NI Employment Quarterly Update – June 2022

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Contents

Introduction

Leeanne Armstrong
Legal Director
T +44 (0)333 006 1545
E leeanne.armstrong@TLTsolicitors.com

Amy Collins
Senior Associate
T +44 (0)333 006 0802
E amy.collins@TLTsolicitors.com

Welcome to the latest issue of TLT's Northern Ireland (NI) focused employment law updates.

The last quarter has seen employment law in the news on a number of occasions, not least because of the publication of what is believed to be the highest recorded settlement of an employment tribunal case in Northern Ireland, paid by DAERA to Dr Bronckaers who had her whistleblowing claim upheld by a Tribunal at the end of last year. The Equality Commission also published details of two cases they supported, involving allegations of sex discrimination. In an article published in the News Letter on 7 June 2022, Geraldine McGahey, the Chief Commissioner for the Equality Commission reported that "… year on year, sex is the second most reported form of discrimination to our legal advice team …" The two most common issues reported relate to pregnancy and maternity, followed by harassment. She calls on all to "remain committed to creating workplaces that are inclusive and welcoming for all our employees, where they feel respected and valued."

We've also seen movement on the legislative front. Just prior to the suspension of Assembly business before last month's election, we saw the introduction of parental bereavement leave in Northern Ireland, and the publication of the Domestic Abuse (Safe Leave) Act (Northern Ireland) 2022, the first of its kind in the UK which will provide entitlement to paid leave for victims of domestic abuse.

In this quarter's update, we take a closer look at the employment news that made the headlines, as well as covering three interesting decisions of our own Industrial Tribunal.

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Case: 15481/20IT Morgan v Northern Health & Social Care Trust

Dismissal for misconduct was within the band of reasonable responses.

Background

The claimant was employed as a catering assistant at an adult day care facility operated by the respondent. A disciplinary investigation began in May 2017 following an allegation of "threatening and aggressive behaviour" by the claimant towards a "Service User", a vulnerable adult who attended the facility. This was later expanded to include additional allegations including breaches of the employer's smoking policy, threatening and inappropriate behaviour towards staff and repeated use of foul language. The claimant was initially redeployed following the incident with the "Service User" but subsequently suspended following the further allegations of misconduct.

The investigating officer compiled an extensive report of over 240 pages containing witness statements and relevant polices and correspondence. It concluded that the matter should proceed to a disciplinary hearing. At the disciplinary hearing, the panel concluded that the claimant was guilty of gross misconduct and a decision was taken to dismiss him with pay in lieu of notice. The claimant appealed the outcome and an appeal panel upheld the dismissal.

The claimant claimed unfair dismissal, alleging that he did not commit any misconduct, let alone gross misconduct. He raised allegations relating to the investigation, including about the experience of the investigating officer and alleged bias. He did not raise any criticism of the disciplinary hearing or allege any unfairness in the conduct of the disciplinary hearing.

In assessing whether a dismissal for misconduct is fair or unfair, a Tribunal must consider whether the employer's decision to dismiss an employee falls within the band of reasonable responses. In other words, was it reasonable for the employer to dismiss him. In establishing reasonableness, a Tribunal must be satisfied that:

a) The employer held a reasonable belief that the Claimant was guilty of the misconduct alleged;

b) At the time of holding that belief, he had reasonable grounds to sustain it; and

c) That belief was formed after as much investigation was carried out as was reasonable in all the circumstances of the case.

> … was it reasonable for the employer to dismiss him.

Having heard evidence from the Claimant, the investigating officer, and from a member of the disciplinary and appeals panels, the Tribunal concluded unanimously that the decision to dismiss the claimant was within the band of reasonable responses, and dismissed the claimant's claim. They found:

- The respondent had a genuine belief that the claimant was guilty of misconduct in respect of the service user incident, and had reasonable grounds for this belief.
- The investigation was "extensive, comprehensive and entirely reasonable in all the circumstances of the specific allegations" and a reasonable conclusion had been reached to forward the matter to a disciplinary hearing.
- The investigating officer had considerable professional experience of conducting investigations and he had also received training as an investigation officer.
- The investigation, disciplinary and appeal processes were within the band of reasonable responses for a reasonable employer and there were no breaches of the relevant procedures.
- In reaching its decision, the respondent had taken account of the claimant's clear disciplinary record, as well as the claimant's continued failure to accept wrongdoing in his actions and his repeated disregard for the respondent's policies and procedures.

Our insight

This decision is illustrative of the importance of carrying out a thorough investigation into allegations of misconduct, and carrying out a disciplinary process in line with the company's procedures. In a disciplinary process, it is good practice for a disciplinary panel or officer to ask themselves if they believe the employee to be guilty, on what grounds and why, taking account of all the evidence gathered during investigation. In deciding whether dismissal is the appropriate sanction, an employer must apply its mind to any mitigating factors including matters such as length of service and disciplinary record.

