The Agenda podcast by Lewis Silkin: In-House Employment Lawyers Coffee Break

Episode 5: Controversial beliefs in the workplace and statutory guidance on fire and rehire

Tarun

Hello and welcome to our In-House Employment Lawyers Coffee Break podcast, I'm Tarun Tawakley.

Colin

And I'm Colin Leckey.

Tarun

We're into March now, and I promise Colin, I will do my very best not to make any jokes about the egg-cellent content that we have planned or hide any other easter eggs in today's session. But I've already failed on multiple fronts, so I will just crack on with our run-through of the latest developments and practical takeaways for the month.' We're going to start this time, by looking at an employment tribunal decision, which centres on how to handle controversial and offensive beliefs in the workplace, and then move on to the statutory guidance on fire and rehire. So, Colin, do you want to kick us off with your eggs-pert analysis on what happened in *Miller v University of Bristol.*

Colin

Absolutely! Do I get to complain about your controversial and offensive puns in the workplace?

Tarun

I mean, I think it's a belief well worthy of protection.

Colin

Well given the low bar that seems to apply these days, maybe it is. So, Dr Miller was a sociology professor at Bristol University, and he was sacked because of his controversial comments relating to Zionism. Dr Miller had strong anti-Zionist beliefs, which the tribunal said were protected, continuing a trend we've seen for a much broader spectrum of beliefs to be found to meet the *Grainger* test, even where those beliefs might be regarded as offensive by others.

But whereas Bristol University thought his remarks had crossed a line, the tribunal disagreed and said it was direct discrimination to have dismissed him. Essentially, because sacking was a disproportionate reaction to the legitimate need to protect the University's reputation and the human rights of students and other stakeholders. And it was that lack of proportionality, that tipped this into a case of direct discrimination. In other words, the tribunal said he was essentially sacked for the beliefs he held.

Tarun

I mean it's really tricky, isn't it Colin? I mean, the case law shows that having a protected belief comes with some limited right to manifest that belief. So you can't dismiss someone for holding a belief that many people would find offensive, and you have to respect that this comes with some rights to say things that are offensive. And if you go beyond what's necessary and proportionate in stopping people saying those things, suddenly you find yourself with a case of direct discrimination, don't you?

Colin

Right, so where does this leave us for managing conflicting protected beliefs in the workplace? Really, where does protected manifestation of belief end and offensive harassment of colleagues and other stakeholders

begin? And that's really the question at the heart of all of this. Well before we go on to discuss the lessons we can learn, it's worth remembering that this decision is only a tribunal decision, so no precedent weight. And the context is firmly in the world of academia and that the significance of that is that freedom of speech and academic freedom all carry significant weight in any balancing exercise in this kind of industry.

But apply this to the corporate world, and I think the best advice for employers is just to avoid knee-jerk reactions. Now, that can be hard to do because a lot of employers feel pressure to take a zero-tolerance approach to employees who make statements both in, and in some cases, outside of the workplace which are going to upset colleagues and others, and possibly impact their reputation. For an in-house employment lawyer advising the business really, not to hurry to sack someone who has said something offensive, may be good advice that you can provide to the business, even if it's at risk of being regarded as overly cautious. But really, the case here is certainly the evidence that we think you need to urge that caution and encourage the business to think things through.

Tarun

I mean, I think this is one of the things that I found really interesting. It was the fact that the ET concluded here that summary dismissal was disproportionate, so employers who fail to properly consider whether a less severe sanction may be appropriate will be at risk. And I suppose that's a really difficult balancing act in practice, where you have someone who has an offensive belief, you've had some really serious complaints about how that belief has been manifested and you've got a potential PR storm on the horizon. It's going to be really hard not to default, to applying what is available to you as the most severe sanction of gross misconduct dismissal, isn't it?

Colin

I think I think that's right, although it is also worth noting that the University weren't helped on that point because in this particular case, they'd commissioned two separate reports into the comments made by Dr Miller and the conclusion was that his comments weren't discriminatory or antisemitic, and that then made it harder to show that summary dismissal was the right outcome.

And there were also some other things that let the University down in their defence, particularly consistency - they hadn't been consistent in how they treated similar comments, which made it look as though they were influenced by a media firestorm over Dr Miller's comments. And that does bring home the need to have a look at your internal policies and make sure they're fit for purpose and make sure you're not overly influenced by outside pressures.

