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Albion Chambers EMPLOYMENT AND PROFESSIONAL DISCIPLINARY TEAM NEWSLETTER

No clowning matter

The right to be accompanied

In mid-September, various news outlets ran a story about a man who brought a clown to a redundancy meeting in New Zealand. As reported by the BBC News website (15 September 2019), Josh Thompson, a copywriter, received an ominous email inviting him to attend a meeting with his bosses. Upon receiving the email, Josh knew he was facing redundancy. He was encouraged by HR to bring a 'support person' to the meeting, as he was legally entitled to do.

But rather than bringing along a friend or family member, Josh thought he may as well try to make the best out of the situation. So he hired Joe, a clown.

During the meeting, Joe made balloon animals – noisily – but also nodded his head along when Josh received the bad news and mimed crying when the redundancy paperwork was handed over. And Josh would now highly recommend hiring a clown for any suspected redundancy meeting.

Which is all very well if you live in New Zealand, where a 'support person' can be a friend, family member, colleague, union representative, lawyer or even, it seems, a clown. And where you can be accompanied at a redundancy meeting. But the right to be accompanied is, as we know, far more circumscribed here. In the time it takes to make a balloon animal or two, this article will look to provide a quick recap of who has the statutory right to be accompanied to a meeting in England and Wales, when that right arises and what possible claims can be brought for an employer's failure to comply.

It should be borne in mind that one should always consider whether a worker has any contractual right to be accompanied over and above the statutory position.

What is the right?

The statutory right to be accompanied is provided by section 10 of the Employment Relations Act 1999. Where a worker (as defined) is required or invited by his employer to attend a disciplinary or grievance hearing and the worker reasonably requests to be accompanied, the employer must permit the worker to be accompanied at the hearing by one companion who is chosen by the worker and who is a person within subsection (3).

Who has the right?

Section 13 provides that the right covers anyone who is defined as a worker in subsection (1). The categories of 'worker' are: those defined as workers under section 230 of the Employment Rights Act 1996; agency workers; home workers; persons in Crown employment within the meaning of section 191 ERA 1996; and those employed as relevant members of staff of the House of Lords or House of Commons within the meaning of section 194 (6) or section 195 (5) ERA 1996. The right applies regardless of the worker's length of service.

Which type of meetings?

The right to be accompanied under section 10 of the Employment Relations Act 1999 applies to disciplinary hearings and grievance hearings. But it only applies to grievance hearings which concern the performance of a duty by an employer in relation to a worker and to disciplinary hearings which could lead to the worker receiving a formal warning or the employer taking 'some other action' with regard to the worker. That means some other disciplinary action (see *Heathmill Multimedia ASP v Jones* [2003] IRLR 856). A purely investigative meeting is not within the scope of section 13 (4) (*Skiggs v South West Trains Ltd* [2005] IRLR 459).

Who can be a companion?

Section 10 (3) provides that a companion must be another of the employer's workers or a trade union official who is employed by the trade union or certified in writing by the union as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings.

Provided that the worker has chosen a person that falls within section 10 (3), the worker's choice of companion has nothing to do with whether the worker's request has been made reasonably under section 10 (1) (b) (see *Toal v GB Oils Ltd* [2013] IRLR 696; and *Roberts v GB Oils Ltd* [2014] ICR 462).

Legal representation in limited circumstances

There has been held to be, in limited circumstances, a right to legal representation at internal disciplinary hearings where the employer is in the public sector. The disciplinary process must 'feed in' to a second statutory process where a 'civil right or obligation' enjoyed by the public sector employee will be determined. In the leading authority of *R (G) v Governors of X School and Y City Council* [2011] IRLR 756, the Supreme Court held that, on the facts of that case, Article 6 rights did not apply to the disciplinary process.

What's the companion's role?

Section 10 (2B) provides that an employer must permit the worker's chosen companion to confer with the worker during the hearing and to address the hearing in order to put the worker's case; sum up that case; and respond on the worker's behalf to any view expressed at the hearing.

