NI Employment Quarterly Update – March 2022

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Introduction

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

In this quarter, we report on some recent decisions coming out of our Fair Employment Tribunal on religious belief/political opinion discrimination allegations. Although in both cases the claims were not upheld, the decisions act as an important reminder to employers to ensure that behaviours of staff members or their customer/client base which contravene dignity at work practices must be addressed appropriately and consistently. We have also reported on another decision of the Industrial Tribunal which flags the heavy penalty of not following a fair procedure (including the statutory 3 step procedure) in the context of a dismissal. We also discuss a case which re-affirms to employers that, provided there is basis to do so, and company procedures are being followed, the investigation of potential misconduct cannot be considered a fundamentally and repudiatory breach of the employment contract in the context of a constructive unfair dismissal claim.

In our horizon scanning we bring you an update on the employment bills that have been moving through the Assembly, and highlight the new Harassment and Bullying at Work guidance published jointly by the Equality Commission for Northern Ireland and Labour Relations Agency. The guidance is a must read for HR professionals on best practice when it comes to effectively addressing these serious issues in the workplace.

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Case: 01409/19FET Campbell v Lisburn and Castlereagh City Council

The respondent was not liable for acts of religious and political belief discrimination and harassment by a third party.

Background

The claimant was a Roman Catholic with no set political opinion. However, by virtue of the Irish origin of her forename it was conceded that the claimant would be perceived to be a Nationalist. The claimant was not directly employed by the respondent and worked as an agency worker on placement arranged by her employer, Grafton Recruitment. Further to this, the respondent referred to as 'Mr A' was not an employee of the respondent but rather a member of the respondent's golf course.

The claimant was engaged by the respondent as an agency worker at Castlereagh Hills Golf Course. The harassment claim related to an incident on Sunday 28 October 2018 whereby the "furious" Mr A made remarks about the claimant's religion before pressuring her to explain why the Union Flag had been taken down from the flag pole outside the club. The tribunal found that Mr A's conduct towards the claimant met the statutory definition of harassment on grounds of her perceived religious belief and/or perceived political opinion. However, that harassment was perpetrated by a third party of the respondent and is not conduct for which the respondent can be held liable under Fair Employment and Treatment (NI) Order 1998 ("FETO")

To establish liability for the respondent for the alleged conduct of Mr A, the court decided that the claimant would need to prove that either the respondent directly discriminated against her in its treatment of her relating to Mr A and/or that the respondent's action/failure to act to address her complaints against Mr A of itself amounted to harassment of her falling within the definition of Article 3A of ("FETO").

The claimant's grievance was dealt with by management in an informal manner which failed to effectively address the matter. However, having upheld the complaint and agreed remedial action with Mr A and the claimant, a record should have been maintained. The tribunal found that the respondent should have followed up with the claimant and checked if she had any residual or new concerns.

> "The claimant's grievance was dealt with by management in an informal manner which failed to effectively address the matter.

Although the respondent could not be held liable as "Mr A" was a third party, the tribunal stated that the respondent's procedural failings exhibited an overly casual approach by it to a serious matter, and fatally undermined the respondent's assertions that they handled the matter appropriately and took it seriously.

Our insight

The big hurdle for the claimant was that the act of discriminatory treatment related to their political opinion and religious belief was committed by a third party member of the golf club, and not someone employed or engaged by the respondent. Whilst legislative provision doesn't exist under FETO to make employers liable for the acts of third parties, note that the position is different where it involves acts of sexual harassment committed by third parties.

Also, it is important to remember that employers can be liable for how they respond to such situations as their response may be considered an act of discrimination or harassment.

Case: 00016/20FET Davidson v Mallaghan Engineering Limited

Employer is found not to have discriminated against claimant on grounds of religious belief or political opinion.

Background

The respondent, Mallaghan Engineering Limited, is a large Northern Ireland based firm producing airport ground support equipment such as aircraft passenger access steps. The claimant, a Protestant, joined the company in April 2019. At this time the company employed around three hundred people, of whom 14% were Protestant and some 86% were Roman Catholic.

Upon joining the company, the claimant attended an induction meeting for new staff, which included being supplied with its policy documents, and being specifically informed as to the respondent's dress code. The dress code outlined that the respondent's staff are not permitted to wear sports kit, such as football, GAA, and rugby shirts when at work.

