

The importance of *Reynolds* in discrimination cases

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Alcedo Orange Ltd v Mrs G Ferridge-Gunn [2023] EAT 78 (HHJ Tayler)

Introduction

By this judgment, the EAT allowed an appeal against a finding that an employee's dismissal was because of her pregnancy (contrary s.18 Equality Act 2010) on the ground that the ET had not considered *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010. *Reynolds* is no doubt familiar to experienced employment lawyers, it stands for the principle that, in a discrimination claim, the relevant decision maker must have been (at least significantly) influenced by a protected characteristic. A composite approach, bringing together the act of one individual with a discriminatory reason of another is not permitted.

Facts

In brief, the Claimant brought her claim as a litigant in person; she started work for the Respondent on 27 January 2020 and she had a meeting with the managing director (Mr Boardman) and another manager (Ms Caunt) on 14 February 2020 to discuss her performance. Some issues with the Claimant's performance were raised.

The Claimant informed Ms Caunt that she was pregnant 19 February.

A further meeting took place with Mr Boardman on 21 February, at which a degree of improvement was noted.

The Claimant was absent due to morning sickness on 24 and 25 February.

The ET found that Ms Caunt made comments to the Claimant regarding her morning sickness/absence, namely: "is it a virus", "is it contagious", "how much time off are you going

to need for this”, “sorry to be unsympathetic, but I’ve never been pregnant before” and “stop faffing and go home”.

After learning that the Claimant was pregnant, Ms Caunt told Mr Boardman that the Claimant had misled him at the meeting on 21 February.

On 27 February the Claimant attended a meeting with Mr Boardman and Ms Caunt at which she was dismissed. The Claimant was told that her performance was “below par” and her employment was “not working out”.

Mr Boardman knew that the Claimant was pregnant before she was dismissed.

EAT’s judgment

In concluding that the Claimant’s dismissal was discriminatory, the ET relied on the comments made by Ms Caunt (set out above). The ET considered it could draw inferences from those comments.

The EAT could not be satisfied that the ET had analysed the case properly, applying the principles in *Reynolds*; it was not clear whether the ET had found that Mr Boardman had personally been influenced by the Claimant’s pregnancy when making the decision to dismiss. Accordingly, the appeal was allowed.

Points of broader significance

Firstly, noting that the Claimant was a litigant in person, the EAT took the view that the Respondent’s representative had been under a duty to draw the ET’s attention to the principle in *Reynolds*.

Secondly, the EAT referred to authorities concerning the extent to which an ET may assist a litigant in person. In that regard, the EAT emphasised the overriding objective, which includes a requirement that, so far as possible, the parties are put on an equal footing. If it appears that a party is making an assertion that gives rise to a claim of a type that has not been correctly labelled, the ET should consider the balance of justice in deciding whether to raise the issue. In this case, the EAT was of the view that while the Claimant had stated that she relied on the comments made by Ms Caunt as background evidence only, it was clear the Claimant was asserting that Ms Caunt had a significant influence on the eventual decision to dismiss. In the

EAT's view, the case cried out for an analysis of whether this was a decision by a sole decision-maker or a decision by a sole decision-maker influenced by others, or whether the decision to dismiss was taken jointly by Ms Caunt and Mr Boardman. NB: in the latter case (a joint decision) it would be sufficient for Ms Caunt to have been significantly influenced by the protected characteristic.

Finally, the EAT observed that the principle in *Reynolds* can cause case management problems that may require adjournments or applications to amend. Indeed, in remitting the case back to the same Employment Judge and members, the EAT stated that it would be open to the Claimant to apply to the ET for permission to amend her claim to bring a separate complaint in respect of the actions of Ms Caunt in telling Mr Boardman that he had been misled. Such a claim would allow the Claimant to argue that her losses resulting from dismissal flowed from detrimental treatment by Ms Caunt.

As well as highlighting the need for careful drafting where it appears that a decision maker might have been influenced by another person, this judgment demonstrates that it is often in a Respondent's interests, when dealing with a litigant in person, to ensure that the claims and legal issues are identified properly at an early stage of proceedings. Otherwise, particularly where the principle in *Reynolds* is of acute importance, Respondents risk an ET looking favourably on a late application to amend, adjournments and potentially having any judgment in their favour overturned on appeal.

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