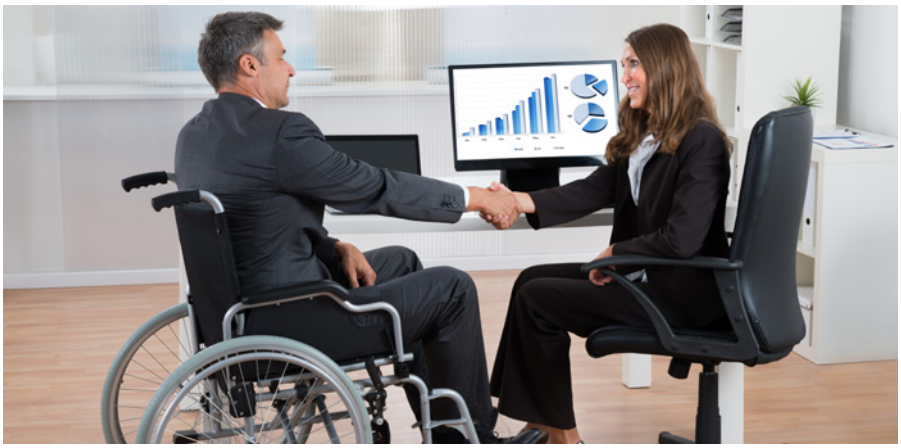
NEWS FROM THE HR TEAM

South Staffordshire & Shropshire Healthcare NHS Foundation Trust V Billingsley 2016



This case is a good reminder of the importance of making reasonable adjustments for staff with disability if there is a chance that it will work. The employee is not required to show that the adjustment will work.

Mrs Billingsley who worked as a data input clerk, suffered from dyspraxia which meant she was more prone to making errors than her colleagues. The recommendations from a report commissioned by the Trust to improve performance was to provide 50 hours of training sessions by a dyspraxia specialist tutor and provision of technical aids. The Trust initially failed to implement the advice, though three years after provided 20 hours of specialist training and technical aids.

The employee's performance improved, however it later dropped when her supervisor changed. As a result, the Trust began a formal review and eventually dismissed Mrs Billingsley on grounds of capability.

The Tribunal held that the employer had failed to make reasonable adjustments in good time. If the adjustments suggested had improved the employee's performance, the employee may not have been dismissed. The Tribunal further found that the employee had been unfairly treated by being subjected to performance reviews without making reasonable adjustments and to have dismissed her before implementing the adjustments fully.

The Trust appealed, though the EAT dismissed the appeal on the grounds that it was not up to the Tribunal to consider whether a reasonable adjustment would avoid a dismissal. Even if there is a chance for the adjustment to work, the employer must consider it.

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Pregnancy and maternity discrimination in the workplace

A new report on pregnancy and maternity discrimination shows that the number of new and expectant mothers forced to leave their jobs has almost doubled since 2005 and it states that urgent action should be taken by the government to tackle the problem. So, what changes have been recommended and are they likely to happen??

The Women and Equalities Committee, which was appointed by the House of Commons, has published a report regarding pregnancy and maternity discrimination in the workplace, this shows that the number of new and expectant mothers forced to leave their jobs due to pregnancy discrimination or concerns over the safety of their child has almost doubled over the last decade to 54,000. It describes this increase in workplace pregnancy discrimination as "shocking".

The report calls for UK women to have protections similar to those in Germany where employers can only dismiss or make new and expectant mothers redundant in specified circumstances. The report also recommends:

- A substantial reduction in the current £1,200 fee for women taking pregnancy-related discrimination cases to an employment tribunal and an increase in the three-month limit on taking cases to the tribunal to six months.
- Protection from redundancy until six months after women returns to work from maternity leave.
- Increased pregnancy and maternity-related rights for agency, casual and zero-hours workers.
- Extension of the right to paid time off for antenatal appointments to agency, casual and zero-hours workers, to be available after a short qualifying period of work.
- A requirement for employers to undertake an individual risk assessment when they are informed that a woman who works for them is pregnant, has given birth in the past six months or is breastfeeding.
- New and expectant mothers who are concerned that their health or the health of their baby is being put at risk by their work should have an easily accessible, formal mechanism to compel their employer to deal with such risks appropriately.
- The government monitors access to free, good quality, one-to-one advice on pregnancy and maternity discrimination issues and assesses whether additional resources are required.
- The government publishes a detailed plan outlining the specific actions it will take to tackle pregnancy and maternity discrimination within the next two years and ensure that rights and protections will not be eroded in the Brexit negotiation period.

The government will consider and respond to the report's recommendations soon. However, it has already previously stated that it will not change employment tribunal fees until it has completed and published its own post-implementation review on the impact of the introduction of tribunal fees.

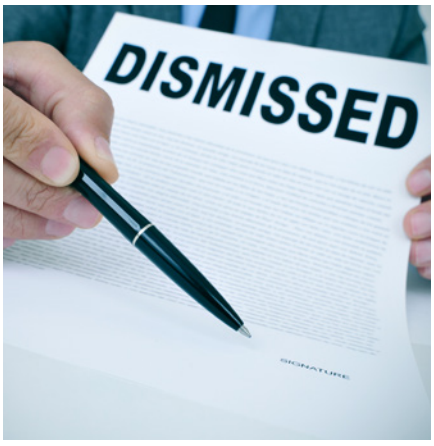
Kratzer v R + V Allgemeine Versicherung AG

The case highlights the importance of clearly drafted job adverts. The requirements in the post advertised by R+V Allgemeine Versicherung AG specified that applicants must have a good university degree in one of the specified fields along with relevant, practical, vocational experience. Mr. Kratzer applied for a trainee position and subsequently his application was rejected. He claimed compensation on grounds of age discrimination and declined to attend an interview that was later offered to him by the company.