> The tribunal concluded from the evidence that the actions of individuals wearing GAA sports kit was merely a personal expression, with no thought of causing offence.

The claimant relied on a number of different acts which he said constituted acts of unlawful discrimination on the grounds of his religion/political opinion. This included allegations of employees wearing GAA sports clothing in the workplace in contradiction to the company's policies outlined on the first day of his employment. Having considered the allegations raised by the claimant the tribunal concluded that it was not satisfied that the claimant was subjected to any harassment or other detriment as a consequence of anyone wearing GAA sports kit. The tribunal concluded from the evidence that the actions of individuals wearing GAA sports kit was merely a personal expression, with no thought of causing offence.

In addition to the allegations set out above, the claimant raised numerous other complaints regarding conversations that took place in the workplace, and also sectarian graffiti in workplace toilets. In respect of these allegations, the tribunal found there were inconsistencies in the claimant's own version of events and the claimant's evidence to support the allegations was generally weak. The tribunal also emphasised that the claimant had not raised concerns internally with Human Resources regarding the alleged conversations or graffiti.

On the whole, the tribunal concluded that the claimant had not been treated less favourably on the grounds of perceived religious persuasion or political opinion and the claimant was not victimised.

Our insight

Although the respondent was not found liable for discrimination on the specific facts of this case, the issues in it are a reminder to employers of the importance of ensuring that the work place is a fair and neutral place where sectarian behaviours are not tolerated. Whilst the respondent had a policy on dress code, it appears that it was not always adhered to. Ensuring a neutral working environment and enforcing dress codes will certainly reduce the likelihood of receiving complaints such as the ones evidenced in this case.

It is also notable that the tribunal was critical of the claimant for not having raised any of the concerns that formed the basis of his claims, internally via the respondent's own grievance procedures. It is a reminder of the importance of the grievance process in the workplace, and highlights that overlooking or failing to properly engage with it can be damaging for employers and employees in subsequent tribunal proceedings.

Case: 18386/21IT McGregor v Wood Green Management Limited

The tribunal found that the claimant was not constructively unfairly dismissed. For such to occur there must be a fundamental breach of contract rather than a minor or trivial issue.

Background

Wood Green Management Limited are in charge of Wood Green Care Home which provides care for people with residential and nursing needs living with dementia. The claimant commenced employment with the company in May 2019. The claimant's son had also worked for the home but was dismissed. Reports surfaced that it was the claimant's intention to have the home closed down as a result of what they believed had been unfair treatment of their son. The claimant also believed the home had been giving certain family members preferential treatment in relation to visiting slots during the covid lockdown.

Management at Wood Green felt that these reports warranted investigation and the claimant was suspended from her employment on full pay to allow the respondent to investigate *"into allegations of inappropriate behaviour on your part and the potential implications for our business"*.

Following the claimant's suspension, management became aware of discrepancies in relation to the claimant's clocking in and out of work. These discrepancies showed that the claimant had been paid for hours that she may have not worked and had potentially been working shift patterns not approved by managers. The claimant was subsequently invited for a disciplinary hearing.

A number of failed attempts were made to arrange the disciplinary meeting, the claimant having suffered a bereavement as well as raising a number of other issues which made the dates being proposed unsuitable. Before the meeting could take place, the claimant submitted her resignation to the company stating that the outcome of the disciplinary meeting was a *"foregone conclusion"*.

The tribunal concluded that it would have been careless of the respondent not to investigate the allegations involving the claimant, and their actions were in line with their disciplinary policy.

The tribunal concluded that, although critical of the lack of pro-activity during the investigation, or the level of tact shown by the employer in response to the claimant's bereavement, neither these acts nor the initiation of a disciplinary investigation amounted to a fundamental and repudiatory breach of the employment contract required to establish a claim of constructive unfair dismissal.

