# Israel-Gaza conflict: what rights do employees have to express their views on social media and what can employers do to manage risk?

**In this briefing, we consider why the discussion of the Israel-Gaza conflict by employees is potentially a problem for employers, the rights of employees to express their political views and what measures employers can take in practice to manage the objectionable expression of views by employees.**

**Why is discussion of the Israel-Gaza conflict by employees potentially a problem?**

There are a range of strong views held on the Israel-Gaza conflict, with the risk that the expression of those views may be emotive. When expressed on social media, the stakes are raised even further. The tone of political debate on social media is often robust, with users emboldened to speak in a more provocative way than they would in person. Added to which, there is the scope for social media posts to reach a large audience.

It is easy to see how this presents a risk for employers. Views on the conflict could be expressed in ways which run contrary to the values and aims of the organisation, bring the organisation into disrepute, amount to the harassment of other employees or third parties or give rise to

a range of criminal offences, civil causes of actions and/or breaches of regulatory obligations. Employers faced with this are unlikely to sit by and do nothing. Indeed, we have already seen people facing disciplinary action, and even losing their jobs, because of social media posts about the conflict.

- In the US, Ryan Workman, a law student had a job offer rescinded after she wrote in a student e-newsletter that Israel was solely to blame for the conflict and it had *"created the conditions that made resistance necessary".* The message was circulated on social media and users alerted her prospective employer, Winston & Strawn, who rescinded the offer on the basis that the comments were in *"profound conflict"* with the firm's values.

- Also in the US, Citibank fired 25-year old banker Nozima Husainova after she commented on an Instagram post about the Gaza hospital bombing, stating *"No wonder why Hitler wanted to get rid of all of them",* followed by a smiley face emoji. A screenshot of the post was shared to X (formerly Twitter) and users asked Citibank whether it condoned her comments. Citibank promptly fired Ms Husainova and released a statement that it condemned *"anti-Semitism and all hate speech and do not tolerate it in our bank."*

- In Canada, Mostafa Ezzo, an Air Canada pilot lost his job after he posted photos of himself on Instagram dressed in Palestinian colours, holding banners saying

that Israel was a *"terrorist state"*, that it should *"burn in hell"*. Again, social media users reported him to his employer, and he was fired shortly afterwards.

- In the UK, Fadzai Madzingira, the Online Safety Director at the media and communications watchdog, Ofcom, was suspended for posts made on a private Instagram account, which were screen grabbed and posted online. One post described Israel as an *"apartheid state"* and she also appeared to "like" another post calling the UK and Israel a *"vile colonial alliance".* Ofcom's Code of Practice on public statements states that expressions of opinion on matters of political controversy which could compromise Ofcom's reputation for impartiality or otherwise harm their reputation should be avoided.

- Also in the UK, an unnamed tube driver was suspended by Transport for London (TfL) for apparently leading a chant of *"free Palestine"* on a tube train filled with passengers. Video footage was posted on social media which appeared to show the chant being led by the driver over the train's speaker system. The footage came to TfL's attention and the driver has been suspended while an investigation takes place.

Employers in the UK are entitled to take steps to manage the objectionable expression of views by their employees about the conflict. However, this must be handled with great

care.  What should be kept front and centre, is that freedom of expression is foundational in a democracy, and the expression of political views is of particularly special importance.  Interference with free expression is permitted, but it will be scrutinised carefully, and any misstep could leave employers exposed to legal claims.

**What rights do employees have in connection with the expression of their political views?**

***Rights under the European Convention of Human Rights***

UK citizens have the right to freedom of thought, conscience and religion under Article 9 of the Convention.  This includes the right to manifest such religion or belief, for example, by posting about it on social media.  To qualify for protection the belief must be compatible with human dignity and attain a certain level of cogency, seriousness, cohesion and importance – in other words it must be more than a mere view or opinion.  Yet if the employee cannot jump these hurdles, the expression of views may still be protected under Article 10 of the Convention, which enshrines the right to freedom of expression more generally.  This includes the freedom to hold opinions and to receive and impart information and ideas.

However, neither of these rights are engaged where the views expressed are aimed at the destruction of the rights and freedoms of others.  However, this is a high threshold and means things like advocating totalitarianism or Nazism, or espousing violence and hatred in the gravest of forms.  Beliefs which are offensive, shocking or disturbing to others may still be protected.