Section 10 (2C), however, provides that an employer is not obliged to allow the companion to answer questions on behalf of the worker; address the hearing if the worker indicates he does not want the companion to do so; or use the powers conferred by subsection (2B) in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.

Time off for companions

Under section 10 (6), an employer must permit a companion time off during working hours to accompany a worker to a relevant hearing. Section 10 (7) provides that the companion is entitled to be paid for the permitted time off in accordance with section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992.

Request to postpone the hearing

If a worker's chosen companion is unavailable at the time proposed for the hearing by the employer and the worker proposes an alternative time which is both reasonable and within five working days after the day proposed by the employer, the employer must postpone the hearing to the time proposed by the worker (section 10 (4) and (5)).

Claims for failure to comply with the right to be accompanied

Under section 11 of the Employment Relations Act 1999, a worker may present a complaint to an employment tribunal where his employer has failed, or threatened to fail, to permit the worker to be accompanied at a relevant hearing by a companion; to allow the companion to use the powers conferred by section 10 (2B); or to agree to a proper request to postpone the hearing under section 10 (4).

Subject to the ACAS early conciliation extension of time provisions under section 207A of the Employment Rights Act 1996 applies, the time limit for bringing proceedings is three months beginning with the date of the failure or threat or, where it was not reasonably practicable to do so, within such further period as the tribunal considers reasonable (section 11 (2), (2A) and (2B)).

A tribunal may award up to two weeks' pay (subject to the statutory cap) but the award is compensatory and so any loss or detriment suffered must be supported by evidence. Where no loss or detriment has been suffered, a tribunal should award a nominal sum (see *Toal v GB Oils Ltd* [2013] IRLR 696).

Such a claim is heard by a panel of three rather than a judge sitting alone (see section 4 (3) of the Employment Tribunals Act 1996).

Companion's claims

Where someone has been requested to accompany a worker to a relevant hearing, he may present a complaint to an employment tribunal within three months of the relevant failure (again subject to the ACAS 'stop the clock' provisions and the 'reasonable practicability' test) if his employer fails to permit him to take time off as required or to pay him for that time off (see sections 168, 169 and 171 TULR(C)A 1992). The provisions concerning remedy are set out in section 172 TULR(C)A 1992.

Detriment claims

Under section 12 of the Employment Relations Act 1999 and section 48 ERA 1996, a worker has the right not to be subjected to a detriment on the ground that the worker has exercised or sought to exercise a right under section 10 (2A), (2B) or (4) or that he accompanied or sought to accompany another worker pursuant to a request under section 10. The usual compensation principles for detriment claims apply.

Automatic unfair dismissal

A worker or companion who is dismissed will be held to have been automatically unfairly dismissed if the reason or principal reason for the dismissal was any of the grounds discussed above in relation to detriment claims (section 12). The right not to be dismissed unfairly in this way extends to workers, not just employees (section 12 (6)); no qualifying period of service applies (section 12 (4)); and interim relief is available (section 12 (5)).

Simon Emslie

Massages and mixed messages

The issue

Raj v Capita Business Services Limited and another [2019] UKEAT 0074_19_0606 dealt with whether the ET applied the shifting burden of proof correctly when determining if a team leader massaging Mr Raj's shoulders amounted to harassment related to sex.

At first instance the ET found that the claimant had been subjected to unwanted physical contact by his team leader but held the conduct wasn't related to sex and dismissed the sexual harassment claim. This was despite deciding that the conduct had the effect specified in S 26(1)(b)(ii) of the EqA.

The facts

The conduct complained of was massaging the claimant's shoulders two or three times in an open plan office. The ET determined that the contact was with a gender-neutral part of the body and although misguided, the evidence that they considered to determine whether the conduct related to gender, it determined that the evidence did not lead to that conclusion in the circumstances of this particular case.

Grounds of appeal

Mr Raj appealed on the basis that the ET had erred in law in failing to apply the shifting burden of proof provisions in determining whether he had been harassed in relation to sex. The ET, somewhat surprisingly, did not make any reference to the shifting burden of proof in S 136 EqA when giving reasons.

