

The LA employment alert!

APRIL 2009

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The Employment Alert is intended to assist you in identifying potential problems which should ring alarm bells and on which you should seek specific advice. It is not intended to be an exhaustive statement of the law or a substitute for seeking specific advice. LA is regulated by the Solicitors Regulation Authority. A list of members is available on request.

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 LesterAldridge LLP

Concerned for the environment?

Is this a religion or a belief? Yes, according to a London Employment Tribunal.



“His concerns regarding climate change did not fit with his employer’s interests”

The Employment Tribunal were prepared to accept that an employee of Grainger Plc was protected under the Employment Equality (Religion or Belief) Regulations 2003 (the “Regulations”) due to his environmental concerns.

The Regulations protect philosophical beliefs regardless of whether they are similar to a religious belief.

In this case the employee, Tim Nicholson, was made redundant in 2008. He alleges that he was selected for redundancy due to the fact that his strong environmental beliefs and concerns regarding climate change did not fit with his employer’s interests.

Mr Nicholson therefore considers that his selection for redundancy was unfair as it breached the protection afforded to his beliefs by the Regulations.

The decision by the Employment Tribunal was made following an application by Grainger Plc for his claim to be struck out as they considered that his “belief” was not protected by the Regulations.

However, the Employment Tribunal refused to strike out the claim which means (unless the claim is settled) that it will proceed to a full hearing.

Action point

Due to this case being at the very early stages of proceedings it is merely an interesting decision and should not be the cause of undue alarm for employers.

Though it could encourage others with strongly held beliefs (concern for the protection of dolphins perhaps?!) to bring these sorts of claims.

Employers should take this as an insight into how liberal (generous!) the Employment Tribunals can be in considering the scope and protection of UK employment laws.

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Guilty...

If an employee does not admit that they are guilty of misconduct and the evidence is not conclusive – how can the employer decide whether they are guilty or not guilty?

Virgin Trains have recently been caught out by this dilemma.

In *West Coast Trains (t/a Virgin Trains) v Tombling* the Employment Appeal Tribunal (EAT) have recently confirmed the decision of the Employment Tribunal that Virgin Trains were not reasonable in concluding that an employee was guilty of misconduct.

Ms Tombling worked as part of the train's onboard shop staff. Towards the end of a train journey Ms Tombling broke the screen on the computer based till that was used in the shop.

Virgin Trains dismissed Ms Tombling for wilfully breaking the till screen.

CCTV footage showed that Ms Tombling had touched the screen with her fist, her palm and had

then hit it with her head (ouch!) on two occasions during the journey.

Ms Tombling said that breaking the screen was an accident. She stated that the train had lunged which caused her to fall forward and bang her head on the screen which had caused it to smash (don't be cynical – it could have happened!).

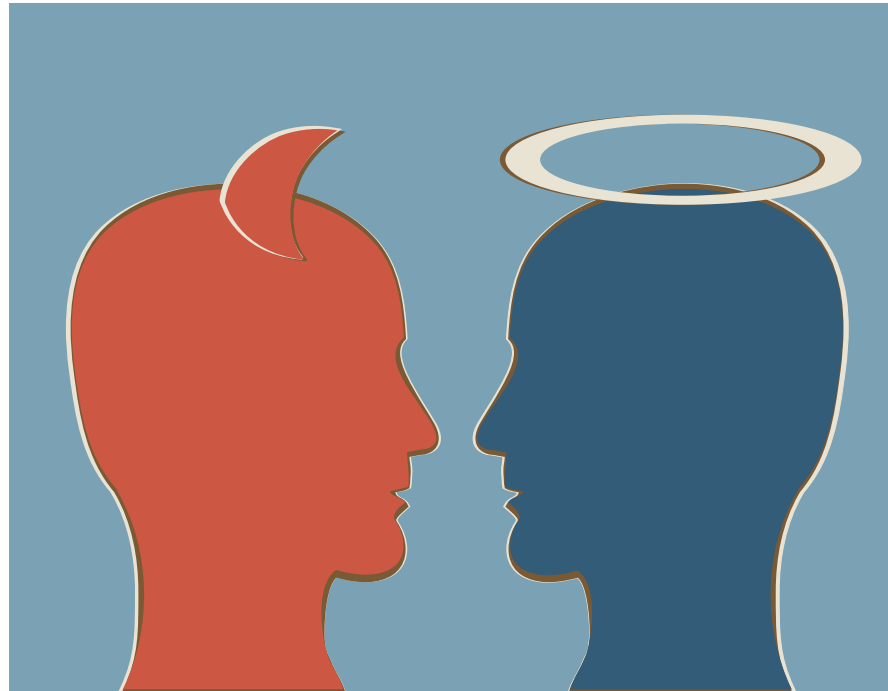
Virgin Trains concluded that the movement of the train had not caused Ms Tombling to fall and hit her head. They considered that the CCTV footage of the incident did not show that the train journey was a "rough ride".