Therefore, in the majority of cases, Article 10 will be engaged, and possibly Article 9 as well. Yet these rights are not absolute rights. In certain circumstances, employers may interfere with them by introducing rules regulating staff behaviour. Broadly speaking, this is permitted where the interference is lawful, necessary and aimed at protecting the rights or reputation of others.

Although private sector employees cannot rely on the Convention rights directly (e.g. to bring a claim against their employer for an alleged infringement), the Courts and Tribunals must interpret UK law in a way which is compatible with these rights. This means that relevant discrimination and unfair dismissal claims must be viewed through the prism of these Convention rights.

***Protection from religion or belief discrimination***

The Equality Act 2010 protects employees and workers from discriminatory treatment in connection with their religion or belief. This does not mean that all views expressed about the Israel-Gaza conflict will be protected from discrimination. In Grainger plc v Nicholson, the EAT set out the criteria for a philosophical belief (as opposed to a religious belief) to qualify for protection – the belief must:

- be genuinely held;
- be a belief, not a mere opinion or viewpoint;
- concern a weighty and substantial aspect of human life

and behaviour;

- attain a certain level of cogency, seriousness, cohesion and importance; and

- be worthy of respect in a democratic society, and not be incompatible with human dignity or conflict with the fundamental rights of others.

If a belief is protected, then the employee will be protected from discriminatory treatment because of the belief, including indirect discrimination, which tends to be the battleground in disputes related to the expression of protected beliefs. For example, the employee may complain that sanctions for social media posts cause particular disadvantage to those with political beliefs. However, an employer can avoid liability if it can show that the rule was a proportionate way to achieve a legitimate aim, such as protecting its reputation or protecting others from harassment.

Helpfully, in the recent case of Higgs v Farmor's School, the EAT gave some guidance on how to assess the proportionality of any disciplinary action for the expression of religious or political views. In all cases, employers should ask whether their objective is important enough to justify the action and, if it is, whether there is a less intrusive way of achieving that objective. Employers should also go on to consider the following factors before taking action:

- what was said;

- the tone used;
- the employee’s understanding of the likely audience;
- the extent and nature of the intrusion on the rights of others and any consequential impact on the employer’s business;
- whether it was clear that the views were personal;
- whether there was a potential power imbalance between the employee and those whose rights are being intruded upon; and
- the nature of the employer’s business and whether the views could impact vulnerable service users or clients.

The key take-away is that each situation is going to fact-specific, and a careful assessment is needed in each case before sanctioning an employee.

***Protection from unfair dismissal***

Even where an employee cannot rely on discrimination law, they retain the right not to be unfairly dismissed. Ordinarily, employees need two years’ service to bring this claim. However, where the sole or principal reason for the dismissal is, or relates to, the employee’s political opinions or affiliations, the two-year service requirement is dispensed

with, and it becomes a “Day 1” right (although it is not treated as an automatically unfair dismissal). There is very little case law guidance on how this exception works in practice and so, in relevant cases, it is better to err on the side of caution and assume that employees will have the right regardless of length of service.

In order to dismiss fairly, employers will need to demonstrate that the employee understood that their actions would be treated as misconduct and that they were aware of the potential consequences. In Weller v First MTR South Western Trains Ltd, the Tribunal highlighted that if an employer wishes to sanction an employee for social media activity, especially where it is conducted on a personal device during personal time, they must *“provide clarity or some degree or education or awareness training”.*

A fair dismissal for misconduct also requires a fair procedure, which complies with the requirements of the Acas Code of Practice on Discipline and Grievance. This includes conducting an appropriate level of investigation and considering arguments put forward in defence. In Webb v London Underground Ltd, an employee was dismissed for posting comments on a private Facebook account which had harmed the employer’s reputation and was in breach of the employer’s policies. However, the dismissal was held to be procedurally unfair because the employer had failed to engage with arguments put forward by the employee during her disciplinary hearing regarding her Convention rights. Although these were complex points, the employer ought to have grappled with them.

A Tribunal will also want to see that the interference with the Article 9 and/or Article 10 Convention rights can be justified. If the interference *cannot* be justified, it is

likely this would take the dismissal outside the “band of reasonable responses” and mean the dismissal is unfair.