The EAT concluded that the correct stage one question had been asked. Were there facts that could lead the ET to conclude that the massaging was related to sex? The ET had lawfully decided that the answer was no. A rejection of part of the second respondent's explanation, that she had tapped him on the shoulder, did not establish a prima facie case. Neither did Mr Raj satisfying the other elements of the claim.

The ET decided that there was physical contact akin to massage, but accepted the second respondent's explanation that the massages were misguided encouragement and that the respondents had consequently proved the conduct was unrelated to sex. The EAT found that the ET was entitled to dismiss the claim as it found that the respondents had proved an explanation unrelated to sex.

This demonstrates consideration of the stage two test, although not explicitly stated in the reasons given.

The EAT went further, it concluded that the cited case of *Birmingham*

City Council v Millwood [2012] UKEAT/0564/11/DM did not establish a 'rigid rule of law' that the burden of proof always shifts if part of the respondent's evidence is rejected. Whether a prima facie case is raised will always be context and fact specific. That case required 'something more' to shift the burden. The claimant in *Millwood* had established that there was less favourable treatment and a difference in race. That wasn't the situation for Mr Raj who couldn't show the conduct was related to gender, it was an isolated incident involving only him. The second respondent's explanation of encouragement was viewed in the context of poor performance.

Decision

The appeal was dismissed. There was no error of law in concluding the stage one threshold hadn't been satisfied. The view of the EAT was that ET had gone on to consider stage two in any event, which it was entitled to do. Perhaps the reasons given could have been clearer, but that in itself wasn't an error in law.

Conclusions

The EAT decision is readily understandable in the context and circumstances of this case. However two points stand out:

(i) in an appellate landscape where the ET is regularly criticised for "not showing its workings out" there may be some value in assisting the ET with a post-evidence list of issue, ensuring all Is are dotted and Ts crossed, and most importantly;

(ii) what the heck was the respondent thinking?

Lucy Taylor

Assisting LiPs

How far should the Tribunal go?

The employment tribunal is fertile ground for encountering litigant's in person. Whilst it is in the interests of justice and the overriding objective for the tribunal to ensure, as far as it can, equanimity of arms, just how far is a tribunal expected to go with that assistance?

Such a question will be argued by Richard Shepherd before the Court of Appeal in February next year.

Background

The Appellant in this matter represented herself at an employment tribunal. In her ET1 she had indicated that she had been unfairly dismissed 'including constructive dismissal'. The particulars annexed to the ET1 set out circumstances which seemingly supported the view that she had been constructively dismissed. However, during a case management hearing, where this issue was considered, the Appellant advanced that she had not resigned her position but had, in fact, been dismissed. The discussion at the hearing was distilled into an agreed list of issues which recorded that the tribunal was to determine, inter alia, whether the Appellant had resigned (the Respondent's position) or been dismissed (the Appellant's position).

The matter was heard at the Bristol employment tribunal. At the commencement of the hearing the Appellant confirmed that the list of issues represented the issues to be determined by the tribunal. Throughout her evidence the Appellant maintained that she had not resigned her position but had been dismissed. Somewhat contradictory and opaque evidence was offered by the Appellant during cross-examination which cast doubt on the circumstances of the termination. At one point the Appellant agreed that the content of a text message could be construed as a resignation and was also unable to identify to the tribunal where the dismissal was to be found in the bundle of evidence.

At the conclusion of the hearing the employment tribunal found that the Appellant had resigned her position and had not been dismissed by the Respondent. Her claim, therefore, failed but she was given leave to appeal on the basis that there was an argument that the tribunal should have considered her constructive dismissal claim.

The Appeal before the EAT

The Appellant submitted that the employment tribunal should have considered her constructive dismissal claim as it had found that she had resigned her position and had acknowledged her constructive dismissal claim. It should, she advanced, have considered whether she was entitled to resign her position as she was a litigant in person at the hearing. Furthermore, by failing to engage with her constructive dismissal claim, and not allowing her to adduce evidence of it at the hearing, the employment tribunal had failed to consider her alternative pleaded case of constructive dismissal. At its core, the argument of the Appellant was that having found as of fact that she had resigned it was obliged to go on and consider 'whether she had resigned in circumstances where she was entitled to do so'.

