Employment Newsletter

September 2018

BACKHOUSE JONES

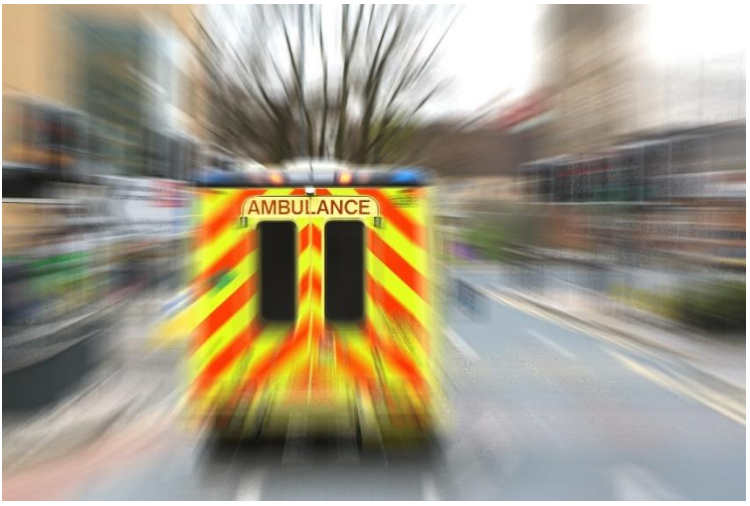
How clear is notice?

The Employment Appeal Tribunal ('EAT') considered this is in the case of *East Kent Hospitals University NHS Foundation Trust v Levy* when it dismissed the Trusts appeal against a decision that an employee's notice was to depart her current department and not her employment.

The Facts

The Claimant, Mrs P Levy was employed by East Kent Hospitals University NHS Foundation Trust (the 'Trust'), as an Administrative Assistant in the Records Department. Mrs Levy had been offered a role in the Radiology department (subject to pre-appointment checks) and following an altercation with a colleague in the records department she handed in a letter, stating "Please accept one month's notice from the above date", to which the manager responded on the same day accepting the "notice of resignation", referring to her last day in that department.

The offer of employment in the radiology department was subsequently withdrawn due to the Claimant's sickness record, and the Claimant sought to retract her notice. The Trust refused to allow her to retract her notice claiming that she had resigned from her employment and reaffirmed that her employment would end at the end of her notice period.



The Claimant brought a claim for unfair dismissal in the Employment Tribunal (ET), however the Trust argued that she had resigned. The term 'notice' is generally understood to denote an unambiguous notice of termination of an employee's contract and communication between the parties must be clear and unambiguous: both parties must understand what has taken place. However, the ET held that her letter was ambiguous in terms of whether she was giving notice to depart the Records Department or to leave her employment. The ET found that even if the words used had been clear and unambiguous, the context in which they had been used meant there were "special circumstances" which required them to be construed objectively, having regard to all the circumstances of the case. The ET found that the Claimant's manager had in fact understood that she was resigning from the department, not her employment with the Trust which was a reasonable construction of the letter.

The Claimant therefore successfully established that she had been dismissed which the ET held was unfair. The Respondent appealed against the finding, however the appeal was dismissed.

Commentary

This case is a reminder that the circumstances of a particular case and not just the words used must always be taken into account when deciding whether or not notice is clear and unambiguous.
Once valid unambiguous notice has been given it cannot be refused or withdrawn

without the other party's agreement. There is a common misconception that an employees' notice has to be 'accepted' to be valid, however that is not the case. There are in fact no statutory requirements as to the mechanics of receiving an employee's notice and any contractual requirement for 'acceptance' would be very rare.

There are certain circumstances where a notice period may be varied, however, this must be by mutual consent. There is however an exception to the general rule, being that employers or employees who speak words of dismissal or resignation in the heat of the moment should be given the opportunity to withdraw any such dismissals or resignations following a cooling off period.

Is a poorly handled retirement procedure discriminatory?