**What measures can employers take to manage the objectionable expression of views by employees?**

Where does this complicated landscape leave employers? Defensively, employers should ensure that they have a good suite of policies in place, which are given to staff and understood by them. This could include the following:

- A Code of Conduct which sets out expectations regarding standards of behaviour and is clear about the circumstances in which this extends to time outside work.

- A Social Media Policy which prohibits staff from accessing social media on work devices at any time and also sets out expectations about social media use on personal devices. It would be a good idea to require staff to state on their social media platforms that the views expressed are their own and not those of the organisation.

- Equality and Anti-Harassment Policies should explain accurately what characteristics are protected and also give examples of protected beliefs. Training should also be provided.

- Disciplinary Rules should state that breaches of the Code of Conduct, Social Media, Equality and Anti-Harassment Policies will be treated as misconduct, and serious breaches as gross misconduct.

Where an employee crosses the line, employers need to consider the following:

- As far as possible, assess which legal rights are engaged.

- Focus on precisely why the expression of the belief amounts to misconduct – consider the factors in the Higgscase discussed above.

- If disciplinary action is needed, the disciplinary process needs to be fair and in line with the Acas Code.

- Once disciplinary action has started, be prepared for a grievance to be lodged in response, which will have to be dealt with.

- If the employee is to be sanctioned, remember that this

should always be done in the least intrusive way possible. Is dismissal really necessary? Would a request to take down the post and not repeat with similar posts, together with the provision of training be enough?

- Even where the employee is not dismissed, any disciplinary sanction for the expression of a protected belief may be viewed as an act of discrimination by the employee and used as a basis for constructive dismissal.

- In serious cases, it may be necessary to report the matter to a regulator and/or the police.

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# Supreme Court eases path for

# deductions from wages claims, including for underpaid holiday

**The Supreme Court has ruled that a series of unlawful deductions from wages is not broken by gaps of three months or more between deductions, nor by the making of a lawful payment in between the unlawful payments. This decision makes it easier to succeed in claims where repeated deductions have been made from pay, for example, in underpaid holiday claims.**

**What is the background?**

Entitlement to paid holiday in the UK is governed by the Working Time Regulations 1998 in England, Wales and Scotland and the Working Time Regulations (Northern Ireland) 1998 in Northern Ireland. Under both, workers are entitled to 5.6 weeks' holiday per year. Four weeks is derived from the EU Working Time Directive (**Directive Leave**) and 1.6 weeks is an additional domestic entitlement (**UK Leave**).

In terms of pay for holiday, UK law states that leave should be paid at the rate of a "week's pay" for each week of leave. For workers with normal working hours, a week's pay includes basic salary only and excludes other types of payments such as commission and overtime. However, European case law has made it clear that workers are entitled to receive their "normal pay" during any period of Directive Leave.

There have been a number of cases which have sought to

determine exactly what types of payments should be included in "normal pay". In 2014, in the case of *Bear Scotland Ltd v Fulton and Baxter*, *Hertel (UK) Ltd v Wood and others, Amec Group Limited v Law and others* (**Bear Scotland**), the EAT held, for the first time, that payments made in respect of non-guaranteed compulsory overtime (i.e. overtime an employer is not obliged to offer, but, if offered, a worker must accept) should be included in holiday pay.

This decision exposed employers who had *not* included such payments in holiday pay to claims that they had made a series of unlawful deductions from wages. Where this is the case, the three-month time limit for bringing the claim runs from the last deduction in the series and the worker is able to claim for all losses in the series. When multiplied across a workforce, this left affected employers facing huge backpay bills.

However, the EAT went on to limit the impact of its decision by ruling that:

- A series of deductions must have a sufficient similarity of subject matter and there must be a sufficient frequency of repetition.

- There could not be a gap of more than three months between the unlawful deductions in order for the deductions to form part of the same "series" (the "three-month rule").

- Its decision applied to Directive Leave only and not to UK Leave, for which basic pay only could still be paid.

- Workers are deemed to take their Directive Leave before their UK Leave.