Our insight

In order to successfully establish a constructive unfair dismissal claim, there must be a fundamental and repudiatory breach of the employment contract rather than some minor or trivial issues as the tribunal held to be the case here. A breach can be shown through a single act, or a series of acts culminating in the final act, or "last straw" which entitles an employee to resign and claim constructive unfair dismissal. Although each case will turn on its own facts, this case is a helpful reminder that the act of investigating an employee's potential misconduct where there is basis to do so, and where it is carried out in accordance with disciplinary policy, will not of itself be sufficient to constitute a fundamental and repudiatory breach of the employment contract.

Case: 21662/20IT McReynolds v Robinson Services Laundry Ltd

The tribunal concluded that the claimant was unfairly dismissed and as such he was awarded compensation of £10,639.23.

Background

The claimant brought a claim of unfair dismissal by the respondent claiming that conduct by the respondent led to the claimant having to resign.

The claimant worked nightshift in the respondent's laundry. The claimant was not officially classed as a vulnerable adult but as per evidence provided by their brother they would be approaching that threshold. He was informed he was at risk of redundancy and was instead offered an alternative role which included driving duties. A formal consultation process had not yet commenced. The claimant was fearful of this role due to the need to drive in congested city streets and did not consider himself capable of the proposed role.

The claimant advised his manager that the new job offer was beyond their capabilities and they had no choice but to take redundancy. The claimant was advised by a member of management: *"I can't give you redundancy as there is a job there for you."* The Claimant was instead told to submit a resignation letter, and informed that if he did so, his manager would get him £1,500.

The respondent argued in Tribunal that they had a potentially fair reason for dismissal (redundancy) because the claimant's position would have come to an end in any event when he would not take the new role offered to him. The tribunal concluded that whilst the respondent may have had a potentially fair reason for dismissal by way of redundancy, fair procedures (including redundancy procedures and the Statutory Dismissal and Disciplinary Procedures) had not, at that stage commenced. As such it would not have been reasonable for the respondent to have relied upon redundancy as a sufficient reason for dismissing the claimant.

Instead the tribunal found that the principle reason for the claimant's resignation was the respondent's expressed intention to discontinue the night shift and a proposed change to his established contractual duties were his employment to continue. Finding that the claimant had been unfairly dismissed, the Tribunal said it was clear the claimant had left in response to this anticipatory breach of his implied contractual terms.

> The claimant advised his manager that the new job offer was beyond their capabilities and they had no choice but to take redundancy.

Our insight

A redundancy will occur when an employee is dismissed due to; (1) the actual or intended closure of the whole business, (2) the actual or intended closure of the business at a particular workplace, or (3) a reduction in the need for employees to carry out work of a particular kind. This case highlights the importance of ensuring that a proper and consistent process is followed in circumstances where redundancy is contemplated, which must include a period of consultation.

In this case, it was wrongly assumed that the claimant could not be made redundant as there was an alternative role available. However, the respondent argued it could no longer sustain the claimant's existing role, therefore giving rise to a redundancy in circumstances where the need for someone to carry out that particular role was no longer required.

By denying the claimant redundancy and instead telling him to either accept the alternative role offered (which varied considerably from his existing role) or resign, the respondent had fundamentally breached the claimant's contract of employment.

Case: 00292/20IT Courtney Dawson V PMC Limited t/a Bluebird Care Holywood

The tribunal found that the respondent has a fair reason for dismissal namely the claimant's conduct, however they had failed to follow a fair procedure as such the dismissal was unfair.

Background

The claimant brought a claim of unfair dismissal against the respondent for failing to follow the disciplinary processes set out in the respondent's handbook and the statutory dispute resolution procedures. In a detailed response to the claimant's claim the respondent contended that the claimant was dismissed on the grounds of gross misconduct.

The claimant was a care supervisor for the respondent's business which provided domiciliary care to service users in their own houses. It was alleged that the claimant had engaged in behaviour that could be considered bullying. This included excluding two colleagues from a WhatsApp group, and a video which showed a member of staff 'bullying and berating' one of the excluded colleagues.

A subsequent investigation took place with the claimant being asked to attend a disciplinary meeting. The claimant did not attend and the meeting was rescheduled. It was alleged that an invite letter which outlined the allegations against the claimant was issued. However, the claimant stated she never received this letter until after her dismissal.

