both Morrisons and the Human Rights Commission coming out second in decisions given by the Court of Appeal and Supreme Court respectively. We shall examine the impact of both decisions in addition to the perils of the Christmas party and a look at a decision on harassment.

Christian Bakers

The decision of the Christian Bakers from Northern Ireland refusing to bake a cake with the image of Bert and Ernie from Sesame Street with the slogan support gay marriage has taken up time in news bulletins and newspaper columns. Until the decision of the Supreme Court, Mr. Lee who had been supported in his claim of direct discrimination on the grounds of his sexual orientation had won. The Supreme Court however had a different view.

The Court found that the refusal to bake the cake was not because of Mr. Lee's sexual orientation, that in fact his sexual orientation was irrelevant to their decision to decline his request. The Court also found against the assertion that the refusal could be associative discrimination, saying the mere fact that Mr. Lee may associate with the gay community did not make out a claim of associative discrimination.

Lastly the Court rejected the claim that Mr. Lee was discriminated against on the grounds of his political beliefs.

In its conclusion the Court relied heavily on the European Convention on Human Rights, mainly articles 9 and 10, emphasising that a person cannot be forced to express a political opinion in which you do not believe.

The Christian bakers, not believing in gay marriage could not on that basis be forced to write a slogan on a case with which they did not believe.

The conflict between rights is sharply illustrated by this case, which can feel like a contest between who's rights have more cogency or right to be protected when they come into conflict with one another. This should not be the message that is taken away however, it appears the Supreme Court took the view, that it was not the baking of a cake for a gay man which was refused, not the image of Bert and Ernie on the front, it was the writing of a slogan with which they disagreed and which the Court have confirmed that cannot be forced to state, despite being a commercial enterprise.

We can only theorise that "but for" the slogan the bakers would have baked the cake and if they had refused purely because the cake was being purchased by a gay man, the outcome would have been different.

Harassment

The case of Evans v Xactly heard by the EAT considers what amounts to harassment in accordance with section 26 of the Equality Act 2010.

Mr. Evan was a sales representative for the Respondent. He was employed for under one year when he was dismissed for poor performance. Mr. Evans submitted a claim to the Employment Tribunal that amongst other claims he had been harassed in the workplace.

The grounds of his harassment complaint was that he had during his employment been referred to as a "fat ginger pikey". Mr. Evans who had connections with the traveller community asserted that the comment was potentially both discriminatory and harassment.

In its decision the Tribunal assessed that in the context it was made, an office which had a culture of good natured teasing amongst competitive sales people, the comment could not be held to be harassment.

The EAT concluded that this was a conclusion which on the facts the Employment Tribunal was entitled to make, there was no misapplication of the law.

Morrisons

The Morrisons case again made headlines with the decision of the Court of Appeal finding that the famous supermarket chain was responsible for the data protection breach perpetrated maliciously by a member of staff.

Mr. Skelton had a personal grudge against Morrison's his employer at the time. He had been asked as part of his role to send data to Morrison's external auditors. He shared that data online and sent a copy to three national newspapers.

Those employees who's informed had been shared in breach of data protection laws, brought claims seeking to hold Morrisons liable for the breach by Mr. Skelton. Morrisons fought the claims on the grounds that they should not be held vicariously liable for the malicious actions of an aggrieved member of staff.

The Court of Appeal rejected Morrison's argument finding instead that there was sufficient connection between Mr. Skelton's job and his wrongful actions to hold Morrisons responsible.

This is a sobering case in light of new GDPR rules and the heavier penalties that can be awarded as a consequence of data breach. Employers need to ensure staff are fully trained in data protection issues and look at their systems to build in as many safeguards as possible. Allowing one person access to so much information without additional checks will not have assisted Morrison's position in this claim.

The Christmas Party Conundrum

The annual Christmas knees up, hopefully a time to celebrate the year, enjoy time away from the grind of work with colleagues and relax. What happens however when the festivities get out of hand? There is a brawl or an inappropriate advance made. Who is responsible? Who is liable in the event of a claim?

The decision in Bellman v Northampton Recruitment Limited concerned the sales manager and the managing director and the fall out of the works Christmas party.

The party itself was coming to a close and Mr. Major the MD arranged for taxis to take staff to the hotel to continue drinking. The drinks at the "after party" were again mainly paid for by the Company.

Unfortunately, after two more hours of drinking an argument broke out between the staff and Mr. Major called all staff over to give them a lecture about his authority. When Mr. Bellman questioned Mr. Major about his decision Mr. Mr Major punched Mr. Bellman so severely it caused brain damage.

The Court of Appeal was asked to decide whether the company was vicariously liable for Mr. Major's actions despite the incident happening outside of work.

Looking at to elements the Court of Appeal – the nature of the employees' job and secondly the connection between the job and the wrongful conduct.

In this case the Court found that the nature of the job role must be constructed broadly and objectively. In terms of the connection between the incident and that job, the Court considered the fact that Mr. Major owned the company, he had a directing mind over the business, he was lecturing staff about his authority within the business at the time – presumable utilising his position as the MD, plus the "after-party" would not have happened at all save for the organised work social event which had preceded it.

Given all of these factors the Court of Appeal found a sufficient connection between the job and the actions of the MD to amount to vicarious liability for which the company was responsible.

It is worth therefore reminding staff that whilst the party can be fun, they are still representing the company and should abide by your usually codes of conduct.

And finally…..

So concludes another newsletter, we hope that it hasn't made for too spooky reading and that your bonfire nights go with a bang. As always please call if you have any questions.

Bye for now.

Lynsey and the team.

Lynsey Howes

Direct: (01482) 639674
Email: lhowes@hamers.com

5 Earls Court, Priory Park East,
Kingston upon Hull, HU4 7DY
Switch: (01482) 326666
www.hamers.com