These conditions limited the risk of large backpay claims because, in practice, the series of unlawful deductions would likely be broken by the lawful payments made in respect of the UK Leave. For example, a worker takes their 20th day of Directive Leave on 4th August and takes their UK leave across September, October, November and December. The worker then takes the 1st day of Directive Leave in the next holiday year on 15th January. As there would be a gap of more than three months between 4th August and 15th January, the series of unlawful deductions would be broken.

In 2015, the Government stepped in to limit the impact of the ruling even further, by introducing regulations which prevented most claims of unlawful deductions from wages looking back further than two years from the date of the claim (although, in practice, the three-month rule had made it very difficult to establish a series of deductions going back even as far as this). However, these regulations do not apply in Northern Ireland.

**What happened in this case?**

Claims for underpaid holiday extending back to 1998, were brought by 3,380 police officers and 264 civilian employees employed by the Police Service of Northern Ireland (**PSNI**). The claims were that they had been paid basic pay for periods of holiday only, and not their "normal pay", which included overtime. The PSNI accepted the claimants had been underpaid, but disputed the period for which they were entitled to recover. The PSNI sought to rely on the three-month rule to limit the value of the claims.

In June 2019, the case went to the Northern Ireland Court of Appeal. The Court agreed with an earlier Industrial Tribunal decision and disagreed with the decision in *Bear Scotland*. The Court ruled:

- Whether or not there is a series of deductions is a question of fact to be decided in each case. To identify a series it is necessary to look for the "common fault" or "unifying vice" of the underpayments. Here, the unifying vice was that holiday pay had been calculated by reference to basic pay rather than normal pay. This meant the underpayments belonged to the same series.

- A series is not ended by a gap of more than three-months between the unlawful deductions, nor by making a correct and lawful payment.

- Annual leave is not taken in a particular order. Directive Leave and UK Leave form part of a "composite whole" and each day's annual leave must be treated as a fraction of that composite pot.

This decision meant it was easier for workers in Northern Ireland to establish a series of unlawful deductions from wages by virtue of underpaid holiday. When coupled with the fact that the two year look back regulations did not apply in Northern Ireland, the PSNI was left facing a backpay bill of £30 million.

However, this decision was not binding in England, Wales and Scotland, where *Bear Scotland* remained the leading authority. Unsurprisingly, the PSNI appealed to the UK Supreme Court. A decision of the UK Supreme Court is binding across the whole of the United Kingdom, thereby taking precedence over both *Agnew* and *Bear Scotland*.

**What was decided?**

The Supreme Court agreed with the Northern Ireland Court of Appeal and ruled that:

- What constitutes a "series" is a question of fact that must be answered in light of all relevant circumstances including, but not limited to, their similarities and

differences, their frequency, size and impact, how they came to made and what links them together. In this case, the Northern Ireland Court of Appeal had been right to find that each unlawful underpayment was linked by the same "common fault" (i.e. that holiday pay had been calculated by reference to basic pay only) and belonged to the same series.

- A series is not necessarily ended by a gap of more than three-months between the unlawful deductions or by the making of a lawful payment. Unlawful deductions do not have to be next to each other in order to establish a series.

- There is no legal requirement that Directive Leave and UK Leave must be taken in a particular order. Instead, both forms of leave (together with any additional contractual holiday the worker may be entitled to) form part of a composite whole.

**What does this mean for employers?**

This decision means it will be easier for UK workers to bring deduction from wages claims in respect of underpaid holiday pay. It will be possible to establish a series even where unlawful payments are interspersed with lawful payments and even where there are gaps of more than three months between the deductions.

Employers who have not adjusted holiday pay to include components of pay representing a worker's normal pay should ensure that holiday pay is now regularised. Exposure to claims for the historic underpayments will remain, but workers will still only have three months from the date of the last deduction to bring the claim (subject to any extension of time given by virtue of Acas Early Conciliation and/or ordered by an Employment Tribunal). Where claims are brought in time, they will remain limited to the two-year look back period in England, Wales and Scotland.

Employers should remember that this ruling does not apply to deductions caused by underpaid holiday only. It applies to any deductions from wages claim where the series of deductions relates to any form of wages as defined by the ERA 1996 including a fee, bonus, commission or other employment-related emolument.

