Bird & Bird

UK Employment Case Updates for the Hotels, Hospitality & Leisure Sector

July 2023

Glover v Lacoste UK Ltd (2 February 2023) – decision available here

In this indirect sex discrimination case, the Employment Appeal Tribunal ("EAT") held that the Respondent employer's requirement for fully flexible shift working was a provision, criterion or practice ("PCP") that applied to the Claimant employee even though she did not return to work under the relevant arrangement and even though the requirement was ultimately reversed.
The Claimant worked at one of the Respondent's stores five days a week based on a rota provided every four weeks. She went on maternity leave in March 2020, and prior to returning made a flexible working request to work three days per week. The Respondent denied the request both initially and on appeal, but on appeal offered an alternative – of working four days a week on a fully flexible basis (i.e., any day of the week) (the "offer"). No further right of appeal was offered. The Claimant was not required to work during this time because the store remained closed due to covid and she was on furlough.

The Claimant asked for the original request to be reconsidered, as the requirement to work any day of the week would not be possible taking into account her childcare commitments. The Claimant stated that if the Respondent did not agree, she would need to consider resigning and claiming constructive dismissal. In response, the Respondent agreed to the Claimant's original request. Notwithstanding this the Claimant then presented a claim for indirect sex discrimination, arguing that the Respondent's previous requirement of fully flexible shift work was a PCP which put female employees at a disadvantage when compared to male employees, due to an inability to arrange adequate childcare (on the basis that women still have the primary responsibility for childcare), that she had been placed at that disadvantage, and this PCP could not be justified as a proportionate means of achieving a legitimate aim.

The EAT held that upon its final determination of the flexible working request, the Respondent had applied the PCP in question. This was the case even though the Claimant had never worked under that arrangement, and even though the Respondent later changed it mind. As a result, the Respondent's "U-turn" was too late to avoid a potential claim. The EAT also held that the Claimant had clearly suffered a disadvantage as a result of the PCP. Despite not working under the offending arrangement, her flexible working request had been rejected twice and she had been left with no option but to consider resigning.

This case illustrates the need for employers to ensure that they carefully consider all flexible working requests and ensure that the decisions they make are robust and free from discrimination. Changing the decision at some later date does not extinguish the risk of a potential discrimination claim arising.

McQueen v The General Optical Council [2023] EAT 36 – decision available here

In this case, the Employment Appeal Tribunal ("EAT") found that an Employment Tribunal ("ET") was entitled to dismiss the Claimant's claims of discrimination because of something arising from disability under section 15 of the Equality Act 2010 (the "Act") where the Claimant's disabilities had no effect on the aggressive behaviours for which he was disciplined.

The Respondent employed the Claimant as a registration officer. Over the course of the Claimant's employment, he had several "meltdowns" where he raised his voice and displayed aggressive body language towards his colleagues during stressful situations. The Claimant argued that his "meltdown behaviours" arose in consequence of his disabilities (dyslexia, symptoms of Asperger's, neurodiversity and hearing loss). The first "meltdown" led to a referral to occupational health which recommended that in future, the Claimant should be provided with written instructions if he was being asked to change how a task was carried out. Further incidents resulted in disciplinary action and a formal warning. The Claimant then raised a grievance and submitted a claim under section 15 of the Act.

The ET dismissed the claim, finding that the Claimant's inappropriate behaviour at work did not arise in consequence of disability. Having considered the medical evidence, the ET held that the outbursts were caused by the Claimant's "short temper" and because he "resented being told what to do". The Claimant appealed to the EAT, arguing that the ET misapplied the broad test of causation required when a claim under section 15 of the Act is brought. The Claimant contended that the correct test was whether his disability had "more than trivial influence" on the "something" (i.e., his conduct) arising in consequence.

The EAT dismissed the appeal and upheld the ET's decision that there must be a clear link between the "something" leading to the unfavourable treatment and the disability. Even though the Claimant consistently determined a link between his disabilities and his behaviour at work, the ET was not entitled to accept that view based on the medical evidence. As the Claimant's disabilities played no part in his conduct, there was no need for the ET to consider if the unfavourable treatment was partly because of his disabilities. Despite criticism of the ET's unusual reasoning and structure of its judgement, the EAT did not find any error of law or principle. The EAT was satisfied that no "principal reason" or "predominant cause" test had been applied. The EAT also provided helpful guidance as to how to structure decisions in section 15 cases, stating the questions to ask are:

- what are the disabilities;
- what are their effects;
- what unfavourable treatment is alleged in time and proved; and
- was the reason for the unfavourable treatment an effect or effects of the disabilities?

The EAT's decision highlights that sufficient and specific medical evidence will be required by claimants to prove their case in claims of discrimination because of something arising in consequence of a disability. The manifestation of a disability will vary from person to person, therefore it is important that employers seek medical advice to ensure that they understand their employees' disabilities, the way in which such disabilities may or may not impact on an employee's conduct and behaviour in the workplace and any reasonable adjustments that can be made.

Morris v Lauren Richards Ltd [2023] EAT 19 – decision available here

In this case, the Employment Appeal Tribunal ("EAT") held that an Employment Tribunal ("ET") erred in law when determining that an individual was not disabled under the Equality Act 2010 (the "Act") by focusing on the likely impact of termination of employment on the individual's anxiety when assessing whether the effect of the anxiety was long-term.

The Claimant brought a claim for disability discrimination against the Respondent, her former employer. There was a Preliminary Hearing in the ET to determine whether the Claimant was disabled for the purposes of s.6 of the Act. The ET found that the Claimant suffered from an impairment (anxiety) which had a substantial adverse effect on her ability to carry out normal day-to-day activities. However, she had only experienced the effect of anxiety for three and a half months at the time of the alleged discrimination and the anxiety had arisen from matters related to work. The primary issue for the ET, therefore, was whether this effect was long-term, as set out in paragraph 2(1) of Schedule 1 of the Act:

"The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected."

In assessing whether the effect of the Claimant's anxiety was likely to last for at least 12 months, the ET took into account the fact that her anxiety related to workplace issues and was therefore unlikely to persist following the termination of her employment. The ET concluded that the effect was not long-term, and the Claimant was not disabled under the Act.

The Claimant appealed. She argued that the ET had been wrong to take into account events that occurred after the relevant act of discrimination, namely her dismissal, when considering whether her condition was long term.

The EAT upheld the appeal. It stated that the threshold set for an ET of likelihood, i.e., whether it is something that "could well" happen, is a low one. The ET therefore had to make an assessment on the available evidence as to whether the Claimant's condition and its effects, from which she was suffering at the date of dismissal, "could well" continue for another eight-and-a-half months, having persisted for three-and-a-half months up to the date of dismissal. It held that the ET had been wrong to attach material weight to the fact that her anxiety had been caused by the workplace and was unlikely to persist after termination of her employment. The EAT remitted the question of long-term effect to the ET.

This case highlights the approach an ET should take in assessing whether an individual is disabled for the purposes of the Act. It is a useful reminder of the low threshold to be applied when considering the likelihood of the effects of an impairment lasting for at least 12 months. Even if the effect is relatively short-term, if it had been present prior to the act of discrimination, an ET is entitled to find that it amounts to a disability because it "could well" last for 12 months or more.