BCLP. Client Intelligent

Insights

UK HR TWO-MINUTE MONTHLY: MARCH 2024

CAN AN ACTOR BE DISMISSED FROM PLAYING A PART DUE TO RELIGIOUS BELIEF, AND DOES A TRIBUNAL HAVE JURISDICTION OVER AN EMPLOYEE WHO WORKS OUTSIDE THE UK - PLUS A GENERAL NEWS ROUNDUP

Mar 27, 2024

SUMMARY

Our March update includes a case on whether a theatre and agency could dismiss an actor playing a lesbian role because of her devout Christian beliefs, and a case looking at whether an employee who spends virtually all her working time on a yacht outside the UK has the right to bring employment claims under UK law. We also feature a news round-up looking at the Treasury Committee's report on "Sexism in the City", focusing on employment practices in financial services, the plans for a four day week in summer by the creation of "4ugust", and the government's views and written guidance on "Kinship Care".

CAN AN ACTOR BE DISMISSED FOR STRICT AND PUBLICLY HELD RELIGIOUS BELIEFS

The claimant is an actor and a committed Christian. Her religious beliefs had in the past led her to refuse to play certain parts.

In January 2019, the claimant was cast in the lead role of Celie in a stage production of The Colour Purple. Celie is seen as an iconic lesbian role and the production is recognised as being at least in part about the physical lesbian relationship between Celie and another female character.

In 2014 the claimant published on Facebook her general beliefs on homosexuality stating that, *"…I do not believe you can be born gay, and I do not believe homosexuality is right… I do believe that everyone sins and falls into temptation but it's by the asking of forgiveness, repentance and the grace of God that we overcome and live how God ordained us too, which is that a man should leave his father and mother and be joined to his wife…"*

In March 2019, shortly after the cast for The Colour Purple was publicly announced, the claimant's Facebook post was shared on social media and quickly went viral. This led to a social media storm criticising the claimant and the planned production for having cast her as Celie. To add to this, the claimant maintained that her beliefs had not changed since the Facebook post and, despite the post going viral, she would not distance herself from it.

As a result, the theatre terminated its contract with the claimant, although it offered to pay her the money that would have been due under the contract to play Celie. The termination letter noted that the claimant's continued engagement was considered untenable – the theatre said it would affect the harmony and cohesion of the cast, audience reception, the producers' reputation and the good standing and commercial success of the production. The claimant's agency initially did not respond, but then also terminated their contract with the claimant as a result of the social media storm. The claimant has not had any paid acting work since.

In August 2019, the claimant commenced tribunal proceedings for direct discrimination and harassment because of, or related to, her religious belief. She also brought claims for indirect discrimination and (against the theatre) breach of contract. Shortly before the tribunal hearing, having only then read the script, the claimant said she would not have performed the part of Celie anyway due to her religious beliefs and would have resigned from the role had she not been dismissed. She continued the proceedings nevertheless.

The tribunal dismissed all the claimant's claims. It took note of the facts that the claimant (a) by her own admission had not read the script at the time of accepting the part, and (b) admitted that, on learning that the role involved the portrayal of a physical lesbian relationship, would not have performed the role of Celie and would have resigned anyway.

In relation to the direct discrimination claim against the theatre, the tribunal held that the claimant's religious belief was **not** the reason for her dismissal. The tribunal, using the "but for" direct discrimination test held that, while the situation would not have arisen "but for" the expression of the claimant's belief on social media, this expression of belief was not the reason for her dismissal. The tribunal held that the reason for her dismissal, as argued by the theatre, was *"the effect of the adverse publicity from its retweet, without modification or explanation, on the cohesion of the cast, the audience's reception, the reputation of the producers and "the good standing and commercial success"* of the production". This distinction between and separation of the protected characteristic and the reason for the alleged discriminatory dismissal, along with the order for costs taking into account third parties, is perhaps the key point(s) of the case.