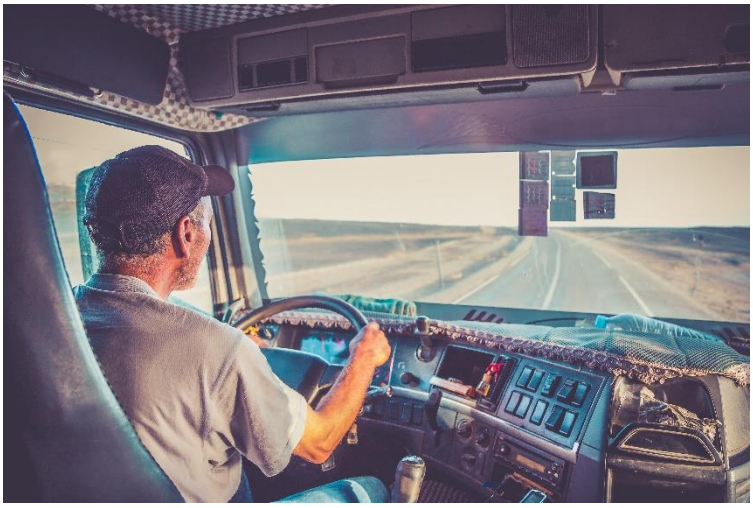
No held the Court of Appeal (COA) in the case of *Dunn v Secretary of State for Justice*

The Court of Appeal held that the poorly handled ill-health retirement procedure did not amount to disability discrimination.

The Facts

Mr Dunn was a prison inspector employed by the Secretary of State for Justice. After becoming ill with depression and a serious heart condition Mr Dunn applied for ill health retirement, which due to the large scale of the Respondent had to go via various different departments. There were significant delays during which Mr Dunn's condition deteriorated and incorrect information about the retirement benefit was given. After a lengthy delay Mr Dunn eventually took early retirement with effect from 29 February 2016. Mr Dunn's managers apologised for the delays and poor handling of the process.

Mr Dunn brought proceedings in the Employment Tribunal (ET) for direct disability discrimination and unfavourable



treatment arising out of the way in which he was treated by the Respondent throughout the process, and successfully claimed three different complaints. He was awarded compensation of around £100,000.

The successful complaints included that the Respondent failed to react adequately to the recommendations of the occupational health report in that no stress risk assessment or weekly reviews were undertaken, no support mechanisms were put in place for Mr Dunn in his return to work interview, and finally the poor handling of his early retirement application itself.