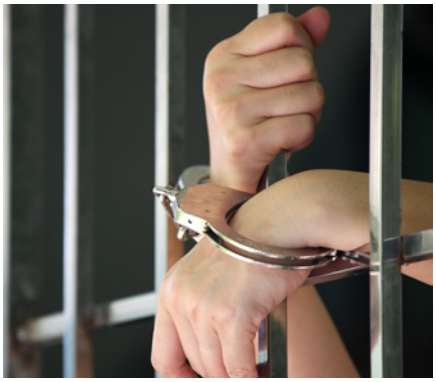
The claim was dismissed by the national courts and was later referred to the European Court of Justice to consider whether an individual who was not interested in seeking employment could bring in a claim of age discrimination.

The ECJ held that where an application for employment is submitted with the sole purpose of entitling the individual to claim compensation for discrimination, they are not protected and therefore, not entitled to compensation.

While vexatious claims being dismissed by tribunals are a welcome news, employers must be aware that claims can still be brought about by potential applicants who may have been deterred to apply for a job due to discrimination. Employers must be careful with the way an advert is worded and avoid any potential pitfalls that can lead to a discrimination claim.



Unfairly dismissed for being in prison



The tribunal has found that a small employer unfairly dismissed an employee who was sent to prison for six months. What did the employer do that rendered the employee's dismissal unfair?

Unfortunately, there are times in employee's personal lives, where they may end up in prison. If they commit a serious crime, this can be for years at a stretch but lesser criminal offences attract much shorter sentences, perhaps for a few weeks or months. During that time the employee will be unable to attend work but, as one employer has just found out, if you want to dismiss in these circumstances yet fail to do so correctly, you could end up in a spot of bother and on the wrong side of an unfair dismissal claim.

Joseph Carter (C) began working for Aulds Bakery (AB) in 2005. On 9 September 2013 he was found guilty of breaking the speed limit on the M8, changing lanes when it was unsafe to do so and behaving in an abusive manner by shouting, swearing and challenging members of the public to fight. Having committed these criminal offences, C was sentenced to six months in prison. His partner contacted AB to advise them what had happened but, at that particular point, C did not make any contact himself.

In early November 2013, having served two months, i.e. one third of his sentence, C was released from prison and contacted AB to arrange his return to work. However, on 13 November 2013 he received a letter terminating his employment. This was on the grounds that he had "frustrated" his employment contract due to his imprisonment. C claimed unfair dismissal and in May 2016 the tribunal upheld his claim.

What mistakes?

The tribunal found that AB had made two mistakes. Firstly, it had ignored the Acas Code of Practice and not followed any dismissal procedure at all, i.e. it had just sent out the termination letter. That meant its dismissal process was procedurally unfair. Secondly, the employer's ground for termination, i.e. frustration, couldn't be relied on in this situation.

Frustration of contract is a legal concept. It refers to an event which: **(1)** wasn't reasonably foreseeable; **(2)** isn't under the direct control of either party; and **(3)** makes any further performance of the contract, as it was originally intended to operate, impossible. Where these three factors exist together, an employment contract can be lawfully terminated but this genuinely only arises in a few limited situations. These are: in the event of an employee's death, a legal change that makes the parties' original contract illegal (which is rare), imprisonment that is long term in relation to the employee's length of service - frustration of contract cannot be relied on where there is a comparatively short sentence.

On the facts, C's imprisonment was not considered to be long term - he had been employed for eight years. In addition, AB's frustration letter was sent following his release, at a point when he was able to return to work and continue performing his contract. This ruling doesn't mean you can't dismiss those who are sent to prison short term. What you must do in these situations is follow the Acas Code and stay away from frustration.

The cost of withdrawing an accepted job offer £

An employment tribunal has ordered an employer to pay damages of one month's salary for breach of contract after it withdrew a verbal job offer. What was the case all about and what are the lessons to be learned from it?

In **McCann v Snozone Ltd 2016** the employer appointed a recruitment agency to identify suitable candidates for a job vacancy. Following two interviews, McCann (M) was verbally offered the post over the telephone by the agency acting on behalf of the employer and he verbally accepted it. The salary and start date had not been agreed at that point. The employer subsequently withdrew the job offer and so M brought a claim in the employment tribunal for damages for breach of contract.

The employment tribunal held that the verbal offer and acceptance created a contract of employment which could then only be terminated by the giving of notice in accordance with that contract. However, as the employer had terminated the contract without notice by withdrawing the offer of employment, M was entitled to damages for breach of contract equal to salary in lieu of notice. As no contractual notice period had been agreed, the tribunal said that reasonable contractual notice should have been given by the employer and it held that a reasonable notice period was one month, taking into account the seniority of the post and the fact that M's salary would have been paid monthly. M was therefore awarded damages for breach of contract amounting to one month's salary of £2,708.

A verbal job offer still constitutes a legally binding employment contract once it's been accepted by a job applicant, even if some of the main terms, such as salary, have yet to be finalised and even though the individual has not actually started work yet. The legal position here is just the same as it is for written job offers. So, it's advisable to avoid making verbal job offers as you could find that an employment contract comes into existence even before terms have been agreed.