RMI Employment Law Bulletin
Autumn 2021

During the Pandemic the Government's attention was naturally not on passing new employment legislation. With the economy starting to get back to 'normal', in this quarterly update we take a look at some of the caselaw developments that you may have missed.

Case Law Update

Compensation for career-long loss – (Secretary of State for Justice v Plaistow)

The Claimant worked as a prison officer and was the subject of enquires as to his sexuality, including from his line manager, who would refer to him as a "poof". He was subjected to physical abuse which included a prison officer pointing a finger into his face and slapping him; he was screamed at; water was squirted at him; and on one occasion his work bag was coloured pinkhenr and a 'fairy' cake was smeared inside it. He was victimised for raising grievances about the treatment and was ultimately unfairly dismissed.

As a result of the discrimination, the Claimant was suffering from PTSD, anxiety, paranoia, and sleep disturbance; he found it difficult to leave the house, interact with other people, and attend to his personal care.

The tribunal considered that even if the Claimant could return to work at some point, which was an "extremely remote" possibility, *"this is one of those rare cases where it is appropriate to consider the Claimant's future losses on the basis of a career long basis"*.

The EAT held that the tribunal was entitled to find that the Claimant had suffered permanent damage to his career and was thus entitled to be compensated accordingly. It did find however that the tribunal needed to look again at the discount which should be applied, to reflect the general uncertainties of life which might have cut the Claimant's career short, such as the possibility of disability or early death.

It is rare that compensation for loss of earnings will reach the £2 million region, as the tribunal found to be the Claimant's loss in this case. Nevertheless, this case highlights that there is no cap on the amount which a tribunal can award, and, that there are circumstances where awards can be made, to reflect financial loss, for the remainder of an employee's working life.

Burden of proof in discrimination claims – (Royal Mail Group v Efobi)

The Supreme Court in Royal Mail Group v Efobi (2021) has confirmed that the burden of disproving an allegation of discrimination does not shift to the employer, unless the Claimant has first established a prima facie case.

The Claimant identifies as a black African and Nigerian. He worked as a postman for Royal Mail. He wanted a more managerial role so that he could put his qualifications to use. He submitted over 30 applications for such roles with his employer over a number of years, but

none were successful. He brought a claim to the employment tribunal on the basis that the rejection of his applications was as a result of race discrimination. His claim was dismissed by the tribunal. The Employment Appeal Tribunal upheld his appeal. The EAT held that the tribunal had been wrong to interpret section 136 of the Equality Act 2010 as imposing on the Claimant an initial burden of proof.

Section 136 of the Equality Act 2010, which deals with the burden of proof in discrimination claims, imposes a two-stage test. In respect of stage one, the relevant wording is *"if there are facts from which the court could decide."* However, this wording had changed from the older provisions in the Race Relations Act 1976 (which the Equality Act 2010 replaced) where the wording was *"where the complainant proves facts."* On this basis, the Claimant argued that that there was no longer a requirement on him to prove facts at the initial stage, but rather, the position was now neutral, and that it was simply for the tribunal to determine 'if there are facts.'

The Court of Appeal reversed the EAT's decision, finding that the tribunal did not make any error of law. The Supreme Court agreed and dismissed the Claimant's appeal. The Supreme Court held that the change of wording under the Equality Act did not change the law, and that the burden of proving his or her case begins with the Claimant. Once sufficient facts have been established by the Claimant pointing to discrimination, and in the absence of any other explanation, the burden then shifts to the employer to disprove the allegation. The Court held that the change of wording was simply to make clear that the tribunal is required to consider all of the evidence at the first stage, and not simply that adduced by the Claimant.

During the employment tribunal hearing, Royal Mail did not call evidence from any of the actual decision makers who determined that the Claimant's applications were unsuccessful, in circumstances where his race was stated on his application forms. On this basis, the Claimant also argued that the tribunal failed in its duty to draw adverse inferences. However, the Supreme Court held that tribunals have a wide discretion as to whether to draw, or not to draw, adverse inferences, and that it was not unreasonable for adverse inferences not to have been drawn on the facts of this case. It stated that: *"there can be no reasonable expectation that a respondent will call someone as a witness in case that person is able to recall information that could potentially advance the claimant's case."*

In addition, even if adverse inferences had been drawn, on the basis that the recruiters (who were not called to give evidence) were aware of the Claimant's race, it was held that this would not, without more, have been sufficient to establish a prima facie case of discrimination.

Is it a reasonable adjustment to protect pay permanently when disability means that an employee can no longer do their role? – (Aleem v E-Act Academy Trust Ltd)

No. This case involved a teacher who had developed mental health issues and as a result was unable to teach. As the issues were sufficiently serious, they were deemed a disability and her employer moved her to an alternative role as a reasonable adjustment. As this role attracted lower pay Ms Aleem was paid for a period of 3 months on her higher salary during which time her employer clearly stated this was a temporary measure during her probationary period in the new role. When the role became permanent Ms Aleem's pay was reduced and employment tribunal proceedings were instigated on the basis that she felt that

the pay reduction was discriminatory, and it was a reasonable adjustment for her pay to be kept at the higher rate.