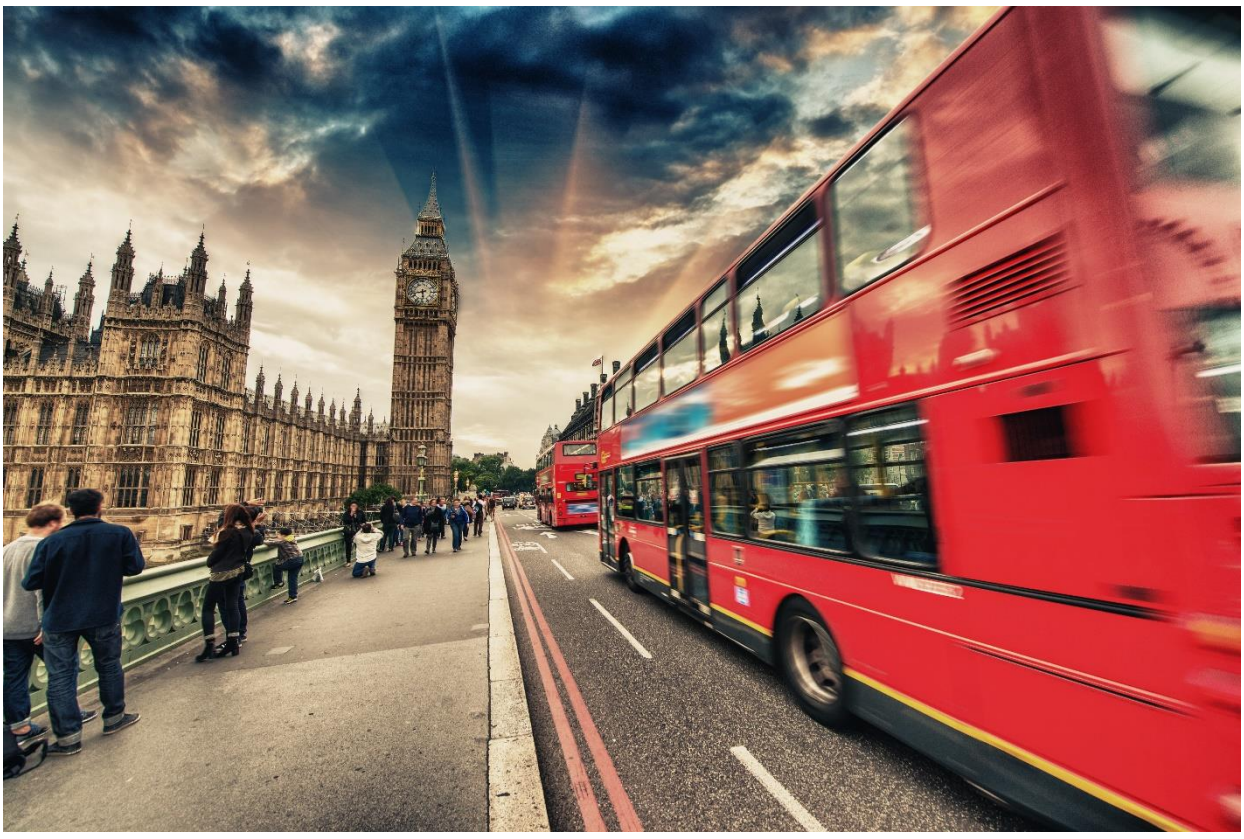
The Respondent successfully appealed against the ET's decision on the basis that the ET's reasoning on finding in favour of Mr Dunn was incorrect. The ET had not

considered whether Mr Dunn's disability had operated in the minds of the relevant decision makers, so as to cause them to act, or fail to act, in the manner complained of. The EAT noted that the Respondent's unreasonable treatment of Mr Dunn could not by itself, justify a conclusion that a person without a disability would have been treated more favourably.

The Court of Appeal dismissed Mr Dunn's appeal against the EAT's decision and said, if a claimant cannot show a discriminatory motivation there can be no discrimination; he or she can only satisfy the "because of" requirement in s.13 if the treatment in question is inherently discriminatory. Although the Court accepted the ill-health retirement process was inherently defective, it did not amount to being discriminatory.

Commentary

This case reminds us that while on the face of it a claim such as this may appear at first to be discriminatory, it must be considered whether the acts and omissions of the Respondent have been influenced, consciously or subconsciously, by the fact that a Claimant has a disability or by something which was a consequence of that. There has to be a causal link between the treatment and the protected characteristic. The mishandling of a process or system concerning a protected characteristic such as disability, is not discriminatory simply because the process or system related to that protected characteristic.



ACAS- Employee Reference Guidance

The use of references in hiring employees is becoming ever more important, as the information age progresses and contact time with potential applicants reduces further. Employers have begun to pay considerable attention to previous references to gauge the kind of employee they are hiring, and invaluable information can be obtained at this stage of the recruitment process.

Consequently, ACAS has published revised guidance as to how previous employers must conduct themselves when completing references for employees moving on and also when requesting references for prospective employees. Getting it wrong can lead to difficulties, both time consuming and costly. Commonly asked questions are summarised below, and the guidance interpreted to clarify the correct approach.

Does an Employment Reference Have to be Provided?

Generally, there is no legal obligation for an employer to provide a reference. An employer may choose whether to provide one and how much detail to include. You can provide either a reference of pure, basic fact, or a reference noting further detailed information regarding the individual personally.

It is important that a business implements a policy relating to requesting and providing references to ensure a consistent approach is applied. It should be predetermined what information is to be included in providing a reference, the format and how it is written – a unified approach is key.