Similarly, the tribunal found the claimant's religious beliefs were not the reason for the agency terminating her contract. Rather, the agency terminated her contract because of a fear that continued association with her would *"damage the business"* and that the publicity storm about the claimant playing the role of Celie *"threatened the agency's survival"*.

The tribunal dismissed the claimant's harassment claims against both the theatre and the agency. The tribunal held that *"the real harassment of the claimant was in the social media campaign"*, rather than through any action of theatre or the agency. Finally, the claimant's breach of contract claim was also dismissed. The tribunal held that it was in fact the claimant who had repudiated/breached her contract because, although she knew she would not play a lesbian character, she did not raise this with the theatre. Accordingly, no damages were due.

Bearing in mind all the above and the dismissal of the claims, the tribunal awarded costs against the claimant. The tribunal found that the claimant's claims had no reasonable prospect of success from the outset, especially once she realised she would never in fact have played the role of Celie, and that the continued conduct of the claims was unreasonable. The tribunal awarded the entirety of the respondents' costs against the claimant, subject to detailed assessment. The tribunal took into account when making the (high) award of costs that the claimant had been funded throughout by two religious organisations.

The claimant appealed and the respondents cross-appealed.

The EAT upheld the tribunal's decision, and dismissed both the claimant's appeal and the respondents' cross-appeal. It held that the tribunal was entitled to find that the reason for the claimant's dismissal was the adverse publicity and audience reception, and potential impact on the standing and commercial success of the production, rather than the claimant's religious beliefs. The EAT rejected the claimant's argument that, since those factors arose as a consequence of her belief, her belief was therefore an operative reason for her treatment.

In relation to harassment, the EAT held that the tribunal had permissibly found on the facts that the respondents had not contributed to the hostile environment that had arisen. The social media storm was not caused by (or encouraged by) the theatre of the agency.

The EAT also dismissed the claimant's appeal against the tribunal's rejection of her breach of contract claim against the theatre. The claimant had been offered the full contract fee, so there was no pecuniary loss. In addition, given that the claimant knew that she would not play a lesbian character but had failed to raise this with the theatre, or to familiarise herself with the requirements of the role, the EAT agreed with the tribunal's finding that the claimant was in repudiatory breach of her express contractual obligations and of the implied term of mutual trust and confidence. The EAT noted that *"the [claimant's] breach of contract claim was….hopeless"*.

With regard to the costs order, the EAT held that the tribunal was entitled to find that the threshold for making a costs award was met for the reasons given. Further, in awarding the entirety of the respondents' costs, the tribunal had permissibly taken into account the resources of not just the claimant, but of the two Christian organisations that had supported the claims, as they were deeply invested in bringing and continuing the claims as a public opportunity to promote religious beliefs, rather than fighting the claims on their merits.

WHY THIS MATTERS

The EAT judge acknowledged that this case was unusual - it seemed the case had been brought more to benefit of the aims of the organisations funding the litigation than as a means of compensation for the claimant.

Notwithstanding this, the case deals with the difficult issue of how employers should respond where a conflict arises between an individual's religion or beliefs and the differing views of others. Previous case law in this area, including *Higgs v Farmor's School* has focused on whether an employee has inappropriately or objectionably manifested their belief. However, in this case, the reason for the treatment was found to be neither the claimant's belief nor its manifestation. It was found to be a separable and separate feature, being the potential business/reputational harm and publicity/commercial effects arising from a social media storm and adverse publicity which followed as a result of that manifestation. This allowed the tribunal and the EAT to separate the reason for the claimant's treatment from her protected characteristic.

This separation, which effectively breaks the causation between the treatment suffered by the claimant and the claimant's protected characteristic could be important in future (and similar) discrimination cases where there is public attention and, in turn, a social media storm, or at least a "buzz". Other cases in this area have created publicity and plenty of social media activity, and we will see whether this principle of separation is argued in future by employers. Essentially, the argument would be that the protected characteristic may have been a factor in, **but not the reason for**, the treatment in question. The treatment resulted from the consequences – from the attendant publicity and social media attention.