The Employment Tribunal considered that the investigation into the misconduct was fatally flawed.

They pointed out that a sudden movement of the train could have resulted in the accident occurring and that it did not have to be a "rough ride" for the accident to have taken place.

Virgin Trains failed to inspect CCTV footage of other parts of the train which might have shown that other people (standing) had been affected by a sudden movement of the train.

Virgin Trains appear to have considered that Ms Tombling hit the screen with her head to cover up the fact that she had broken it on purpose.



...or not guilty?

In this case the EAT did confirm that it is not necessary for an employer to rule out every possible alternative

can be a tendency to believe that if the situation is not A then it must be B. Situations are rarely that straightforward.

Also, if in doubt – consider a lower disciplinary sanction (e.g. final written warning) which might be more easily justified. If there is a further disciplinary issue (while the warning is live) and you dismiss you are likely to have a stronger defence to an unfair dismissal claim.

explanation in a misconduct situation – but the employer does need reasonable grounds to sustain the belief that the employee is guilty of misconduct.

There is no doubt in this case that the employers genuinely believed that the employee was guilty of purposefully breaking the till screen. However, they failed to fully explore and consider other possibilities.

This case is a reminder to employers to keep an open mind in disciplinarys. There

This did not hold much weight with the Employment Tribunal who saw from the CCTV footage that this "cover up" caused significant discomfort to Ms Tombling. The first time she hit her head on the screen she is seen rubbing her head afterwards. On the second occasion the impact is sufficient to knock her to her knees!

Action Point

This case is an example of an employer failing to carry out a thorough investigation and so allowing the Tribunal to find that they had reached an unreasonable conclusion.

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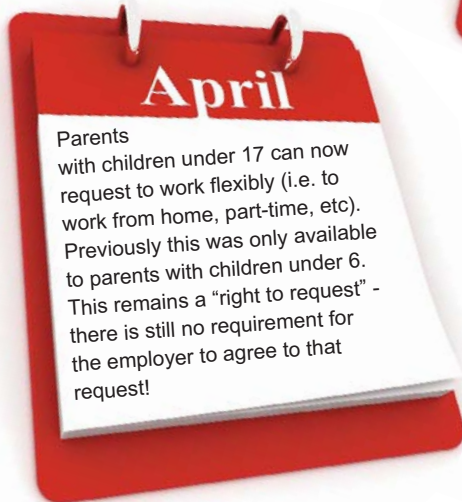
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Don't miss these changes!

April brings a number of changes to the law which employers should make a note of.



Recruiting staff is a treacherous pursuit for employers, as one UK law firm has recently been reminded.

(Yes, even law firms get caught out by the law!) in the UK.

The law firm, Osborne Clarke, have an online application process for their trainee solicitor positions. Mr Purohit, who is an Indian national, tried to apply for one of these positions online and encountered problems.

The response he received as one part of the process was "We are sorry but we are unable to accept applications from candidates who require a work permit to take up employment in the UK".

Mr Purohit was successful in a claim for indirect race discrimination against the law firm following the rejection of his application based on his not having permission to work

Osborne Clarke were unable to justify their reasons for having a policy of not accepting applications from non-EEA candidates.

The Employment Tribunal found (and the Employment Appeal Tribunal confirmed their findings) that the law firm had failed to justify their policy which, in the case of Mr Purohit, resulted in indirect race discrimination on the grounds of nationality.

The Tribunals criticised Osborne Clarke who could not show that they had any evidence to support their opinion that the UK Border Agency would not accept an application for a work permit for trainee solicitors.

Action Point

This case is a reminder that employers should consider job applications purely on merit.

Considerations about work permit issues should only come into consideration at the later stages of a recruitment process – and ultimately employers might have to let the UK Border Agency decide whether they will provide a work permit.

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