



May 2016

Should we stay or should we go?

As the EU referendum draws nearer, the arguments for and against remaining in the Union are intensifying. But there are still calls for clarity on what an exit would mean for us all – individually and collectively.

The influence of Europe is never all that far from UK workplaces. And the world of employment law has been alive with predictions about what would, and wouldn't, change if Brexit were to succeed.

The latest opinion to have caught our eye comes from Michael Ford QC who was commissioned by the TUC to give his view on the likely effect of our exit on UK employers and workers. It makes for an interesting read <https://www.tuc.org.uk/international-issues/europe/eu-referendum/workplace-issues/brexit-could-risk-legal-and-commercial>

No doubt there will be plenty more to take in before we head to the polls on 23rd June.

Disciplinary wasn't discrimination

Ms Wastenev is a Christian worker employed by the NHS Trust. She was alleged to have 'groomed' a junior Muslim colleague by, among other things, praying with her and laying her hands on her.

The colleague said that she had begun to feel ill as a result of Ms Wastenev's abuse of her managerial position. There was an investigation and Ms Wastenev was given a final written warning (reduced to a first written warning on appeal). Professional boundaries had been blurred. But Ms Wastenev then brought a tribunal claim, alleging discrimination and harassment because of or related to her religion or belief.

Her claim hinged on the reason she was disciplined. If it had been for manifesting a religious belief in consensual interactions with a colleague, then that would have been within her rights, and therefore religious discrimination to discipline her for it. But it wasn't; she had been disciplined for her unwanted and unwelcome behaviour towards a colleague. That was something different altogether, particularly when taking into account Ms Wastenev's more senior position. Her claim

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failed at the tribunal and at the Employment Appeal Tribunal.

There was also a human rights angle. Had Ms Wasteneys right to freedom of thought, conscience and religion been breached? No. That right doesn't give people 'a complete and unfettered right to discuss or act on [their] religious beliefs at work irrespective of the views of others or [their] employer', the tribunal said.

So the way in which religion or belief is manifested is all-important to whether disciplinary action is appropriate or not. It's something that takes a careful analysis.

Wasteneys v East London NHS Foundation Trust



Incorporation of company policies



Employers should have a whole host of company policies, on everything from equality to data protection. While they're expected to be followed, they are not necessarily contractual. And if they're not contractual, it's far easier for employers to change them.

In *Department for Transport v Sparks*, the employer's attendance management policy, contained in its handbook, said that disciplinary action in respect of cumulative short-term absences could only begin once an employee had hit the trigger point of 21 days off in any 12-month period. The employer tried to introduce a new policy which was less favourable to staff.

Ms Sparks and her colleagues argued that the original policy remained in place because it was contractual and couldn't be unilaterally varied by the employer.

The Court of Appeal found in the employees' favour. There was a

distinct flavour of contractual interpretation in the way in which the handbook was introduced by the employment documents, the Court held. It was said to set out 'many of your terms and conditions'. And the handbook chapter on health stated that it set out 'your terms and conditions of employment relating to sick leave' and '...to the management of poor attendance'.

It was more than good practice guidance. The policy that Ms Sparks and her colleagues had sought to rely on was, the Court said, apt for incorporation as a contractual term.

As fact-specific as this case is, it raises some universal points about aligning your paperwork with perceptions. Do you know what status your policies hold? Do your employees know? And are your company documents – your contracts, policies and handbook - doing their job properly? If not, it's time for a review.

Department for Transport v Sparks



‘Private’ emails and human rights

Mr Garamukanwa was employed by the Trust as a clinical manager. After his relationship with staff nurse Ms Maclean ended, he suspected that she had become involved with a female colleague. And that’s when anonymous action against the two women began, involving a false Facebook account and malicious emails sent to management.

Ms Maclean felt that Mr Garamukanwa was stalking and harassing her. There was a police investigation, but no charges brought. Evidence from that investigation – which included photographs on Mr Garamukanwa’s phone connecting him to the malicious emails - was handed over to the Trust and used in subsequent disciplinary proceedings. Mr Garamukanwa was dismissed for gross misconduct.

