

Transcript for podcast

David: Hello, and welcome to the MF Mac Employment Podcast. I'm David Hossack, and I'm very pleased to be joined by my colleague, Fiona Meek.

Fiona: Hi, David. Yes, glad to be here.

David: Before we get started, just a reminder that we send out a free employment law e-news every month. And if you don't already subscribe to that, please email us at employment@mfmac.com and we'll get you added to that list.

In recent times, we've seen a lot more in the media and in Employment Tribunals in terms of cases around women's health, and there's a lot been said about the menopause. And in that connection, we need to think about Protected Characteristics in terms of the Equality Act of 2010. I'm not going to go through all of these today. We did look at these in another podcast recently, but the ones that might be relevant here are sex, age, and disability. And whilst there's a lot of consideration being given to menopause of late, not so much is said about endometriosis. And the recent case of Pal against Accenture Limited is one that covers that. So, what was this case about, Fiona?

Fiona: So yes, I think that's right David. We've seen lots of cases in relation to menopause, as you say, citing Protected Characteristics of sex, age, but lots of the case law has been in the sphere of disability discrimination, and this is a case where the claimant here is claiming that her condition of endometriosis amounts to a disability in law, and she brought a claim against her employer saying that their treatment of her amounted to disability discrimination. So this was following her losing her job due to the employer suggesting that she wasn't meeting the performance standard required.

David: It also scrutinized the use of what's called up or out policies. What are these?

Fiona: So yes, these policies are quite common in certain types of industries such as consultancy. So essentially what this is a policy where employees are not assessed at the role that they are doing, but their ability to be able to work towards promotion at a higher grade. So, if they are not working towards that higher grade and are not on a trajectory that they would be looking at promotion in the near future, then they are assessed as underperforming, and

there could be a dismissal as a result of the failure to meet the standards that are required.

David: It's not looking at your current role and how well you're doing that, but how well you're doing in relation to your proposed role.

Fiona: Yes, absolutely. So, it's that forward-looking rather than assessing you in respect of the particular job you're doing right now, it's assessing you in terms of your ability to be able to step up to go to the higher role by virtue of a promotion.

David: Okay. So, what were the facts of this case, Fiona?

Fiona: So, this was a relatively recent case. It was only heard in February 2026, and it was widely reported in the press, so it was one that I thought would be helpful for us to talk about today. So, the claimant was employed latterly as a manager. Now, she had worked for the employer for around about 10 years, and she had been recently diagnosed with endometriosis and had been signed off sick for a month after having to undergo surgery to remove two ovarian cysts.

Now, she was off sick for around about a month after she had had the surgery. She returned to work full-time in October of 2018. Now, this was against occupational health advice at the time, which had recommended a phased return. And just before I continue with the facts, I should mention you, you may be thinking, oh, well, we're now looking at 2026, and the facts we're looking at here are 2018. So, this is just a, a reminder for our listeners of the backlog we're actually seeing in relation to Tribunals that this all happened quite some time ago, but actually is only getting to the tribunal a number of years later.

David: And I think that's probably more the case in England than in Scotland.

Fiona: Yes, it is. Certainly in certain areas of England, particularly London, I think is quite badly affected by backlogs. But yes, sorry, I, I digress slightly going back to the facts here. So, this was a consultancy business that she worked for, and they had one of these "up or out" policies. Now, I'll just quote here what the Tribunal said about the progression-based models. So what they said is, *"It expects its employees to be demonstrating continuous development towards the next level of seniority in the career model and to be already demonstrating performance at that level before they are promoted. A failure to demonstrate continuous improvement constitutes underperformance for internal purposes. This means that even if an employee is performing at the level of the position they currently hold, if they do not within a reasonable period*

demonstrate the skills to be promoted to the next level up, they are deemed to be underperforming. In those circumstances, they may, if appropriate, move to other areas within the respondent or leave the respondent either as is common through their own volition or more rarely, as in the case of the claimant, through being dismissed."

So, this is a rather unusual type of policy, but as I said, it's quite common in certain types of industry. And when the claimant had returned from sick leave, she had her end-of-year performance review where she had been rated as not progressing in line with this particular policy. Now, she then had a further period of sickness absence related to her condition of endometriosis.

So, she returned to work in the spring of 2019, and at a mid-year talent discussion, she was again assessed as not progressing. Now, in July of 2019, she was invited to a meeting to discuss her performance, and she was advised that it was a possibility that she may be dismissed following that meeting, and ultimately that's what happened here, and she was dismissed.