At the initial hearing the Tribunal dismissed her claim to be paid at the higher rate and found this was not a reasonable adjustment.

On appeal the EAT supported this finding. The EAT found that whilst it was reasonable to continue to pay the higher rate during any probationary period and whilst a grievance was being raised, as the higher pay was clearly and consistently a temporary measure once this was completed it would be wholly unreasonable for this to continue.

In conclusion

This case is a welcome clarification for employers. It is interesting to note that this case particularly addressed issues from the earlier case of G4S Cash Solutions (UK) Ltd v Powell, which found that continuing a higher rate of pay for a lower paid position would be a reasonable adjustment. It is clear now that this will not always be the case.

It is important to note that one of the key differences are the actions of the employers in these cases. In Powell , the employer stated that the previous pay level would be continued as part of an agreement to return to work. In Aleem, the Employer had clearly stated at all times that the higher pay was a temporary measure and that her pay would be adjusted after the grievance and probation period concluded and the Claimant accepted the job on this basis. It is therefore vital that employers are clear in their communications, particularly if any adjustments are or may be temporary. Provided employers are clear at all times, the long-established principle that it will rarely, if ever, be a reasonable adjustment to continue pay for a role that the employee is no longer performing.

Events post-dating the presentation of an Employment Tribunal claim and time limits – (Sakyi-Opare v Albert Kennedy Trust)

Most time limits for presenting a claim to the Employment Tribunal are three months from the date of the relevant event, such as the date of dismissal in an unfair dismissal case or the date of an act of discrimination with the important caveat that conduct extending over a period is to be treated as done at the end of the period. For example, when looking at a pattern of harassment the time limit would come from the last time the harassment took place.

In the recent case of Sakyi-Opare v Albert Kennedy Trust the Employment Appeal Tribunal (EAT) has held that, in determining that the Claimant had not brought her claim within the three-month time limit, the Tribunal was in error in failing to address matters which post-dated the presentation of her claim.

<u>Facts</u>

The Claimant was studying social work at Brunel University. She had undertaken a placement with the Respondent, who is an LGBT homelessness charity. During the placement she alleged that she was the only Christian in the office, and that employees of the Respondent would denigrate and ridicule her faith. The Respondent then terminated the placement on the basis that there was not enough staff to provide her with supervision.

Following the placement, the Respondent had raised concerns with the Claimant's university about inappropriate comments she had allegedly made. As a result, the university proceeded to institute 'professional suitability proceedings' against the Claimant. The Claimant disputed the allegations and argued that they were an attempt by the Respondent to wrongly portray her as unsuited to being a social worker, and as prejudiced against LGBT people.

The Claimant brought a claim against the Respondent claiming discrimination and harassment on the grounds of her religion. She presented her claim to the Tribunal on 5 October 2018. In respect of the acts which she sought to establish were discriminatory, the Tribunal at a preliminary hearing considered that even if that last of them happened on 24 May 2018, then the deadline for presenting her claim was 23 August 2018. It also found that it was not just and equitable to extend the time limit in the circumstances.

During the preliminary hearing on 1 March 2019, the Claimant had made an application to amend her claim to raise new matters. Those matters included a meeting which the university had required her to attend on 22 January 2019 relating to the professional suitability proceedings, which arose from the Respondent's complaint. The Claimant argued that the Respondent's involvement amounted to a continuing act of harassment against her, and on that basis, her claim was not out of time, since any unlawful treatment was ongoing. The Tribunal held that the meeting did not constitute continuing harassment and that it was a separate issue, and her case was dismissed for being out of time.

Decision

The EAT upheld the Claimant's appeal. It found that the Tribunal did not properly deal with the substance of Claimant's application to amend her claim form, to include the further acts of alleged harassment. The EAT determined that there is no reason why a Claimant cannot amend their claim to include a cause of action that occurs after the presentation of a claim and only after determination of that application should the Tribunal consider time limit issues. This was particularly so in circumstances when those events would have been a potentially relevant factor in deciding whether or not the claim was in time.

Comment

The case is a useful reminder to employers that particularly in claims involving claims of discrimination, just because the case is brought out of time, does not mean that Claimant cannot bring still bring their claim. Events which post-date a claim could later be included in the claim and may mean that a claim, which initially appears out of time, is actually in time.

In Conclusion

Don't forget, any advice contained in the above is general in nature and will need to be tailored to any one particular situation. As an RMI member you have access to the RMI Legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.

Motor Industry Legal Services

Motor Industry Legal Services (MILS) provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.