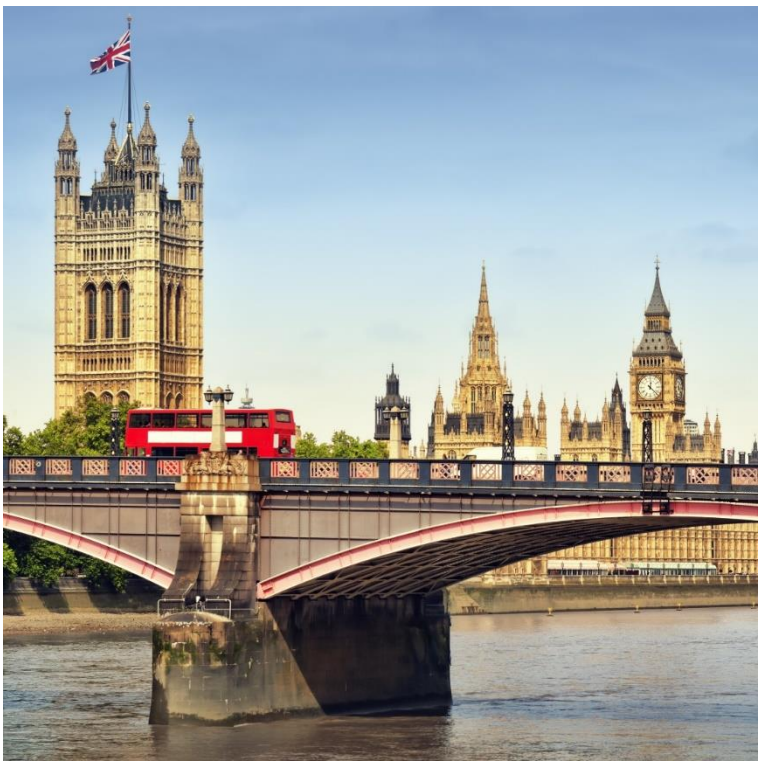
What can an Employment Reference Include?

An ordinary reference is likely to include basic facts about the relevant employee such as details as to his/her duties and employment start and end dates. References should *not* include irrelevant personal information.

You may be asked specific questions regarding a former employee's attendance level, or whether they were dismissed and for what reason. Whilst such details can be included, the answers must be fair and factual. Opinions or other subjective comment are not advised as they are more susceptible to being challenged.

One approach is to simply state numerically (perhaps as a percentage)

the level of attendance for the relevant employee. If the question asks whether the employee was dismissed, consider



answering 'yes or no' without detailing the reason if they were.

Where an opinion or comment *is* provided however, it must be supported by fact and the decision to do so should be applied across the workplace.

When Should References be Provided?

References can be required for a position at any stage of the recruitment process and it is generally advisable that job advertisements state at what stage references will be required.

Employers must only seek a reference from the applicant's current employer with their permission. Ensure this is obtained as soon as possible so not to delay matters and if consent is not provided this enables the prospective employer to draw whatever inference they deem appropriate.

Can an Employer Give a Bad Reference?

References provided *must* be a fair and accurate reflection of the individual. Thus, it must not include misleading or inaccurate content. Any opinions – as mentioned above – must be supported by a fact.

In circumstances when it is tempting to divulge detail of a former employees conduct that was not deemed to be satisfactory, do refrain as there can be consequences costly to the business if they are not supported and breach company policy to provide a factual reference only. Likewise if a detailed reference is given regarding one employee and not another this could be deemed as discriminatory.

Resolving Problems with References

Where a job applicant is unhappy with a reference provided, they can request a copy from either the employer who gave the reference, or the employer who received it. This can then be used by the job applicant as an evidential basis, upon which damages can be pursued in Court. Whilst in order to be successful, they must show that the reference and the information contained was misleading and inaccurate, if there is inconsistency with company policy in doing so and furthermore, a subjective view was provided, this could be difficult to justify and the litigation process which follows may be time consuming and costly.

Summary

The primary message communicated by ACAS in the revised guidance is that references must be factual and consistently applied. In order to achieve this, ensure a policy is in place to all staff and if this is deviated from, ensure any additional information provided can be supported to protect against any potential claim for damages.

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

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