Case: 14487/20IT Gemma McCaughley v Footprints Women's Centre

Tribunal finds that the withdrawal of an offer of employment amounted to unlawful age and sex discrimination.

Background

The claimant applied for the post of Support Services Manager with the respondent. Following an interview in October 2019, she was informed of her success by the CEO. The offer was made subject to receipt of satisfactory references and Access NI checks. The claimant confirmed her acceptance of the offer on 1 November 2019. However, on 8 November 2019, the respondent sent an email to the claimant confirming withdrawal of the job offer with immediate effect. The case involved particular focus on disputed accounts of a number of events between the date of the offer and its withdrawal.

a) At a meeting between the claimant and the CEO, the claimant requested some flexibility to allow her to deal with school drop off and pick up at certain times. In the CEO's evidence, she noted feeling "concerned" by the request.

b) When providing the claimant with a template copy of the main terms and conditions of employment, the CEO is said to have drawn attention to the maternity terms, noting them as "not great". The CEO alleged that the discussion had been in the context of sick leave, but conceded in cross examination that she did not refer to any other policies during her discussion with the claimant.

c) The claimant requested a salary uplift.

d) The claimant asked that references were not immediately sought from her current employer to allow her the opportunity to notify them of her departure and agree a leaving date.

e) The claimant had been told her start date would be January 2020. When it was confirmed as 6 January, she asked if she could start on 2 January, or arrange to take those days as holidays to avoid having a reduced wage in January.

The claimant sought an explanation from the respondent for their decision, but never received a reply. She subsequently received a sum from the respondent as "payment in lieu of notice" on 22 January 2020.

> Case authorities have established that it is not enough for the claimant to simply establish a difference in status and a difference in treatment.

The claimant brought claims of direct sex and age discrimination against the respondent. Additional claims of automatic unfair dismissal and breach of contract were dropped at the beginning of the hearing.

In considering whether the withdrawal of the job offer constituted less favourable treatment on grounds of age and sex, the Tribunal were required to consider firstly whether the claimant had proven facts from which the Tribunal could conclude in the absence of adequate explanation that the respondent had committed the unlawful act of discrimination. If such facts were established, it would then be for the employer to prove that he did not commit the unlawful act of discrimination.

Case authorities have established that it is not enough for the claimant to simply establish a difference in status and a difference in treatment. There must be 'something more'. Where an employer has behaved unreasonably, it is necessary to consider the employer's reasons for acting in the manner it did.

The Tribunal noted several inconsistencies in the respondent's evidence. They found the claimant to be an honest and reliable witness, and accepted her account of events. They were satisfied that the "something more" than a mere difference in treatment or status had been shown by the claimant.

The Tribunal considered the explanations put forward by the respondent for the treatment, which included that the claimant:

i) had not met all the requirements for the post,

ii) had unrealistic expectations in respect of the financial terms and conditions; and

iii) was inflexible and controlling.

They found the explanations to be unsubstantiated, noting amongst other things that the claimant had passed the interview, and at the time the offer was withdrawn the respondent had not requested references or carried out Access NI checks. They also found there was nothing untoward with the claimant requesting a modest uplift to meet her current salary in a comparable community organisation, and it had been accepted by the CEO in cross examination that discussing particulars, including working hours and start date were a normal practice following a recruitment process.

The Tribunal concluded that "the respondent has failed to prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of age and sex …". They found the withdrawal of the post to be unreasonable, "… in a context where both the maternity leave conditions had been described in a manner which could have been discouraging for a female of child bearing years and where a request for flexibility for childcare reasons was a cause for concern."

The Tribunal upheld the claimant's complaints, finding they could infer discrimination, "… not from the unreasonable treatment itself but …from the absence of any satisfactory explanation for it."

The claimant was awarded £8,500 for injury to feelings.

Our insight

This case provides a clear illustration of the legal tests and considerations a Tribunal will apply when considering if unfavourable treatment amounts to less favourable treatment because of a protected characteristic. It is also a reminder to employers that protection against discrimination extends to applicants and employees. As this case shows, in the absence of an adequate explanation for unreasonable treatment, a Tribunal may be able to infer it is discriminatory. Therefore, whether it is a decision not to progress an application, or withdraw a job offer, it is important to ensure that careful account is taken of the reasons why. This case also saw documentation that may have otherwise been privileged being disclosed to the Tribunal during the hearing, after the respondent's CEO discussed legal advice she had taken in her evidence. Employers should note with caution that sharing details of legal advice could amount to an effective waiver of privilege and see otherwise confidential communications shared in tribunal proceedings.

Back to contents

Case: 18585/21 Julian Sahadatelli v XSRE.ME Ltd

Tribunal finds that an employee had suffered an unauthorised deduction from his wages when he was not given notice to take annual leave by his employer during furlough.