Finally, the ruling that all types of annual leave entitlement form part of a "composite whole", leaves employers with a practical headache. By way of example, a full-time worker working for Company X is entitled to 33 days' annual leave made up as follows:

- 20 days' Directive Leave paid at his normal rate of pay (i.e. basic pay plus overtime);
- 8 days' UK Leave paid at his basic rate of pay; and
- 5 days' of contractual leave paid at his basic rate pay.

In other words, around 60% of his leave is paid at the normal rate of pay and around 40% of his leave is paid at the basic rate of pay. Strictly speaking, when he takes one day's leave, the pay for that one day should be calculated according to that ratio. And where employers have workers with differing holiday entitlements, the calculations would need to be adjusted on a case-by-case basis.

Chief Constable of the Police Service of Northern Ireland v Agnew and others

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# Bonus clawback provisions designed to disincentivise an employee from resigning were lawful and not in restraint of trade.

**In *Steel v Spencer Road LLP t/a The Omerta Group*, the High**

**Court has ruled that provisions in an employment contract requiring repayment of a discretionary bonus if the employee resigned with three months of the bonus payment date were lawful and not a restraint of trade. The result was that the employee was obliged to repay a discretionary bonus of £187,500.**

**What happened in this case?**

Mr Steel was employed by Omerta, a global executive search firm. He was entitled to participate in a discretionary bonus scheme intended to reward good performance and incentivise staff to remain in employment. Entitlement to a bonus was conditional on Mr Steel remaining in employment and not being under notice to terminate (whether given by him or Omerta) on the bonus payment date, or in the three-month period that followed. In the event that these conditions were not met, the contract provided that Omerta was entitled to clawback the bonus as a debt. It also provided that Mr Steel would indemnify Omerta for any costs, fees and charges it incurred in enforcing recovery of the bonus payment.

In January 2022, Mr Steel was paid a bonus of £187,500 (almost three times his basic salary of £65,000). Mr Steel gave notice to terminate his contract on 22 February 2022. In line with the bonus clawback provisions in the contract, Omerta sought repayment of the bonus. Mr Steel refused to comply and Omerta served a statutory demand for the bonus monies, plus legal fees of over £12,000. Mr Steel applied to set aside the statutory demand. He argued that the bonus clawback provisions were unenforceable on the grounds they amounted to a restraint of trade (i.e. terms which restricted his freedom to work for others) and/or a penalty clause.

The Judge found that the bonus clawback provisions did not fall within the restraint of trade doctrine. In reaching this decision, the Judge relied on the decision in *Tullett Prebon v BGC Brokers [2010] EWHC 484 (QB)*. In that case, it had been held that clauses which required the repayment of retention bonuses in the event that the employee resigned before the end of specified term were not provisions in restraint of trade. This was because they did not affect an employee's freedom to take up other employment after leaving.

The Judge commented that there might be circumstances where the severity of the consequences were clearly out of all proportion to the benefit received, but this was not arguable in Mr Steel's case, where the conditions attached to the bonus payment were said to be *"very moderate".* The Judge also held that the argument that the bonus clawback provisions operated as a penalty clause had no real prospect of success.

Mr Steel appealed the decision on the restraint of trade point only to the High Court. In the meantime, he repaid the bonus to Omerta.

**What was decided?**

The High Court Judge noted that the restraint of trade doctrine requires a two-stage test. First, whether a particular contract is a restraint of trade. If it is, then the contract will only be enforceable if it is reasonable with reference to the interests of the parties and the public. However, this appeal was solely concerned with the first of these two questions, since if the bonus clawback provisions *were* a restraint of trade, it was not disputed that the statutory demand would fall to be set aside.

Mr Steel's primary ground of appeal was that the Judge should not have followed the decision in *Tullett Prebon* because it had been wrongly decided, and, instead, should have followed the decision in *20:20 London v Riley [2012] EWHC 1912 (Ch)*. The *20:20 London* case did not concern bonus payments in employment contracts, but whether a clause requiring a defendant to repay the proceeds of a business sale if he left the business within three years of the sale was a restraint of trade. In that case, the Judge said that the defendant's argument had reasonable prospects of success and allowed the claim to proceed to trial. Mr Steel said this decision demonstrated that a contractual financial disincentive to resign was, on its face, a restraint of trade.

