Case Law Alert **January 2019**

Eight Cases to Look Out for in 2019

Chief Constable of Norfolk v Coffey

The Court of Appeal (CA) will hear an appeal against the EAT's decision that direct discrimination had occurred because of perceived disability. Coffey had some hearing loss which placed her just outside police national standards, but she passed a functionality test enabling her to work as a constable for two years, without adjustments. Norfolk Police rejected Coffey's transfer application, as she had a progressive condition, which they perceived would eventually present a risk to her performing a front-line role and the EAT held that another person who was not perceived to have a condition likely to deteriorate, would not have been treated in the same way. The question is not just whether it is perceived that the person meets the statutory definition of disability, but also includes whether there is a perception that a person's impairment will progressively worsen.

Asda Stores Ltd v Brierley and others

7,000 equal pay claims have been brought by Asda supermarket employees, mainly women, who argued that their work is of equal value with that of distribution workers based at depots, who are mostly men, and are paid more. The EAT held that store workers can compare their work to distribution workers because where there is a "single source" of pay and conditions, (i.e. Asda), a comparison between the claimant and the comparator is permitted independently of whether unequal treatment arises from collective agreements (as argued by Asda because distribution workers are on separate terms derived from a collective agreement) and whether or not the employment is in the same establishment. The CA heard the appeal in October 2018 and the result is awaited.

Ali v Capita Customer Management Ltd

In May 2019, the CA will hear an appeal against the EAT's decision that a failure to pay a father enhanced parental leave pay was not direct sex discrimination. Ali complained that as a male employee he was entitled to only two weeks paid leave following the birth of his child, whereas a female employee, would be entitled to 14 weeks' full pay following the birth of her child. The EAT held that a comparison has to be made in like-for-like circumstances. Therefore, the comparator is not a woman on maternity leave, but a woman on shared parental leave. As a woman on parental leave would have received exactly the same level of pay as Ali, the inevitable conclusion is that there had been no discrimination because of sex.

Royal Mail Ltd v Jhuti

In June 2019 the Supreme Court (SC) will have to decide if the CA was correct in holding that a dismissal was not automatically unfair for whistleblowing where the dismissing officer was unaware of the protected disclosure made by Jhuti (a breach of Royal Mail's rules and its regulators requirements) because her line manager, to whom the protected disclosure was made, manipulated the facts. According to the CA, the reason for dismissal requires considering the mental processes of the dismissing officer. Even if Jhuti's line manager attempted to get her dismissed because she had made a protected disclosure, by way of deception, that motivation could not be attributed to the employer as it was not shared by the dismissing officer.

Royal Mencap Society v Tomlinson-Blake

The CA held that on a straightforward reading of the National Minimum Wage Regulations 2015, care support workers on sleep-in shifts, providing 24-hour care in residential properties to individuals with learning difficulties, are only entitled to have their hours counted for NMW purposes when they were (and were required to be) awake for the purpose of carrying out a specified task. This accords with Regulation 32, which makes it clear that the only hours that count for NMW purposes are those where the worker is required to be awake in order to perform a specific activity. Unison has lodged an appeal to the SC.

Scottish Courts and Tribunal Service v Davies

An appeal has been lodged with the EAT against an ET's decision that Davies, who was disabled because she was experiencing severe symptoms due to the menopause, was unfairly dismissed and treated unfavorably because of something arising in consequence of her disability as her condition caused her to be confused and forgetful, which had led to an altercation with two men in a courtroom prior to a hearing. The ET were entirely satisfied there was a clear causal link between Davies' disability and her conduct. Furthermore, the treatment could not be justified because while the employer had a legitimate aim - having honest and trustworthy staff – dismissal was not proportionate, as no consideration had been given to the impact of her disability on Davies' conduct.

Uber BV and others v Aslam and others

The CA has given Uber permission to appeal to the SC against its majority decision that Uber drivers are workers, and not independent contractors as argued by Uber, within the meaning of the Employment Rights Act 1996 and the equivalent definitions in the National Minimum Wage Act 1998 and the Working Time Regulations 1998. The majority found that while the written contractual terms indicated that Uber acted only as an intermediary, providing booking and payment services, and the drivers drove the passengers as independent contractors, the practical reality of the relationship is that Uber is a transportation business and the drivers carry out work personally providing the skilled labour through which Uber delivers its services and earns its profits. The minority took the view that the relationship argued for by Uber is neither unrealistic nor artificial. On the contrary, it is in accordance with a well-recognised model for relationships in the private hire car business.

Various claimants v WM Morrison Supermarkets PLC

Morrisons has made an application to the SC to appeal against the CA's ruling that Morrisons are vicariously liable for a former employee's actions in disclosing the personal data of 99,998 employees. Skelton, an auditor, had a grudge against Morrisons because of what he perceived to be unfair disciplinary action against him, and he copied payroll data relating to 99,998 Morrisons' employees to a USB stick and then posted their personal details online. The CA held that Morrisons was vicariously liable for the data breach claims brought by 5,500 employees because Skelton had planned the data disclosure process which was not disconnected by time, place and nature from his employment. There was an uninterrupted thread that linked his work to the disclosure.

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