



Employment law update for schools

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Exit Pay Cap

- New consultation on 95K cap – closes July 2019
- Draft Regs now exclude payments in lieu of notice (up to 3 months)
- Still not clear how limit actually affects individual pension rights
- Errors in drafting mean changes will be needed before they can come into force

What happens next?

- BREXIT! – will we match EU developments in employment law?
 - Parental leave
 - Predictable working hours
- New PM! What would Boris do?
- General Election – what would a Labour Government mean for employment law?

London Borough of Lambeth v Agoreyo

- Primary school teacher suspended for alleged 'inappropriate force' with two disruptive children
- Resigns same day – claims breach of contract
- High Court upholds claim – employer's reason for suspension was unclear, and no exploration of alternatives
- Court of Appeal overrules – High Court should not have interfered with county court findings
- County court entitled to find there was 'reasonable and proper cause' for suspension
- High Court wrong to apply a test of whether suspension was 'necessary'

Talon Engineering Ltd v Smith

- Employee accused of gross misconduct (disparaging colleagues to a supplier)
- Union rep can't make scheduled hearing date – gives alternative 2 weeks later
- Employer refuses to postpone – hearing goes ahead in employees' absence
- EAT upholds unfair dismissal finding – irrelevant that employer complied with statutory right to be accompanied
- Employee 'could not be faulted' for refusing to attend hearing

Asda Stores Ltd v Raymond

- Driver dismissed for urinating in shared delivery yard
- Held to be unfair and discrimination 'arising' from disability
- Employer had claimed breach of health and safety rules – but failed to identify them
- Had not considered explanation (sudden urge linked to diabetes) but just assumed that the basic fact was enough

Ali v Capita Customer Management Hextall v Leicestershire Police

- Paying enhanced maternity pay, but only statutory Shared Parental Leave Pay is not discriminatory
- Those taking shared parental leave not comparable to those taking maternity leave
- If based on contractual term it should be an equal pay claim
- Exclusion for enhanced terms based on pregnancy and childbirth applies – no claim for indirect discrimination possible
- In any event, men not put at a particular disadvantage, and policy was justified

Oxford Bus Company v Harvey

- Bus driver is a Seventh Day Adventist – needs to avoid Friday evening / Saturday working
- Required to work 5 day out of 7 rota – including Fridays and Saturdays – claims indirect discrimination
- Tribunal finds no justification – employer could have accommodated his need
- EAT allow appeal – issue was not the treatment of the individual, but the justification for the rule
- Employer was concerned that an exceptions would lead to further requests and undermine rota
- Sent back to Tribunal to consider justification afresh.

Gan Menachem Hendon Ltd v De Groen

- Teacher in ultra orthodox Jewish nursery dismissed for refusing to deny living with her boyfriend
- EAT holds this was not religious discrimination – based on employer’s belief not hers
- Was sex discrimination – conversation with manager laden with sex-based assumptions and language

Kuteh v Dartford and Gravesham NHS Trust

- Nurse giving pre-operative questionnaire
- Complaints that she was raising religion and making patients uncomfortable
- Continues to do so despite assurances – dismissed
- Dismissal held to be fair – no breach of Article 9
Freedom of religion

Sutton Oak Church of England School v Whittaker

- Teacher dismissed after being seen giving sweets to a year 5 boy, alone in the classroom
- That went against specific instructions he had been given following a warning in 2002
- Tribunal held that this was sexual orientation discrimination – assuming that a gay man was a danger to children
- EAT said Tribunal had failed to make thg right comparison – how would a heterosexual teacher *who had been given the same warning* have been treated?

Tywyn Primary School v Aplin

- Headteacher dismissed for sexual encounter with two 17 year old boys he met through Grindr
- Tribunal finds investigation to be flawed and hostile – full of value judgments
- Unfair dismissal and sexual orientation discrimination
- Employer argues that burden of proof should not have shifted on discrimination – no evidence that heterosexual encounter would have been viewed differently
- EAT uphold decision. Investigation was intimately connected with sexual orientation and its flaws were sufficient to raise inference of discrimination

Saad v Southampton University Hospitals Trust

- Victimisation has no defence of justification
- But an employee is not protected if allegations are false and in bad faith
- Employee raised allegation of discrimination from 4 years ago to delay performance management process
- ET said that was not in good faith and he did not reasonably believe the allegation was true
- EAT say not enough – to defeat claim employer must show the allegation was actually false

City of York Council v Grosset

- Teacher dismissed for showing horror film to vulnerable teenagers
- Tribunal finds that was related to disability – cystic fibrosis leading to fatigue, stress and lapse in judgment
- Court of Appeal upholds finding of discrimination
- No justification because of employer's lack of support
- But Tribunal entitled to find that dismissal was fair – no contradiction, different standard of reasonableness

Baldeh v Churches Housing Association

- Employee fails probation – blunt and unguarded manner, loss of private data
- Employee says that is related to her depression – but only mentions this at appeal stage
- Employer argues unaware of disability at time of dismissal
- EAT holds appeal was part of the decision
- Could be discrimination if factors arising from dismissal were significant part of the reason

Kouchalieva v London Borough of Tower Hamlets

- Passenger assistant on school bus service servicing special needs
- Her disability gave her difficulty moving and in any manual handling
- Employer sought to transfer her to route involving children with auditory impairments
- She refused (longer tube journey) wanted transfer to route involving children with behavioural problems – employer refused
- Held no failure to make reasonable adjustments – not safe to transfer her to her preferred route

Ishola v Transport for London

- Employee raises grievance about colleague, objects to the way it is handled, goes off sick
- OH says unlikely to return until grievance is dealt with to his satisfaction
- Employer dismisses after one year – when sick pay has expired
- No failure to make reasonable adjustment – employer entitled to conclude employee would only return if grievance was upheld

iForce v Wood

- Worker given final written warning for refusing to work near the warehouse door
- Claims disability discrimination – believed that working near the door was colder and damper and would worsen her arthritis
- Employer shows that temperature at warehouse door is not any lower
- EAT holds this means that her unfavourable treatment was not ‘because of something arising in consequence of her disability’

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