And what's interesting from a policy perspective, is that some employers are now tempted to look at a policy approach that says, employees mustn't say anything that could be viewed as offensive on social media, in order to guard against this situation arising. But this increasing recognition of the right to manifest your belief to some extent, as being part and parcel of the belief itself, and of course the human rights backdrop, means that any kind of silencing policy will go too far in in many cases.

Tarun

Thanks Colin, I definitely agree with that. But I suppose if you are going to go that far, you've got to balance that against your own corporate culture. and whether you encourage your staff to bring their whole selves to work and the approach you take to voicing corporate support on social issues.

Moving on to the new finalised Code of Practice on fire and rehire that was published last month.

Now we knew this was coming, as the government consulted on the draft Code at the beginning of last year, but it has now published the revised version of the Code, which we expect to come into force in the summer.

Fire and rehire practices have got a really bad rep in the press over recent years, particularly where it was used during the pandemic. We all remember the P&O scandal of 2022, where 800 workers were fired,

although of course strictly that wasn't a fire and rehire exercise - let's not let the facts get in the way of a good policy! The Code has now come about in the context of all of those scandals and let's look into the details of what the impact will be.

So firstly, when does it apply? Well, it applies in all situations where an employer is contemplating changing terms and conditions and envisages that, in the absence of agreement, it may dismiss and re-engage employees or hire new workers on the new terms. Now, this applies regardless of whether it's just one employee affected or 200. There is a carve out for genuine redundancy situations, so the Code won't apply in those cases.

What standing does it have? Well, there are no new binding legal obligations on employers, but the Code must be taken into account by courts or tribunals. And as you probably know, awards for certain ET claims can be increased or decreased by up to 25%, where employers or employees have unreasonably failed to comply with the Code.

Finally, then, what does it say? Well, there's a significant emphasis that employers seeking to change contractual terms and conditions should only use fire and rehire as a last result and not as a negotiating tactic.

Colin

It is odd, isn't it? I have to say that in my experience, I've never come across an employer that didn't view firing employees as a last resort and it does feel a bit back to front, doesn't it, that we've ended up in a position where legally, arguably, it's now easier to make employees redundant than it is to fire them and offer them continued employment on different terms, and that seems a strange position to end up in, doesn't it?

Tarun

I mean, I completely agree. I suppose looking at what the Code is also trying to do, it does emphasise the importance of open and transparent information sharing and consultation and doing so as early as possible and for as long as reasonably possible. But again, the Code isn't prescriptive in terms of specific timescales, deadlines or content to be shared that would be considered reasonable as every case is going to depend on its own circumstance.

Colin

So, in effect, really just suggesting best practice, which is what most sophisticated or sensible employers would probably be doing anyway.

Tarun

Yes, I think that's right. But there are a few novel points. The first, is the requirement for employers to contact ACAS for guidance before raising the prospect of dismissal and re-engagement with their workforce. Now, it's unclear exactly what ACAS would be expected to do in these circumstances, but presumably it will involve reminding employers of their obligations under the Code at a very minimum.

The second notable consideration is that the Code specifically recommends that employers should consider providing employees with more notice than their contractual notice entitlements. Other considerations include considering practical support, such as career coaching or counselling and seeking feedback from the workforce once changes have been implemented and agreeing to a review date in the future.

Legally, the Code does very little to substantively alter the legal tests of fire and rehire and it doesn't seek to prevent it from being carried out. Now, of course, the Labour party has said that they would outlaw the use of dismissal and re-engagement if they were to come into power following an election this year, but we don't actually have details about how any of that would be implemented in practice.

Colin

Thanks, Tarun. Well, I guess, as I saw a headline this morning about labour being 27 points ahead in the polls, we might find out how it's going to be implemented in practice sooner rather than later. But it is a funny one, isn't it, banning fire & rehire because most employers resorting to fire & rehire do so because they're in financial difficulties and surely, removing that option has the consequence of making job losses more likely. And you do wonder to what extent this has been properly thought through, but let's see how this develops as time goes on.

And on the subject of time, we are out of time! So, thank you very much for joining us today, and the In-House Employment Lawyers Coffee Break will be back on the agenda in April! If you'd like to be part of our In-House Employment Lawyers Community, and you're not already, please do get in touch with us here at Lewis Silkin.