Employment Newsletter

November 2018

BACKHOUSE JONES

Phoenix from the Ashers

Despite being unsuccessful in their local courts, and again in the Court of Appeal, the McArthurs, of Ashers Baking Company Limited, have successfully appealed a decision against them that by refusing to produce a cake bearing a 'Support Gay Marriage' slogan, they were discriminating on the basis of sexual orientation.

Facts

In May 2014, Mr Lee went into a shop within the Ashers Baking Company brand and ordered a cake, iced with images of the much-loved characters 'Bert and Ernie' from Sesame Street. The cake was also to display the logo of LGBT community organisation for whom Mr Lee campaigned, Queer Space, and bear the slogan 'Support Gay Marriage.'

The McArthurs, owners of this particular bakery and founders of the brand, are practising members of the Christian faith. In fact, the name 'Ashers Baking Company Limited' derives from Genesis 49:20, where it is stated that '*bread from Asher shall be rich and he shall yield royal dainties*.'

The order from Mr Lee was taken and paid for. However, during the course of the weekend the McArthurs discussed the order and decided that they could not in good conscience print a cake with the slogan requested. Instead, they phoned Mr Lee, apologised, and granted him a full refund.

Decision

Following this refusal of service, Mr Lee lodged a complaint with the Equality Commission for Northern Ireland (ECNI), who supported him in bringing his claim for direct and indirect discrimination on the grounds of sexual orientation, religious belief or political opinion.

The Presiding District Judge who first heard the claim decided that by refusing to complete the order, the bakery was guilty of discrimination on all three of the proposed grounds. She also held that the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SI 2006/439) and the Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/3162 (NI21)), complied with human rights legislation. This is having balanced the right to possess a religious belief in conjunction with the right not to be discriminated against because of sexual orientation.

Court of Appeal

Ashers appealed this decision to the Court of Appeal, who proceeded to serve a devolution notice and a notice of incompatibility on the Attorney General, who then joined the proceedings. They decided that this was a case of associative direct discrimination i.e. that Mr Lee had been discriminated against due to his association with a community of people possessing protected characteristics.

Supreme Court

Following this judgment, the case found itself in the Supreme Court. Ashers appealed the decision on the basis that the Judges were not in a position to find that there was direct discrimination on the grounds of sexual orientation, as the reason service was refused was because of the message to be printed, not the characteristics of the person placing the order or the community to which he is associated. He asserted that anyone, regardless of sexual orientation, would have been treated the same if they wanted that message printed. Ashers case therefore focussed on the politics rather than the perception.

The Supreme Court found itself persuaded by the submission and, whilst emphasising the trauma and embarrassment caused when discrimination does occur based on sexual orientation, decided that there was no discrimination in this case. As this court is the highest of the relevant jurisdiction, there is no court to which Mr Lee can appeal this decision.

Comment

The decision of this case requires employers to focus consideration on the tasks and duties that their employees might be required to carry out in their occupation. This is because there is a wider remit to refuse to do certain actions and print or advocate for certain causes, based on that employees' personal beliefs. However, we would issue a cautionary note that this doesn't create carte blanche to do (or refuse to do) things because of someone's religious or political beliefs and there are a number of legal hoops to jump through. If, however, you find yourself in a position where an employee is refusing to do something (or you yourselves don't want to do something) because of a genuinely held view, we recommend you contact us for advice.

It may be that the refusal is totally unreasonable but where the refusal is genuine it might require alterations to be made to duty rotas or even job descriptions contained in employment contracts. As employees now have some leeway as to what they can or cannot be asked to do by a prospective customer, and what they can refuse to do.

This case is also a reminder of how far things can go on the point of principle. The damages awarded by the first instance court were only £500, but several years later, the case was in the highest court in the land having no doubt incurred five or six figure sums in respect of legal costs.

Misconduct and Disability Discrimination

The Court of Appeal in the case of ***City of York Council v Grosset*** held that where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to unfavourable treatment because of something arising in consequence of disability under s.15 of the Equality Act 2010, even if the employer did not know that the disability caused the misconduct.

Facts

The Claimant in this case was a teacher who suffered from cystic fibrosis. A number of reasonable adjustments were made to accommodate his disability, however, a new head teacher took over the school and these

adjustments were not properly recorded. In turn, the Claimant was subjected to an increased workload. While under an increased level of stress, he showed the film Halloween, which is an 18 rated horror, to his class of 15-year olds without consent. The class of students the film was shown to was in fact a 'nurture group' which catered for pupils who required more attention than others.

The school did not accept the Claimant's explanation that this was an error of judgement on his part arising out of stress and he was dismissed fir gross misconduct. The Claimant then brought a claim for unfair dismissal and disability discrimination on the basis that the school failed to make reasonable adjustments and that his dismissal amounted to unfavourable treatment '*because of something arising in consequence of his disability*'.

The tribunal upheld some of the reasonable adjustment claims, however the unfair dismissal element of his claim was dismissed. It accepted that the school had a legitimate aim in safeguarding their children, however, the Claimant's dismissal was not a proportionate means of achieving this aim. An unsuccessful appeal was brought and the EAT found that s.15 of the Equality Act 2010 only required the school to have knowledge of the fact the Claimant was disabled, not whether the school knew that the '*something*' which caused it to treat the Claimant unfavourably arose in consequence of his disability.