He went on to lose his claims for unfair dismissal, unlawful race discrimination, victimisation, harassment and wrongful dismissal. But the key question for the Employment Appeal Tribunal (EAT) was whether the NHS Trust had, by looking at ‘private’ material that Mr Garamukanwa had sent to Ms Maclean and photos held on his phone, infringed his human rights. He claimed interference with Article 8 – the right to respect for private and family life, home and correspondence. The tribunal, he said, had not distinguished between public material (the anonymous emails sent to his employer) and private material (such as emails to Ms Maclean about his feelings and their relationship). He claimed that he had a reasonable expectation that the latter would remain private.

No, said the EAT. There was no reasonable expectation of privacy and therefore Article 8 didn’t apply. Mr Garamukanwa’s behaviour had effectively turned material about a personal relationship into a workplace issue. There was no need to draw a distinction between what he claimed was ‘public’ and ‘private’. The police hadn’t done so, and had allowed the Trust to use all of the material without distinction.

Also relevant was:

- that not only did Mr Garamukanwa not object to the evidence being used in the investigation and disciplinary, he volunteered additional material. This negated the suggestion that he had any expectation of privacy in any of the material;
- that once Ms Maclean had complained about feeling harassed, there must have been an expectation that she would complain about any further correspondence (even if those emails were sent to her private address and were about their previous relationship). Mr Garamukanwa couldn’t expect to be able to control what she did with emails she received;
- that the content of emails sent to Ms Maclean strayed beyond the purely personal; they touched on workplace issues too.

A fact-specific case, but one that illustrates very well some difficult issues that employers face from time to time.

Garamukanwa v Solent NHS Trust

Restrictive covenants judged as at ‘Day One’

Do you keep employees’ restrictive covenants under review? As business needs and other circumstances change, you could find that covenants become unenforceable.

But in *Bartholomews Agri Food v Thornton*, the High Court held that a restrictive covenant that wasn’t enforceable to begin with didn’t become enforceable when the employee was promoted to a role that would justify a restriction along those lines. In other words, enforceability is judged as at the time the contract is signed.

For Mr Thornton, that time was at an early stage in his career when he was a Trainee Agronomist. In his contract was a clause that read:

“Employees shall not, for a period of six months immediately following the termination of their employment be engaged on work, supplying goods or services of a similar nature which compete with the Company to the Company’s customers, with a trade competitor within the Company’s trading area, (which is

West and East Sussex, Kent, Hampshire, Wiltshire and Dorset) or on their own account without prior approval from the Company. In this unlikely event, the employee’s full benefits will be paid during this period.”

An inappropriate restriction to place on a Trainee Agronomist and unenforceable, said the High Court. And even though, by the time Bartholomews wanted to rely on the clause, Mr Thornton was a full-fledged agronomist, that didn’t convert the clause into a reasonable, enforceable one. Aside from the fact that the clause was still too widely drafted to work, it was unenforceable at the beginning and it remained unenforceable, regardless of Mr Thornton’s promotion.

A stark warning, then, that not only do you need to get your covenants right to begin with, but you should review them periodically and as employees rise through the ranks.

Bartholomews Agri Food v Thornton

A weighty issue

An Employment Judge has been in the news for his view that overweight workers should be better protected by the law.

Being fat isn’t, by itself, a protected characteristic under equality laws. There may be a related disability issue, in which case the worker has the right to not be discriminated against. But there is not anything hard and fast in discrimination law that protects larger people from losing out during the recruitment process, or from being paid less than their colleagues (for example).

It will be interesting to see where this ends up. Perhaps the point for employers to focus on for now is that less favourable treatment of any worker based on assumption or prejudice is a bad thing. The fact that the law recognises some characteristics and not others is significant, but that shouldn’t be the only consideration when you’re making a decision about a job applicant or a member of staff.