Finally, it also illustrates that, when making an award of costs, tribunals can and will take into account the resources of third parties funding a claimant, particularly when those third parties are highly invested in the case for reasons going beyond the interest of the claimant, in this case to promote their religious beliefs in general.

Omooba –v- Michael Garrett Limited and Another

DOES THE TRIBUNAL HAVE JURISDICTION OVER AN EMPLOYEE WHO (APPARENTLY) WORKS OUTSIDE THE UK

The claimant was employed as a stewardess aboard a yacht operating exclusively outside UK waters. The respondent was registered in Guernsey and the company did not carry out any work in the UK. The claimant's employment contract stated that her normal place of work was on the yacht (on voyages worldwide) or wherever required by the respondent for the performance of her duties. However, the employment contract stated it was governed by the courts of England and Wales and they would have jurisdiction over any disputes or claims. The claimant was dismissed in October 2021 allegedly by reason of redundancy.

Following her dismissal, the claimant brought various claims against the respondent under the Employment Rights Act 1996 and the Equality Act 2010, including a claim for unfair dismissal. The respondent challenged the tribunal's jurisdiction to hear the claims, arguing there was no sufficient connection between the claimant's employment and British employment law, focusing particularly on the fact that the yacht did not enter a UK port or UK waters at any time during her employment with the respondent.

At the tribunal, the duties of the claimant were considered. The parties agreed that all the claimant's "tours of duty" started and ended outside Great Britain. However, the tribunal held that "tours of duty" only referred to the claimant's work on the yacht and did not encompass **all** her duties. The tribunal went on to conclude that her other duties began and ended in Aberdeen, the place where she began her journey to work and to which she returned after her "tours of duty".

The 'base' of the claimant was also considered. The tribunal, referring to the leading 2006 case of *Lawson -v- Serco*, noted that in the case of "peripatetic" employees, being employees who move around a great deal, the concept of the "base" of the employee was significant, and found that the claimant's base was in the UK. Therefore the tribunal had jurisdiction to hear the claim.

The respondent appealed on two grounds. First that it was not open to the tribunal to find that the claimant's duties began in Aberdeen, and secondly that there was no evidence to support the finding that the claimant's base was in Aberdeen.

The EAT, relying on previous case law, upheld the tribunal's finding that they had jurisdiction to hear the claim on the basis that there was a sufficient connection between the claimant's employment and British employment law. The factors considered included:

- the governing law of the contract and the choice of forum for disputes;
- that the claimant accounted to HMRC for tax purposes;
- the claimant's place of residence;
- that the tribunal concluded that the claimant's duties began and ended in Great Britain;
- that the time the claimant spent travelling from her Aberdeen home to the vessel was 'working time'; and
- that the respondent had contractual responsibility for all travel expenses incurred between the claimant's Aberdeen home and the yacht, another indicator that the claimant's "base" was in Great Britain.

The EAT also upheld the principle that a seafarer's 'base' should be treated as their place of employment, not the location of the employer's headquarters or the vessel on which they work.

WHY THIS MATTERS

This case confirms that tribunals will take a multi-factor approach when considering the connection between an employee's contract of employment and UK employment law and whether that connection is "sufficiently strong".

Employers of this type should note that, bearing in mind the frailty of the UK connection in this case, tribunals seem to be taking a broad approach when considering where the employee's "base" may be.

Yacht Management Company Ltd -v- Gordon

NEWS ROUNDUP

SEXISM IN THE CITY/FINANCIAL SERVICES

On 8 March the House of Commons Treasury Committee published a report on its "Sexism in the City" inquiry relating to employment and cultural issues in financial services. The Committee acknowledged that some measures had been taken since 2018 to address sexism in the financial services sector, but the overall conclusion was that progress is far too slow.