Following a disciplinary meeting the decision was made to 'let' the claimant 'go'. The Claimant claimed she never received the invite letter setting out the allegations that she was being asked to respond to, and was not provided with a copy of the notes from the meeting. Furthermore, she did not receive a letter confirming her dismissal for breaches of company policy including documented cases of bullying and harassment until the 23rd December, which was some 8 weeks after the disciplinary hearing at which she was dismissed from her employment.

The tribunal found that the respondent could have dismissed the claimant fairly on the basis of the allegations of gross misconduct levelled against her but the wholesale failure of the respondent to apply a fair process fatally undermined any prospect of doing so. In particular the respondent had not provided advance notice of the allegations against the claimant and the claimant did not have a reasonable opportunity to consider her response. As a result, the process not only fell below the standards of the company handbook but also failed to meet the statutory procedure required.

The tribunal found in favour of the claimant and they were awarded £5,200 in compensation. This included a 50% uplift for a failure to follow the statutory procedure. As a result of the respondent's failure to follow the statutory procedure the dismissal was held to be automatically unfair.

Our insight

This case serves as a reminder of the dangers of failing to follow a fair procedure, including the 3-step statutory dismissal procedure, when contemplating a dismissal. Failure to do so can not only risk a finding of unfair dismissal, but also increases the respondent's financial exposure because of the Tribunal's powers to order an uplift of up to 50% on the compensatory award where the statutory procedures have not been followed.

> As a result, the process not only fell below the standards of the company handbook but also failed to meet the statutory procedure required.

Horizon Scanning – Northern Ireland

Parental Bereavement Leave & Pay

Since our last update the Parental Bereavement Leave and Pay Bill has passed through the Northern Ireland Assembly. The bill completed Final Stage on 7 February and at the time of writing is awaiting Royal Assent. When the legislation is enacted working parents in Northern Ireland will have a day one employment right to two weeks' leave following the death of a child or stillbirth. This leave will be paid (at a minimum statutory rate) if the employee has 26 weeks continuous employment. While the bill brings rights in Northern Ireland into line with Great Britain, it has also gone further. Northern Ireland will introduce at a later date, and following public consultation, similar statutory support for parents who suffer a miscarriage. As the Economy Minister highlighted in his announcement, this makes Northern Ireland one of only a handful of jurisdictions "to have legislated for miscarriage employment rights in such a comprehensive fashion".

New Harassment and Bullying at Work guidance published

The Equality Commission for Northern Ireland and Labour Relations Agency have published a new guide "Harassment and Bullying at Work – Promoting an Inclusive Workplace". Designed to be of practical use to employers and employee representatives when developing and implementing policies it outlines steps to creating an inclusive workplace and includes links to other guidance and model policies published by both organisations. The steps include corporate commitment, assessing the current situation, communicating commitment, training staff and managers, and implementing policies and procedures. Employers may wish to take this opportunity to review the new guidance and to reflect the updated best practice into their own policies and procedures.

Spent convictions reform

Following a public consultation last year, the Justice Minister announced in January her intention to bring forward legislative provisions to reform rehabilitation periods in Northern Ireland. The Minister's statement highlights, "By reducing the length of time that it will take for some convictions to become spent, and allowing more sentences to be capable of becoming spent; more people who want to contribute to society, having turned their backs on crime, will be able to do so".

> Employers may wish to take this opportunity to review the updated guidance and to reflect the new updated best practice into their own policies and procedures.

Employment related bills moving through the NI Assembly

At the time of writing we await Further Consideration Stage for the Fair Employment (School Teachers) Bill. The Private Member's Bill was introduced to the Assembly on 17 January and has been examined by the Committee for the Executive Office. It aims to remove the exemption for school teachers from legislation that prevents discrimination on the grounds of religious belief. We note a press release from the NI Assembly in February highlighting that "Although this Bill has come to the Committee very late on in the mandate, we are committed to examining its proposals and listening to the views of those who could be affected by the Bill."

The Employment (Zero Hours Workers and Banded Weekly Working Hours) Bill completed Second Stage on 31 January and at the time of writing is now at Committee Stage.

The Trade Union and Labour Relations (Amendment) Bill, which sought to reduce the notice for industrial action and the number of employees needed for a trade union request to be recognised by an employer failed to pass Second Stage on 1 March.