Background

The claimant gave notice of the termination of his employment to the respondent in November 2020. The claimant had expected to receive payment for 16 days of accrued but untaken annual leave in his final pay. However, no payment was made for accrued holidays in his final payslip. When he raised the issue with the respondent, he was informed that he had received payment for his holidays in the month of October. The claimant had been furloughed at that time.

The claimant accordingly raised a claim before the Industrial Tribunal for unlawful deduction from wages, stating that he had never told the respondent he wished to take holiday, and they had not told him he needed to take holiday in October 2020.

Under section 18 of the Working Time Regulations (Northern Ireland) 2016, an employer can require a worker to take annual leave provided they give the worker at least twice as many days' notice in advance of the earliest date specified in the notice as the number of days to which the notice relates. In other words, if an employer requires a worker to take 5 days of annual leave, he must provide notice 10 days prior to the first day of the leave he is requested to take. Where leave is being cancelled, the same rule that twice as must notice must be given applies.

Therefore, in order to determine the case, the Tribunal had to consider whether the correct notice had been given to the employee in this case. Given the amount of leave that was required to be taken, the notice required would have been 32 days. The respondent argued that they had given notice verbally to the claimant in September 2020. The claimant denied this happened.

Having considered all of the evidence, the Tribunal preferred the evidence of the claimant, noting that the respondent's case that it had given verbal notice had not been adduced either in the response to claim or in its witness statement, but only under cross examination at the hearing. Further a WhatsApp message sent by the respondent to the claimant stating, "what do you think I can pay …. More and more and more ..?" was described by the tribunal as very telling in that it suggested the respondent did not want to pay any accrued holiday pay. Differing breakdowns on re-issued pay slips also gave the Tribunal cause for concern that they were being drafted in an entirely self-serving manner.

The claimant was awarded £1,052.05 in respect of the holidays that had accrued and were owing to him.

The claimant separately received an award in respect of unpaid notice which was based on the respondent having calculated notice pay based on the claimant's furlough pay (80%) rather than his full wage.

A further claim by the claimant arising from the claimant's failure to provide a written statement of employment particulars was also upheld. Under the Employment (Northern Ireland) Order 2003, a Tribunal is permitted to make a minimum award for such failure which is equal to two weeks' pay, and may make a higher award equivalent to four weeks' pay to the extent it considers it just and equitable. The claimant alleged in this case he had never received a contract of employment, but the respondent said terms and conditions had been provided but were never signed. An award equivalent to two weeks' pay was made.

Our insight

Whilst employers have the ability to require holidays to be taken at a given time, or to cancel booked leave, it is important that the minimum requisite notice is given to the worker. There was a dispute in this case as to whether verbal notice had been given. We would recommend that a written record of what is proposed is put in writing for record keeping purposes. A written notice should be dated, set out the date or dates of the leave that must be taken (or being cancelled if that is the case) and clarify that the request is made in accordance with section 18 of the Working Time Regulations (Northern Ireland) 2016. Although an employer is not required to obtain a worker's agreement to require leave to be taken or cancelled, it would be beneficial to have signed confirmation from the worker that they have received the notice and understand the terms of it.

The case also serves as a reminder to employers that a failure to comply with a legal requirement to provide an employee with an initial statement of employment particulars can result in additional financial penalties in a Tribunal. The statement should be provided to employees within two months of the beginning of their employment.

Horizon Scanning – Northern Ireland

What's happening at Stormont?

At the time of writing, given the ongoing lack of functioning Northern Ireland Executive and/or NI Assembly Speaker for the new mandate, there appears to be little in progress at Stormont.

As the new mandate progresses, we would expect the following to be on a new Minister's to-do list:

- Gender pay gap reporting regulations
- Legislation around leave for miscarriage (as provided for in the Parental Bereavement (Leave and Pay) Act (Northern Ireland) 2022)
- Regulations to bring Domestic Abuse Safe Leave into force (see below)

Cases in the press …

In addition to the tribunal decisions we have reviewed in this update the following cases have also been in the news since our last update.

DAERA whistle-blower

Since covering the decision of constructive unfair dismissal and whistleblowing detriment in our December 2021 quarterly update, the case of Dr Tamara Bronckaers v DAERA has continued to be in the news, not least given the significant £1.25m settlement that was agreed between the parties in April.

An External Independent Review of how the Department of Agriculture, Environment and Rural Affairs (DAERA) dealt with concerns raised in the Industrial Tribunal case taken by the former DAERA vet has now been commissioned by the Head of the NI Civil Service and Permanent Secretaries of DAERA and the Department of Finance. The review's terms of reference have been published and it will include decision-making relating to the defending of the claim and consideration of an appeal.