The High Court Judge decided to follow the decision in *Tullet Prebon*, given that it was the only authority which directly addressed whether a bonus clawback provision in an employment contract was a restraint of trade. In contrast, the *20:20 London* case concerned a wholly different type of contractual provision. Further, the High Court Judge did not consider the reasoning in *Tullett Prebon* to be wrong, noting that there was no doubt that making a bonus entitlement conditional on remaining in employment for a period of time would deter an employee from resigning. However, this did not mean it was a restraint of trade: an employee in this situation is still free to go and work elsewhere without restriction. Therefore, this ground of appeal failed.

Mr Steel also argued that the Judge had failed to consider the impact of other clauses in the contract which operated as a significant disincentive to resign. In particular, while the bonus clawback provisions disincentivised him from resigning within three months of the bonus payment date, he was also subject to a three-month notice period, which meant that he would have to stay in employment for a minimum of six months

after the bonus payment date in order to retain the bonus. Further, he was subject to post-termination covenants, including a three-month non-compete restriction. However, the High Court Judge dismissed this ground of appeal, noting that the conclusion that the bonus clawback provisions were not a restraint of trade was unaffected by the fact there were other contractual provisions imposing other restrictions.

The High Court Judge rejected two further grounds of appeal.

**What does this mean for employers?**

Employers will welcome this decision, since it underlines that contractual conditions designed to deter resignation following the payment of a bonus are enforceable, provided that they do not restrict an employee's ability to work elsewhere after leaving. Furthermore, the lawfulness of such conditions is assessed in isolation, rather than looking at the cumulative effect of all restrictions within the contract, such as notice periods and post-termination covenants.

However, employers should be mindful of the observation that if the severity of the consequences are "out of all proportion" to the benefit received, then it is possible that that such conditions could be unenforceable. The High Court did not made give examples of what it meant by this but we can surmise that if, for example, a vulnerable employee's salary was artificially suppressed and the discretionary bonus, in fact, represented what should have been their actual remuneration and the contract allowed it to be clawed back for a lengthy period post-termination, it could be argued that a

bonus clawback provision effectively handcuffs the employee to the employer in order to receive their basic remuneration.

A point that did not arise in this case is the application of good leaver provisions. Senior employees will expect good leaver provisions to be carved out of bonus clawback arrangements, meaning that a bonus would not be repayable in circumstances where the employee left in the restricted period but was a "good leaver". If the good leaver provision extends to situations where the employee is terminated "without cause", employers should remember that this could potentially cover employees who resign in response to a repudiatory breach. Therefore, employers would be well advised to seek legal advice on the drafting of such provisions to make sure that they are reasonable, clear and achieve the desired effect.

Steel v Spencer Road LLP t/a The Omerta Group

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# Failure to notify employee

# about reorganisation and new roles was maternity discrimination

**In *Smith v Greatwell Homes*, an Employment Tribunal has held that a failure to notify an employee on maternity leave about a business reorganisation, and the new roles within it, was an act of maternity discrimination.**

**What happened in this case?**

Ms Smith began working for Greatwell Homes in 2019 as a Business Improvement Analyst. She had a heavy workload, including taking on a significant part of her line manager's role after she went off sick and then left the business. Ms Smith was regarded as a valuable and ambitious member of staff and was encouraged to apply for a more senior role with line management responsibilities when one became available.

Things seemed to change in April 2020, after Ms Smith told Ms Herzig, the Head of Property Services and Compliance, that she was pregnant. This was not passed on to Human Resources, and Ms Smith had to provide this information to them on two further occasions. Later that month, she was excluded from a bonus Friday off work which was given to staff as a goodwill gesture during the pandemic. Ms Smith was told that she was not eligible because she did not work on Fridays. She challenged the decision, but Greatwell refused to extend the scope of the offer.

Ms Smith started her maternity leave in early September 2020. On 5 April 2021, Ms Smith received a text message from Ms Herzig, informing her of a number of changes to the workplace which had just taken place, namely the appointment of a Mr Syed as Ms Smith's new line manager and the appointment of a Ms Perkins into the new post of Governance and Assurance Manager. Both roles represented opportunities of the sort that Ms Smith had previously been told she should apply for when the chance came along. Ms Smith was unhappy about the text, and the general lack of communication during her maternity leave. She raised a grievance, which was rejected although partially upheld on appeal.