In response it was advanced that the Respondent was entitled to know the case against it. It had prepared its case in response to an agreed list of issues that had excluded the question of constructive dismissal. The Appellant had clearly stated that she had not resigned her position (nor intended to do so) but had been dismissed. This position had been maintained throughout her evidence and during submissions, and she had not presented any case at the final hearing that she had resigned in response to a fundamental breach.

The Decision

The EAT determined that three issues fell to it to be determined:

- Did the Claimant make a claim of constructive dismissal in her ET1;
- Did the list of issues bind the employment tribunal at the substantive hearing; and
- If not, was the employment tribunal obliged to consider that claim or did it err in law by not satisfying itself that the Appellant had abandoned that part of her claim?

As to the first issue the EAT was satisfied that the claim, as drafted, did raise a potential constructive dismissal claim. On the second issue the EAT found in the negative. It was open to an employment tribunal at a Final Hearing to revisit the list of issues (*Brangwen v South Warwickshire NHS Foundation Trust* [2018] EWCA (Civ) 2235 at para, 34) and indeed this approach had been confirmed at the commencement of the hearing when the Appellant and Respondent were asked if the list of issues was still agreed.

As to the third issue however the HHJ Elisabeth Laing DBE

'…did not find this an easy issue to decide …'

It was recognised that a tribunal

should not invent a case for the litigant in person (*Muschett v HM Prison Service* [2010] EWCA Civ 25) and that a tribunal does not have a general duty to hear every allegation, even if the Claimant is a litigant in person (see *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531), although recognising that adhering to such a view would be contingent on the facts of each particular case.

The EAT considered what appeared to be two competing stances. On the one hand the claim, as drafted, presented as a 'paradigm' constructive dismissal claim. On the other, the Appellant had consistently maintained that she had not resigned her position.

In reaching its decision the EAT formed the view that the employment tribunal could not be criticised for arriving at the decision it did. The alternative would have required it to *'descend into the arena'* and have to ask the Appellant to abandon a central tenet of her case, that being that she had not resigned but been dismissed. The EAT determined that the employment tribunal had not erred at law and the appeal was dismissed.

Conclusion

The matter has now been elevated to the Court of Appeal and is due to be heard in February 2020. The arguments raise interesting questions as to how far a tribunal should go in assisting a litigant in person, and the degree to which a list of issues should be departed from. A further update will follow. Watch this space.

Darren Stewart

How to make sloe gin, slowly

For me, the ideal period to leave a sloe gin from creation to consumption is three months. For those that are interested, right now is an ideal time to forage and make sloe gin, it'll be ready for Christmas. On that note, may I be the first to wish you all a very merry Christmas! … please address all complaint letters to our Chambers' Director.

Unusually for an article about Employment and Professional Disciplinary Law, I am going to include a recipe and instructions for making sloe gin within this article. Why can't employment law be interesting and tasty?

What you'll need

A sterilised, airtight container (approx. 2.5 to 3 ltr)
Sloes (and some blackberries)
Brown caster sugar
Cheap gin

Like a blueberry but bigger

First, a sloe looks a little bit like a blueberry but a little bit bigger. Sloes present either as a light bluish colour all the way through to dark purple, almost black. You'll find them on the blackthorn bush, you know, those bushes with inch-long thorns. They're often planted at the sides of fields acting as a boundary or as livestock fences. More often than not, you'll find them close to or mixed in with blackberry bushes and brambles. Thinking about it, you may as well grab a few handfuls of blackberries whilst you're foraging, they'll add another dimension to your sloe gin.

For this recipe you'll need about 500g of sloes - as a rough guide, that's about two plastic takeaway containers, or a decent 1/3 fill of your biodegradable carrier bag.

You may have heard that you should wait for the first frost before picking sloes, that's because the frost can help with the hard work, it helps to split the skin and let the sloes' juice out. However, overnight in the freezer does just as good a job if not better.

