



NeTWork

July 2018

Employment Law Update

This month we talk about:

- Disciplinary appeals - *Patel v Folkestone Nursing Home Ltd*
- Report on Sexual Harassment in the Workplace
- Justifying discrimination arising from disability - *Ali v Torrosian and others*
- Brexit and employment law

Disciplinary appeals - *Patel v Folkestone Nursing Home Ltd*

In this case, the Court of Appeal upheld the Employment Appeal Tribunal's decision that the effect of a successful appeal after dismissal is that the employee was not dismissed.

Mr Patel was employed as a healthcare assistant by Folkestone Nursing Home Ltd (Folkestone). His contract of employment incorporated Folkestone's employee handbook which contained a disciplinary procedure. The disciplinary procedure provided that decisions on dismissal of employees at Mr Patel's level would be taken by the proprietor. The appeal procedure provided that an appeal would normally be conducted by a member of staff not previously connected with the process so that an independent decision could be made.

Mr Patel was charged with sleeping on duty and falsifying residents' records. His defence was that he was sleeping during his rest break and that he had been unable to complete the daily record sheets because of an interruption. Following a hearing conducted by Mr Ndlovu, an external consultant, Mr Patel was dismissed for gross misconduct. Mr Patel's internal appeal was heard by an external manager, Mr Shah, who wrote to Mr Patel stating that the decision to dismiss had been revoked as he considered that Mr Patel had been asleep during an unpaid break and that no procedures of the employer has been breached

as a result. Mr Patel was advised that he would be contacted in relation to a return to work date.

However, Mr Patel did not return to work. He said he was dissatisfied with the reasoning given in the letter, that the letter was incomplete because it did not deal with the allegation that he had falsified records and that he was owed a full explanation. He issued proceedings for unfair dismissal. There was a preliminary hearing to deal with the issue of whether Mr Patel had been dismissed in circumstances where the dismissal had been revoked on appeal.

The employment judge found that Mr Patel had been dismissed for two reasons. Firstly, Mr Patel could not be contractually bound by the outcome of his appeal as Folkestone's disciplinary procedure did not make any provision about what the outcome of an appeal could be. Secondly, the "revocation" of dismissal in Mr Shah's letter was unclear and left out significant issues. The second disciplinary allegation was a significant issue but was not mentioned and Mr Patel should have known where he stood. In the circumstances, the letter was an offer for Mr Patel to return to work on an unspecified basis and which did not address what the effect of the second allegation on him might be.

Folkestone appealed, arguing that there was no requirement for the appeals procedure expressly to give the right to reinstate or impose any particular sanction and that while there was no need for the decision to be communicated for it to have the effect



of reviving the contract, in this case it had been communicated and the words used had been clear enough to make it plain to Mr Patel that his dismissal had been revoked.

The EAT allowed the appeal and issued a declaration that Mr Patel had not been dismissed.

The EAT considered that while the disciplinary procedure did not specify that reinstatement would be the result of a successful appeal, that was inherent in the provision of the appeal. The EAT also disagreed with the employment judge's finding that the letter advising Mr Patel of the outcome of his appeal was unclear. The EAT observed that the letter expressly stated that the decision was revoked and it was clear and Mr Patel was entitled to return to work.

Mr Patel appealed.

The Court of Appeal has upheld the decision of the EAT that there was no dismissal. The Court stated that if an employee has a contractual right to appeal a disciplinary sanction, it is implicit in the contract that if an appeal is pursued and is successful, then the employment relationship is to be treated as having remained in existence throughout. The dismissal will be treated as having no effect.

However, the Court went on to address the fact that the employer's letter allowing the employee's appeal did not deal with one of the allegations against him. The Court found it was arguable that this lack of clarity and failure to resolve that issue was a breach of the implied term of trust and confidence that might justify the employee treating himself as constructively dismissed.

The case is a useful reminder about the nature of appeals against dismissal and the potential consequences of dealing with matters inappropriately.

Report on Sexual Harassment in the Workplace

The Women and Equalities Commission has produced its report on Sexual Harassment in the Workplace.

