

Employment Rights Update

May 2010



The sun is shining as I write this, bouncing off the computer screen. However, dedication to the cause of keeping you updated with case law leads me to ignore the sounds of summer outside.

Cases coming up this month on:

- Race Discrimination
- Unfair Dismissal
- Disability Discrimination.

May & Baker Ltd (t/as Sanofi-Aventis Pharma) -v- Oberago EAT

The Tribunal, in this case, found that the Company was responsible for racist remarks made by an agency worker to an employee. Under Section 31 of the Race Relations Act an employer is responsible for the acts of its employees carried out in “the course of their employment”. The EAT, however, held that as the tribunal had failed to establish a contractual relationship between the worker and the Company, the Company could not be liable for the worker’s behaviour.

This case highlights and underlines the fact that a tribunal cannot overlook the issue of employment status, without good reason, even where justice would appear to suggest that liability should be established.

The Equality Act, as it stands at the moment (i.e. untouched by the Con-Dem government), extends liability to 3rd party

actions provided certain requirements are met. Therefore, provided this part of the act remains, employers will have to deal properly with complaints made against, not only agency workers, but also clients, customers, contractors etc.

Also, contrast this case with the decision in *Leeds City Council v Woodhouse* a race discrimination case brought by David Sorensen. The preliminary hearing considered the definition of “contract worker” as defined by Section 7 of the Race Relations Act. The case was unsuccessfully appealed by Leeds City Council up to the Court of Appeal. Read more on our website at http://www.morrishsolicitors.com/news_single.php?id=204

Salford NHS Trust -v- Roldan

Just when you thought the higher courts had covered all aspects of unfair dismissal claims, another authority is handed down. In this case the Court of Appeal made three important points:-

1. The more serious the consequences of dismissal for the employee, the more careful an investigation is required. In this case one consequence was deportation.
2. An employer faced with a conflict of evidence between two witnesses is not obliged to believe one employee and disbelieve the other. If the employer is unable to resolve

Employment Rights Update

May 2010



the conflict, it is perfectly proper to give the alleged wrong doer the benefit of the doubt.

If the tribunal has properly directed itself in accordance with established case law, its conclusions should not be overturned unless there is no evidence to support it or it is perverse.

Chief Constable of South Yorkshire Police v Jelic

An interesting and important decision came before the Employment Appeal Tribunal in relation to the duty to make reasonable adjustments for an employee who has a disability.

The Claimant in this matter was employed by the Respondent, initially as a Police Constable. In 2002 he was diagnosed as suffering from chronic anxiety syndrome. He was eventually assigned to a non-customer-facing role, which later merged with the Safe Neighbourhood Unit.

That role evolved over time so that it required contact with the public. A report was prepared which showed that he could only partially carry out the duties of a Safe Neighbourhood Unit Constable. He then attended a meeting at which he was told that the decision had been made to medically retire him.

The Claimant pursued various claims before the Employment Tribunal, but it was the complaint of failure to make reasonable adjustments which was

ultimately considered by the Employment Appeal Tribunal.

The original Tribunal hearing the claim found that the Respondent had failed to make reasonable adjustments. They firstly found that reasonable adjustments could have included redeployment into a non-customer-facing role. One role which was identified as being particularly suitable for the Claimant was a role dealing with the National Crime Reporting Standards Database. That role was being carried out by an employee called PC Franklin. The Tribunal found that a reasonable employer would have recognised the symmetry in the Claimant's strengths with that particular role and would have considered swapping their roles. The Tribunal recognised that regard would have to be had for PC Franklin's views, but it was recognised by the Tribunal that PC Franklin could have been ordered to swap roles

The Tribunal also considered that a reasonable adjustment could have been to medically retire the Claimant and then to re-engage the Claimant in a Police staff role.

The Tribunal's decision was appealed by the Respondent.

The EAT held that what amounts to a reasonable adjustment will always depend on the individual circumstances and facts of the individual case. They confirmed that the test is an objective test and the

Employment Rights Update

May 2010



task of determining whether an adjustment is reasonable is a decision for the Tribunal.

The EAT stated that it could be a reasonable adjustment to create a new job if the particular facts of the case support such a finding. It was also confirmed that swapping employees' roles could also amount to a reasonable adjustment, again depending on the facts of the individual case.

The Tribunal confirmed that there is no distinct duty for employers to consult about adjustments, but a failure to do so may jeopardise the employer because they then cannot use the lack of knowledge, that would have resulted from consultation, to defend a claim.

The EAT also confirmed that medically retiring an employee and then re-engaging in a new role could also amount to a reasonable adjustment, but in this particular case there were inadequate reasons given by the Tribunal to support that finding. That matter was remitted to the Tribunal.

We welcome your feedback on our Employment Rights Update. Please feel free to email us with any comments or suggestions for improvement to jayne.phillips@morrishsolicitors.com

For further information, please contact our Employment Rights team at -

Morrish Solicitors LLP

on

0113 245 0733

Please visit our website

www.morrishsolicitors.com or see our

Employment Rights blog

morrishsolicitors.blogspot.com