Shauna McFarland v Morelli Ice Cream Limited & Remo di Vito

Following a challenge to an anonymity order, an original Industrial Tribunal decision from November 2019 has been published. Shauna McFarland was awarded £20,000 in a sexual harassment case against her former employer and one of their employees, whose conduct was found "…by any standard sleazy and sustained".

Following a combination of sick leave and maternity leave Ms McFarland did not return to her job.

The Tribunal found that the second respondent's verbal conduct fell within the statutory definition of harassment. Holding the first respondent had not taken steps to deal appropriately with the conduct despite complaints being raised, they said there had been "no form of investigation; the claimant was never informed by the first respondent of what, if any steps had been taken to address the issue; and there had been no follow up or even basic enquiry as to her welfare."

The first respondent was described by its actions in failing to address the treatment of Ms McFarland as having "knowingly placed the claimant in harm's way." The tribunal considered that the combined conduct of both respondents justified an award in the upper range of middle band Vento (the bands used to assess awards for injury to feelings in discrimination cases), and the first respondent was ordered to pay the sum of £20,000.

Ms McFarland was supported by the Equality Commission for Northern Ireland (ECNI).

Susanne Rice v Flint Studios

In another case supported by the ECNI, Susanne Rice settled her claims of sex and age discrimination against her former employer Flint Studios Ltd before they went to hearing, for £15,000. The sum was paid without admission of liability. She was made redundant shortly after informing her employer she was pregnant and felt concerns and suggestions for improvement she raised regarding management issues were ignored. She also felt uncomfortable with the way she was treated by other senior male staff, and believed this was because she was a woman and also young.

In the news…

Work from home guidance removed

On 6 June The Executive Office issued an **update** to the working from home guidance put in place in response to the Covid-19 pandemic. In the update a TEO spokesperson said: "While the threat from COVID-19 has certainly not disappeared, it has receded. The guidance 'work from home where possible' position is therefore not proportionate at this point."

The update highlighted that employers may still wish to consider remote or flexible working, or adopting a hybrid working approach. It also notes that employers should consider practical mitigations that might be put in place where staff are attending or returning to workplaces.

Cost of living pay pressures

In recent weeks we have seen a raft of headlines around ballots for industrial action. While some strike action has been averted, more appears on the horizon in the news.

It is clear that the cost of living crisis is at the forefront of wage discussions in many businesses and adding extra challenge to pay negotiations. There have been recent examples in the news of employers responding to pressures with one-off cost of living payments or salary increases to support employees as household costs continue to rise.

Given the current economic climate and outlook can we expect to see more of these pressures for employers through 2022?

Legislation Update:

New statutory leave coming for NI domestic abuse victims

Following passage of a bill through its final stages at the Northern Ireland Assembly in the final weeks of the last mandate, The Domestic Abuse (Safe Leave) Act (Northern Ireland) 2022 has received Royal Assent.

The Act sets out that the Department for the Economy must make regulations entitling an employee who is a victim of domestic abuse to be absent from work for the purpose of dealing with issues related to the domestic abuse, known as "safe leave". Unique to Northern Ireland, this is the first example of specific legislative support for domestic abuse victims in the workplace in a UK jurisdiction.

Future regulations will provide the detail on when domestic abuse safe leave will come into force, and how it will work. What we do know is this will be a day one right (i.e. an employee is not required to have a qualifying period of employment to avail of the right). It will provide up to 10 days of paid leave in a year for reasons related to domestic abuse. This could be to find alternative accommodation, attending a medical appointment or taking legal advice.

As this is a case of when, not if, this entitlement comes into force employers may wish to prepare now in advance of regulations coming into effect. In particular, organisations may wish to consider how they can ensure employees feel supported and able to speak to line managers or HR to access this leave when needed, at a difficult time. Employers may also want to give thought to the implementation of a domestic abuse policy which, in addition to the paid leave permitted by law, will set out other ways in which an employer may be able to offer support. This could be through referral to counseling services, or support with workload during challenging periods.

> "Unique to Northern Ireland, this the first example of specific legislative support for domestic abuse victims in the workplace in a UK jurisdiction.

Covid-19 SSP changes extended in NI

Section 44 of the Coronavirus Act 2020, which relates to Northern Ireland, has been extended for a period of no longer than 6 months, up to 24 September 2022. Unlike in the rest of the UK, this means the entitlement to Statutory Sick Pay (SSP) for Covid-19 related absences remains in force in Northern Ireland, with the removal of the usual 3 day waiting period (meaning SSP is payable from the first day of COVID related absence).

Employers should therefore continue to pay SSP if an employee is absent either with Covid-19, or if they are self-isolating and cannot work (provided they are isolating for at least four days).

The Statutory Sick Pay Rebate Scheme has, however, closed to employers across the UK, including in Northern Ireland.

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