Make it sweet

Next, sugar preference is for golden caster sugar, it just adds to the richness in my opinion. Though sweetness is always a matter of personal taste, sloe gin should be a little syrupy, and therefore you need sufficient to achieve that. Also, sloes are incredibly bitter (try one whilst foraging, you'll only do it once. Also a good game is to give one to your toddler and tell them it's a blueberry, they'll never forgive you and all trust will be lost), so you need plenty of sugar.

A middle of the road quantity for sugar is about 250-300g.

Gin, gin, gin

Next, unsurprisingly, our key component for sloe gin, is gin. Don't go for anything of any real quality (but avoid meths from the garden shed). Try to avoid heavily flavoured gins, just go and get 1ltr of supermarket own-brand gin.

Method

Your airtight container should be sterilised, the hottest setting of your dishwasher is sufficient. A container with a wide top is easiest, and those with the rubber seal between body and top are ideal.

Lob the frozen sloes and blackberries into the jar. Lob the sugar onto the fruit. Lob your cheapo gin onto the mixture. Seal it tightly. Even if sealed well, you may want to put two or three layers of cling film over the top and down the sides, and to use a couple of elastic bands around the neck of the container; belt and braces.

Then shake it, shake it like the Shake 'n' Vac advert from the 1980s. Those born after 1986, ask your parents. Shake the mixture until the gin starts to colour and the sugar is dissolved.

For the next week keep your mixture somewhere dark - prolonged sunlight destroys sloe gin. A kitchen cupboard is absolutely fine. Once a day, take the mixture out and give it a really good shake, it helps to break down the fruit and agitate the contents so all that Christmassy alchemy can take place.

Then leave it somewhere dark for its autumnal hibernation, and when you remember or whenever you see it, just give it another little shake, before putting it back into its dark nest.

Christmas

It's Christmas Eve. If you've got friends, you've invited them over. If not, you're on your own. Either way, you'll need something tasty to drink.

Take your mixture and sieve it to remove the bits and pieces (don't throw them away). A slightly syrupy reddish/purple liquid should be produced and you may want to drink it neat, as a warming liqueur, or if you want a slightly looser drink, pour a decent slug into the bottom of a Champagne glass and top up with Prosecco for a sloe-gin fizz.

Take your discarded sloes and blackberries. Having pre-bought a number of chocolate mousses, spoon a little of the fruity/boozy leftovers onto the top for a little pick-me-up if the company of your friends is less than scintillating.

Employment Law – Holiday Pay – 12 weeks to extend to 52 weeks

Remember 18 paragraphs ago I mentioned that my preferred period to 'rest' the newly created sloe gin is three months, or expressed differently, 12 weeks?

Cynical readers may have just realised that the three-month period familiar to employment practitioners was simply an excuse for me to give my sloe gin recipe under the cover of an employment law article.

But as this is an employment law newsletter I may as well give just a sprinkling of it, 'it' being employment law, not sloe gin, you've had plenty of that already.

The issue

Recently there's been a good deal of case law on the subject of holiday pay, most recently looking at regular overtime and whether this should be included in the calculation of a week's pay or not. Other commentators have written about this at length and it isn't repeated here. However, whatever work should be included in the calculation the time frame for the calculation of a "week's pay" is flattened out over the prescribed 12 weeks. But within the flurry of case law we've be subjected to a significant change on the horizon has not received the attention it should have.

To overtime or not to overtime

From April 2020 the timeframe for the calculation of a "week's pay" is to be extended from 12 weeks to 52 weeks. Our clients will need to know about this, they will be making decisions now or in the near future about the allocation of overtime over the Autumn, Winter, Christmas and New year periods. They may be making decisions about whether to engage new staff or whether they will make do with regular overtime, to fill in the gaps. Their decisions may well be influenced if they know that a "week's pay" for the purposes of holiday pay will be calculated by reference to 52 weeks so as to include Christmas overtime versus 12 weeks, which would include the period immediately post-dating Christmas up-to and including the implementation date, but importantly, not the festive period itself.

For large employers, particularly in the hospitality industries, the coming into effect of the 52-week period may mean that their preference will be to take on short term temporary workers, rather than giving their existing staff significant baskets of overtime.

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