The report acknowledges that employers and regulators have to date failed to tackle sexual harassment adequately and calls for it to be put at the top of the agenda. It highlights that there should be mandatory requirements, sanctions for breaches and proactive enforcement such as exist in relation to issues such as data protection and money laundering.

Its recommendations include:

- a mandatory duty on employers to protect employees from sexual harassment in the workplace, enforceable by the EHRC and punishable by fines.

- a duty for public sector employers to conduct risk assessment for sexual harassment, and take steps to mitigate any risks.
- reintroducing third party harassment, so that employers are liable if they have failed to take reasonable steps to prevent others harassing their staff.
- extending sexual harassment protection to interns and volunteers.
- extension of the time limit for bringing a claim to six months, with the clock paused while any internal grievance process is going on
- enabling tribunals to award punitive damages in sexual harassment cases creating a presumption of costs, so that employers will ordinarily have to pay the employee's legal costs if it loses a sexual harassment case
- limiting the ability to use confidentiality clauses in settlement agreements to 'government approved' standard clauses
- making it a professional disciplinary offence for lawyers (and, in certain circumstances, also a criminal offence for the employer and the lawyer) to propose the use of a non-approved confidentiality clause

Justifying discrimination arising from disability - *Ali v Torrosian and others*

Under section 15(1) of the Equality Act 2010 (EqA 2010), discrimination arising from disability occurs where both:

- A treats B unfavourably because of something arising in consequence of B's disability (section 15(1)(a)).
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim (section 15(1)(b)).

To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing

In this case, Dr Ali worked as a GP for the Bedford Family Practice (the Practice). He went on long-term sick leave following a heart attack and his ongoing heart condition was accepted to be a disability for the purposes of the EqA 2010. A medical report confirmed that it was unlikely that Dr Ali would ever be able to return to work full-time, but advised that he could return on a phased, part-time basis. He then suffered a shoulder injury and was signed off work for a further six weeks. On the expiry of that certificate Dr Ali was dismissed by the Practice on the ground of capability.



Dr Ali brought claims of unfair dismissal and disability discrimination. An employment tribunal held that his dismissal was procedurally unfair because of the Practice's failure to consider his return to work on a part-time basis. The tribunal rejected Dr Ali's disability discrimination claims and concluded that while his dismissal amounted to unfavourable treatment for the purposes of section 15, and arose in consequence of his disability, it was justified by the Practice's legitimate aim of ensuring that the best possible care was provided to patients.

Dr Ali appealed to the EAT. The EAT allowed the appeal as the tribunal had not considered matters correctly. While it had considered the impact of Dr Ali's absence in terms of the Practice's financial and operational costs and the effect on continuity of patient care, it had failed to consider the possibility of Dr Ali returning on a part-time basis as a less onerous way of the Practice achieving its legitimate aim. Its decision could not stand given that Dr Ali had indicated that he was able to return on a part-time basis, had provided medical advice to support that view and the tribunal had considered the possibility of a part-time return in relation to Dr Ali's unfair dismissal claim.

As at the date the Practice dismissed Dr Ali, his last fitness to work certificate had ended, and the medical advice was that he should be able to return on a part-time basis. The tribunal had found that the failure to discuss the possibility of part-time working rendered the dismissal procedurally unfair. The tribunal had therefore erred in failing to consider the issue of part-time working as a less discriminatory means of meeting the Practice's legitimate aim.

The disability arising from discrimination claim was remitted to the same tribunal to reconsider the question of proportionality in the light of its finding that it had been possible for the Practice to accommodate part-time working.

This case is a useful reminder of the approach taken by employment tribunal to justification in the context of discrimination.

Brexit and employment law

On 12 July the Government published its White Paper 'The Future Relationship between the United Kingdom and the European Union'.

Contrary to some commentary in this area, the paper proposes that there be no regression in employment laws. That means that it is likely that no EU based laws will be repealed. Such laws include TUPE 2006, the Working Time Regulations and obligations on collective consultation amongst others.

If you have any questions about these or other employment issues please call:

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