This matter then went to the Court of Appeal, who ruled that the legislation was not

ambiguous. There were two causative issues in s.15 for a tribunal to consider. Firstly, whether the Employer treated the Claimant unfavourably because of an identified 'something' and secondly, whether that 'something' arose in consequence of the employee's disability. The Court found that the Claimant was dismissed because he showed the film, being the relevant 'something', and that there was a causal link between that and the Claimant's disability.

Comment

This is the first case which the Court of Appeal has had the opportunity to consider the meaning of s.15(1) '*discrimination arising from disability*'. This decision illustrates how even when an employer reasonably concludes, based on the evidence available to them, that there is no link between an employee's actions and his or her disability, they can still be liable for disability discrimination.

A word of advice to employers is to therefore consider obtaining medical evidence before disciplining or dismissing a disabled employee to fully establish whether the employee's actions could in any way be linked to his or her disability. It is best practice to do everything you can as an employer to try and ascertain whether this causal link exists. If medical evidence is sought, but is not clear cut, employers will have to decide whether to give that employee the benefit of the doubt or risk a s.15 claim should they choose to dismiss the employee.

Was that my job or yours?

In today's fast paced world filled with distractions such as BREXIT and Russian Spies holidaying in Salisbury, you'd be forgiven for putting off the odd thing here and there. It could perhaps be that cupboard you keep meaning to clear out, the odd admin job that has been on your to do list for months on end or indeed that strict diet you put yourself on after every blow out weekend. Keeping your company's employment contracts in order however or making sure the correct restrictions are in place is something you can't be excused from putting off, a lesson learnt by Tenon FM Ltd in the recent case of ***Tenon FM Ltd v Cawley***.

Tenon FM Ltd, a large facilities management company recently failed to enforce post-termination restrictions in the High Court simply due to the fact that they were unable to demonstrate that there was a signed contract in place.

Susan Cawley was initially employed by Tenon in May 2008. She worked her way up the company and was promoted to regional operations director in 2011, national operations director in 2016 and then to operations director, which was the role she held when she resigned in 2018.

Now, as you would expect, promotions usually bring increased perks, conditions and even in some cases, more onerous post termination restrictions. In Ms Cawley's case, the 2011 promotion came with a set of restrictions which were contained in a contract provided to her in 2011. An identical contract was provided in 2012.

When Ms Cawley left the business, she attempted to persuade a colleague to join her future employer. Tenon attempted to enforce the restrictions contained in the 2011 and 2012 contract by way of an injunction.

Whilst searching for a signed copy of Ms Cawleys contract containing the restrictions, Tenon could only produce Ms Cawleys 2008 contract. Where were the 2011 & 2012 contracts you ask?

Ms Cawley stated that the reason why Tenon could only locate one contract was down to the fact she had refused to sign the subsequent contracts owing to their onerous post-termination restrictions.

Decision

The matter came before HH Judge Bidder QC. He noted that should this matter proceed to a final trial, it would likely take place well after Ms Cawleys restrictions had expired. He therefore had to consider whether there was indeed a serious issue to be tried, but also the strengths of the case put forward by Tenon.

Upon consideration, the Court held that Tenon had fallen at the first hurdle simply due to the fact that they could only produce the 2008 contract and failed to show any evidence that the subsequent contracts had been signed by Ms Cawley or indeed any consideration that Ms Cawley had actually agreed to the onerous restrictions contained within them.

It was considered remarkable that Tenon, a large organisation with a fully staffed HR team, experienced managers and personnel files, was unable to locate a signed copy of the contract on which Tenon had based their claim on. Further criticism fell on Tenon due to their failure to the call the HR manager as part of its evidence for injunctive relief and considered it odd that they hadn't provided a statement from the HR manager to rebuff Ms Cawleys claims or a reason as to why they had failed to contact the then HR Manager.

To try and give a lifeline to their faltering, Tenon claimed that Ms Cawleys continued employment and working within the positions

the restrictions were attributed to was enough to show that she had indeed contractually consented to them, a stance often taken by employees when employers fail to return signed employment contracts. However, HH Judge Bidder noted that both the 2011 and 2016 contracts expressly stated that they were effective from signature, suggesting they were not binding if unsigned. Not satisfied that there was a serious issue to be tried, HH Judge Bidder considered that Tenon would fail at trial, rejecting the fact that without authority, an employee continuing to work and the employer continuing to employ could amount to consensual variation, and acceptance by the employee, especially where more onerous terms were introduced.

Comment

Where are your contracts kept? Who makes sure they are all up to date? Are they signed? These are all questions which you can't allow distractions to get in the way of you answering. As proved in this case, it will not be an easy task for an employer to persuade a court at trial or at an interim stage to enforce post-termination restrictions contained within contracts that have not been signed by an employee. This principal can apply equally to any term which does not have immediate effect.

If an employer wishes to introduce new post-termination restrictions during employment, it must provide adequate consideration for the employee's agreement to the variation and ensure that evidence is kept of any such consideration. Further to that, employers should make sure that all employees at a similar level have similar or the same post termination restrictions in their contracts.

Doing the above will help aid you should you find yourself in Tenons position. For any advice on contracts or indeed the inclusion of post-termination restrictions please contact a member of the employment team.

FOR ALL RELATED ENQUIRIES, PLEASE CONTACT OUR EMPLOYMENT TEAM ON 01254 828300

Please note: This publication does not constitute legal advice

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