- Forgiving without forgetting – reviving complaints and constructive dismissal
- Ignorance isn't always an excuse for disability discrimination
- Whose responsibility is it to apply for planning permission?

Forgiving without forgetting – reviving complaints and constructive dismissal

You think an employee isn't reaching the required standard and you subject her to performance management. She says her work is fine and that the performance management is so misconceived that it breaches her employment contract and she's considering resigning.

But her work improves, the performance management is passed and she continues working. All seems to be fine.

But some time later there's an altercation between her and her line manager. She resigns this time, complaining that the way she was treated breached her contract. It wasn't that bad, you say. She agrees it wasn't bad enough to cause her to resign, but she says it's the 'last straw' – she'd almost resigned in response to the performance management, and now this was too much. She's resigning and claiming unfair constructive dismissal.

Can she complain about the performance management now, after seeming to have forgiven it?

In theory, yes – the Court of Appeal has confirmed that a final straw may be able to revive a previous wrong.

Constructive dismissal is when an employee resigns in response to a really serious breach of their employment contract: a breach that goes to the heart of the contract. Such a breach is said to 'repudiate' the contract, allowing them to bring it to an end but call it dismissal. That means that the employee can claim unfair dismissal and compensation at an employment tribunal.

This judgment concerned two difficulties that courts and tribunals have grappled with:

1. Sometimes an employee is treated badly over a period of time, but the wrong that finally motivates them to resign isn't all that bad. Can it be said that they resigned in response to a repudiatory breach of contract?

   Yes. The courts recognise that after numerous minor wrongs, one minor wrong might prove too much to bear and justify resignation.

2. If an employee is subject to a repudiatory breach of contract, they can:
   - resign in response to the wrong; or
   - continue to work, thereby 'affirming' the employment contract.

   That doesn't mean they have to decide immediately. But if they affirm the contract they can't subsequently change their mind and resign in response to that breach alone.

But what if they resign in response to a subsequent breach, and say that despite seeming to have forgiven the earlier wrong it contributed to their decision?

In this case, the Court of Appeal decided that the alleged last straw wasn't wrong at all. That meant it couldn't be a last straw however bad the previous wrongs were. However, the court also said that in theory, an employee can resign in response to a last straw plus an earlier wrong that they appeared to have forgiven.

What this means for you

This case serves as a reminder that employers should always act fairly. Even if an employee

seems to have forgiven previous wrongdoing, it could return to haunt you.

How we can help

Our **Employee handbook** includes a policy on **Grievance and Disciplinary Procedures**. We also have a range of letters for different parts of the disciplinary process.

Ignorance isn't always an excuse for disability discrimination

There are several types of unlawful disability discrimination. One type is unfavourable treatment because of 'something' arising from a disability. This type of discrimination requires that the employer knows about the disability, and it's only unlawful if it can't be justified.

The question in a recent case was whether the employer, in addition to knowing about the disability, has to know that the *something* arose from the disability in order to be found guilty of this type of disability discrimination. The Court of Appeal has recently given the answer: no – if the employer knows about the disability, they might be found to have discriminated even if they don't know about that disability's effects.

The claimant, a teacher, had cystic fibrosis, which the school was aware of when they appointed him. This condition causes mucus to build up in the lungs, and to counter that the teacher spent many hours each day in rigorous exercise. This meant he had less time to work than others, and so he had to get a lot done in a short time. When a new headteacher started, his workload increased. All things together meant he struggled to cope with the demands and became stressed.

In this state of stress, he made the mistake of showing *Halloween*, an 18-rated film, to 15-16-year-olds. He was dismissed for that error of judgment.

The school didn't know of the link between the teacher's condition and his actions – the medical evidence available at the time of the dismissal didn't demonstrate a link. The tribunal therefore found the teacher's dismissal not to be unfair, so his unfair dismissal claim failed.

However, they upheld the claim for discrimination arising from a disability. Knowledge of the consequences of the disability weren't needed for that claim to succeed. Given that the tribunal didn't find the dismissal unfair, how could they also agree that there'd been discrimination?

The answer is that different tests are applied. For unfair dismissal, employers are given a lot of discretion. Tribunals take care not to ask what decision they would have made, but rather whether the employer's decision was within a range of reasonable responses. For this type of discrimination, on the other hand, the courts consider objectively whether an employer's action was a proportionate response to the claimant's actions. They noted, in particular, that if the school had made reasonable adjustments the teacher would not have been in that position.

What this means for you

This shows that you should consider all the consequences of your actions and, especially if an employee has a disability, you should actively consider reasonable adjustments. If you can justify all your actions you shouldn't be found guilty of any type of discrimination.

How we can help

If you need further information about an employee's health conditions, you may wish to use our **Letter to an employee seeking consent to a medical examination**.

Whose responsibility is it to apply for planning permission?

A property owner decides to get another floor built on top of their building.

A builder agrees to complete the work by 31 December 2018, and they start work. But then the council demands the work is stopped because planning permission is needed. After a 4-month delay the owner gets planning permission, but the builder seeks a declaration that, due to the delay, they're entitled to a 4-month extension to complete the work.

Can the owner object and insist on the deadline originally agreed?

The Court of Appeal has recently ruled that, unless the contract says otherwise, it would normally be the owner's contractual obligation to apply for planning permission – there would be an 'implied term' to that effect. Breach of that obligation would normally prevent the owner from insisting on the original deadline.

Essentially, this is because the owner is in the best position to apply as only they know well in advance what they want to do.

If fact, both the owner and the contractor agreed that the owner has 'primary responsibility' for applying for planning permission. The court didn't explain what was meant by 'primary responsibility', but the owner certainly has a greater stake in obtaining planning permission than the builder – the builder will move onto different projects, but the owner will be in difficulty if work is completed without the required permissions. They also know about the matter before the builder does, who may be instructed when it's too late to apply in time.

On what, then, did the parties disagree? They disagreed about the extent of the implied term – was the obligation to **ensure** that planning permission was obtained or was it limited to trying to get it? The second is correct.

What this means for you

The owner and builder could still agree that consent applications are the builder's responsibility, as the builder might have more experience and knowledge of such applications. If you do that, make sure the contract says so explicitly. The builder must be instructed in good time to get the consent before starting work. However, whatever the contract says, always ensure that the necessary consents are obtained before starting the work. There could be negative consequences for both parties, but definitely for the owner.

In brief

You may also want to consider these two matters:

- The Government is consulting on reforming the off-payroll working rules known as IR35. You may be aware that the IR35 rules in the public sector were changed recently, putting the responsibility on government departments to ensure that their workers don't reduce their tax burden by being engaged via intermediary companies when it's not appropriate. The Government is considering applying the change to the private sector also. The consultation closes on 10 August.
- If you rent out property, you're probably aware that there are rules about energy efficiency. On 22 May the Government published guidance on these rules.