In August 2021, Greatwell began to send job adverts to Ms Smith, including a "re-advertisement" of the Governance and Assurance Manager occupied by Ms Perkins. Greatwell claimed this was the start of the process of recruitment for the permanent role, due to commence eight months later. However, Ms Smith resigned on 31 August 2021 and brought an Employment Tribunal claim alleging that she had been subjected to discrimination and/or detriments because she had been on maternity leave. At the heart of her claim was the failure to communicate the job opportunities and the changes to the workplace.

**What was decided?**

The Tribunal found that Greatwell was obliged to notify Ms Smith of the *"sweeping changes"* to the organisation of the business at the same time as other staff. Ms Smith needed to know about the changes in order to be in a position to apply for the new roles. The staff members who had applied for the roles had all been at work at the time and were informed of the changes. In contrast, Ms Smith had been on maternity

leave and was not so informed. The consequence was that she was denied the chance to compete with the other applicants and progress her career.

Greatwell's explanation for this unfavourable treatment was, said the Tribunal, *"inconsistent and confusing"*. However, evidence from two senior witnesses from the business repeatedly highlighted that the reason for the difference in approach was because Ms Smith was on maternity leave, which the Tribunal said were *"tantamount to admissions"*. The Tribunal concluded the reason Greatwell had excluded Ms Smith from the recruitment process was because the positive view Ms Herzig had once had of her was *"…eroded by the knowledge that she had become pregnant and was on maternity leave".* Even if this was a subconscious attitude, it was clear that this was the reason. The Tribunal noted that the re-advertisement of the Governance and Assurance Manager role was *"…window dressing, an attempt to disguise the perceived treatment that had gone before".*

Considering all of the evidence given on behalf of Greatwell in the round, the Tribunal concluded that it revealed *"lazy and unfair assumptions"* that those on maternity leave:

- will insist on taking the full 12 months' leave;
- cannot, or will not, return to work before this;
- should not be given the opportunity to make decisions about these issues for themselves;

- are less useful assets in the workplace; and
- are less likely to be the solution to staffing problems where an immediate response was needed.

The Tribunal also went on to criticise other aspects of Greatwell's treatment of Ms Smith. It said that the response to the notification of her pregnancy was symptomatic of their attitude towards the fact she was pregnant. And the refusal to allow her the bonus day off was a further indication of their general approach to diversity issues, amounted to indirect sex discrimination and was also *"deeply unsympathetic"* to Ms Smith. Finally, the handling of Ms Smith's grievance was *"neither thorough or fair"* and the Tribunal inferred from this a generally negative attitude towards Ms Smith, the fact that she had been on maternity leave and had raised a grievance.

Both the discrimination and detriment claims were upheld. Before the Tribunal ruled on compensation, the parties agreed that Greatwell would pay the sum of £50,000 to Ms Smith.

**What does this mean for employers?**

Employers should pay careful attention to the Tribunal's criticisms of the employer in this case. The dismissive and unfair attitudes shown to the employee even before she went on maternity leave helped to paint a picture of an employer who

did not treat pregnant employees well. Although they may seem like relatively small matters in themselves, when added to the later events, they were particularly unhelpful. Care should be taken that notification of pregnancies are handled efficiently and with sensitivity and warmth. Failure to do so could contribute to an inference of discrimination being drawn.

Employers should seek to agree an appropriate level of communication with employees going on maternity leave. Certainly, staff should not be bombarded with the workplace communications, but nor should they be frozen out, as appeared to the case here. Clearly, employers should agree to send communications about matters of importance affecting the employee, such as a business reorganisation or redundancies. However, care should also be taken to send communications about work social events and training. In one case, a failure to invite an employee on maternity leave to an informal Christmas drinks party was held to be an act of maternity discrimination.

Perhaps most importantly, employers need to put time into embedding enlightened attitudes towards employees taking maternity leave (and other forms of leave such as shared parental leave). The negative assumptions about women on maternity leave found to be held by Greatwell staff are surprisingly common. Training should be given to managers to address these attitudes, which are sometimes unconsciously held.

Smith v Greatwell Homes Limited

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