Most of the discussions/ measures are relevant to employment.

The Committee heard that many firms treat diversity and inclusion (D&I) as essentially a "tick box" exercise, despite clear evidence that diverse firms achieve better results. There have been small improvements in the proportion of women holding senior roles along with a similarly small reduction in the average gender pay gap, which remains the largest gender pay gap of any sector in the UK. It also found a prevalence of sexual harassment and bullying, with firms handling those allegations poorly.

The Committee considers that the overall problem behind all the issues is (a) impunity on the part of perpetrators and (b) a lack of cultural change in the sector. The Committee believes that financial services firms must take responsibility for improving and evolving culture, with the onus on individual employers to achieve this, as opposed to the regulator or the government.

The report sets out a number of recommendations which the Committee believes are essential for tackling sexism in financial services, including the following:

- Legislation to ban the use of non-disclosure agreements (NDAs) in sexual harassment cases;
- Stronger protections for whistleblowers in sexual harassment cases;
- A ban on prospective employers asking for salary history;

- A legal requirement to include salary bands in job adverts;
- Reducing the size threshold for gender pay gap reporting from 250+ to 50+ employees for financial services firms;
- Businesses with wide gender pay gaps should be obliged to explain the disparity and publish an action plan;

The Committee said that regulators should focus their efforts on ensuring firms' boards and senior management take greater responsibility for improving D&I.

The recommendation to ban the use of NDAs in sexual harassment cases could have a major impact on employment dispute settlements and settlement agreements, and comes at a time when the Solicitors Regulation Authority and Legal Services Board are recommending similar measures.

LOOKING FORWARD TO 4UGUST

The 4-Day Week Campaign and think tank Autonomy have launched a new initiative called "4ugust". The idea is that employers have a mini-trial of a four-day week in August. Given the bank holiday in the final week, this would effectively provide workers with four extra days off work. It is suggested that “4ugust” will run every year. Several large employers already offer reduced summer working hours, with a leading accountancy firm allowing employees to leave at lunchtime on Fridays.

In February 2024 Autonomy published a report following a trial of the four-day week in 2022, noting that the majority (89%) of businesses had continued with the policy and that half (51%) had made the policy permanent. The report also found that 58% of the public expects a four-day week to be the standard way of working by 2030.

KINSHIP CARE AND WRITTEN GUIDANCE FOR EMPLOYERS

In December 2023 the government published a “Kinship Care Strategy”.

This is aimed at creating a social care system where children cannot live with and look after their parents. Where this is the case, others such as more distant family members or even friends can be provided with support to live with and care for a family or friend who is known to them. As part of this strategy the government published guidance for employers on “kinship care”. The guidance encourages employers to support staff who are kinship carers, by for example creating/adapting workplace policies to accommodate kinship carers.

There was a House of Commons debate on Kinship Care this month. In response to several questions from MPs from different parties about the possibility of statutory leave for kinship carers, the Parliamentary Under-Secretary of State for Education said he recognised the challenge kinship carers face when, for example, continuing to work as well as dealing with the pressures of

unexpectedly taking in and raising a child. He indicated that the government "*continue[s] to explore what [it] can do*" in this respect.

In response to a separate question about the possibility of leave for kinship carers on 7 March, Kevin Hollinrake MP, Parliamentary Under-Secretary of State for Business and Trade indicated that "employers are the right people to make sure that any provision [the government] provide[s] is a floor, not a ceiling" and urged companies to take "a very considerate approach" to employees who are kinship carers.

Whether employers will receive incentives to encourage kinship care or whether the government will bring into force some kind of statutory leave or other support remains to be seen.

This article was written with Trainee Solicitor Jemima Rawding.

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM

Jemma Green

London

jemma.green@bclplaw.com
+44 (0) 20 3400 4575

David von Hagen

London

david.vonhagen@bclplaw.com
+44 (0) 20 3400 3576