Business Immigration Update

The Home Office appear to be continuing their post-Brexit overhaul of the UK immigration rules and have recently announced the introduction of three new immigration routes which may be of interest to employers. At the time of writing the official guidance on these routes has not yet been published; we expect such guidance will be published in the next month given that the Home Office intend to launch the routes in Spring 2022.

Global Business Mobility route

We understand that Global Business Mobility Route will incorporate and re-model a number of existing visa routes, including: Intra-Company Transfer; Intra-Company Graduate Trainee; Sole Representative of an Overseas Business; and Temporary Worker – International Agreement.

This route will give global businesses more options for sending personnel to the UK. Some of the key changes that have been announced are:

- Intra-company transferees may once again be eligible to settle in the UK, giving employers more flexibility to transfer a group employee quickly without the need to meet an English language requirement, even where this is with a view to settlement;
- Overseas businesses will likely be able to send a team of up to five personnel to set up a branch or subsidiary in the UK, rather than just one;
- The provisions for seconding personnel from overseas clients of UK export companies are likely to be more restrictive than the current visitor provisions, but will allow secondees to be joined by their dependants.

The government hopes to streamline the sponsorship process, and make it easier for businesses to expand into and set up in the UK. Whilst we do not at this time have full scope and guidance on this route, the eligibility and the ease of application, we are excited for this route to launch as it does promise more options for global employers when they are considering relocating staff to the UK, and this should in turn boost global investment in the UK.

Scale-up route

This will be an unsponsored route intended to enable highly-skilled and academically elite individuals to move to the UK to work at a recognised UK scale-up business. The route will lead to settlement.

As noted above we do not at this time have full details on this route, however what we know so far:

- The scale-up visa will be a 'fast track' visa service;
- The route will be open to individuals with a high-skilled job offer (details of what will be considered high-skilled have not yet been published);
- The job offer must be with a 'scale-up' company which means the company must have experienced annual growth of 20% over a three year period (again details on how this will be evidenced are not yet published);
- The company must have at least 10 employees at the start of the three year period they are relying on;
- The salary for the role must be at least £33,000 and the individual will need to pass an English proficiency requirement.
- It is unclear at this time whether or not the company will be required to hold a sponsor licence – albeit we anticipate they will need to have a licence of some kind and a reporting system so that they can report on worker activity.

This route appears therefore to be a 'fast track option' for businesses who can evidence growth over a particular period. This will be a benefit to such businesses who can use this route as opposed to standard sponsorship under the skilled worker route which typically has longer wait times.

> "The government hopes to streamline the sponsorship process, and make it easier for businesses to expand into and set up in the UK.

New High Potential Individual route

This route is also expected to be unsponsored and to lead to settlement. Eligible applicants will not need to have a job offer to qualify, so employers will be able to engage holders of this visa without having to participate in the process of securing it or acting as a sponsor.

The criteria for the route have not yet been made publicly available, however it will be geared towards certain internationally mobile individuals with high potential to contribute to the UK. It is anticipated that eligibility may be linked to having graduated from a 'top global university' and may also include other, and possibly tradeable, points-based factors. It is very likely that an English-language proficiency requirement will be included.

Right to work checks

The end date for temporary adjusted right to work checks has been deferred to 30 September 2022 (inclusive). This does not, however, affect the new Right to Work check measures which are due to come into effect on 6 April 2022.

From 6 April 2022, employers *must* carry out RTW checks online for individuals holding a biometric residence permit ('BRP'), biometric residence card ('BRC') or frontier work permit ('FWP'). These online checks will be carried out using the Home Office's **online RTW check service**. From this date, it will no longer be permissible to conduct RTW checks using a physical BRC, BRP or FWP.

Additionally, from 6 April 2022, a new online system for carrying out RTW checks will be introduced for British and Irish citizens with a valid passport (including an Irish passport card). Individuals will be able to upload images of their passports via a certified IDSP to verify their identity remotely and prove their eligibility to work. It will not be mandatory for Employers to use the IDSP system for British and Irish citizens and they can continue to carry out manual RTW checks for these citizens should they wish to do so.

"From 6 April 2022, employers must carry out RTW checks online for individuals holding a biometric residence permit ('BRP'), biometric residence card ('BRC') or frontier work permit ('FWP').

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