David: So, what were the heads of claim that she brought in in that Employment Tribunal application?

Fiona: So the claimant brought an Unfair Dismissal claim, but she also brought Disability Discrimination claims in relation to her condition, and she said that by virtue of her endometriosis and how this impacted on her, she was disabled, and that by dismissing her, they had treated her unfavourably.

David: And in terms of the disability status there, was that disputed?

Fiona: Yes, this is a case where disability status was disputed. Now, this is different to some of the other podcasts we've done recently where disability status is conceded by the employer, and this is something that just for our listeners' benefit would be something that's usually discussed in the Tribunal process leading up to a final hearing.

David: So the early parts of the Tribunal application?

Fiona: Yes, so Tribunal judges would often ask the employer to let them know whether disability status is being conceded or not because it could narrow down the issues to be discussed if it is. But for this case, the test was particularly important. So, a person is disabled in law if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. This is a legal definition, and you can

certainly have situations where someone with one condition may be disabled, but somebody with the same condition may not be disabled because it really has to look at how that condition affects a particular person.

David: So, it's not the disability in general, it's the impact on the particular individual that's relevant?

Fiona: Yes, generally speaking, that's the case.

David: So, what did the Employment Tribunal make of this?

Fiona: So, the Employment Tribunal agreed that the claimant had been unfairly dismissed on a procedural basis, so they looked at the procedure that the employer had followed. So, they concluded that they hadn't directed the claimant to the correct policy that was being used and that the policy that they had used in terms of managing her through this performance process was more aligned to a misconduct-type scenario rather than a performance management one. They'd also raised some issues about the level of investigation that had been carried out by the employer prior to her being dismissed. And as I said, they found that she had been unfairly dismissed, but interestingly, they said her compensation should be reduced by 100% on the basis that even if the employer had followed a fair process, she still would have been dismissed. So, I'll just quote here. The Tribunal said, *"the claimant received a "Not Progressing" rating in two consecutive performance periods; her chargeability was low; she was not originating new work; there were serious concerns about her style, and her leadership behaviours and her client relationships; and she showed a lack of "client stickiness" and indeed proactivity in finding client roles (which in turn had an impact on her chargeability). She was not even consistently performing at "Manager" level whereas, under the respondent's progression based model, what she needed to be doing was showing that she was ready for promotion to the next level, which she was not doing."*

David: And this then went to appeal.

Fiona: Yes, it did. So, she appealed on various points. So firstly, she appealed looking at the manner in which the tribunal had assessed her compensation, so she said it should not have been reduced in the way it was. She also criticized what was called the client and market career track, so this up-and-out model, saying that this is not fair because if you're looking at a capability-based dismissal, so that's a potentially fair reason for dismissal under the Employment Rights Act. But what she said is, well, hang on a second. If you're looking at

capability, it needs to be the capability of the role I'm employed to do, not some future potential promoted role that I should be assessed in relation to.

David: So it's not aspirational, it's what you're actually doing?

Fiona: Yes, that's what she said. And finally, she appealed in relation to the finding on disability status and in relation to the Disability Discrimination claim.

David: That's really interesting. What did the Employment Appeal Tribunal make of these claims?

Fiona: So the claimant was successful in relation to all aspects of her appeal. So firstly, the, the Appeal Tribunal agreed that there had been errors in the way in which her compensation had been calculated. Now, it's not a big focus for this podcast, but essentially what they said is that the tribunal were analysing what they would've done rather than looking for the respondent to prove how it would've had the opportunity to correct its error. And the Appeal Tribunal concluded that the respondent had provided no evidence to explain how the procedural irregularities would've otherwise been corrected. She was also successful in relation to the argument she made about the up-or-out performance system. So, what the tribunal concluded was that in terms of the Employment Rights Act, when looking at the legislation, capability dismissals relate to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.

So really looking, as you said, David, at the particular role at that time they're employed to do. So, the key point for consideration by the Tribunal was, well, it's the employee able to do their current role, not a question of whether they're ready for promotion. They said, "*A contract of employment could specifically provide that the work the employee is employed to do includes demonstrating the ability for promotion after a period of time in the role. But none of that means that capability, as a potentially fair reason for dismissal, is to be assessed otherwise than in relation to the work the employee was employed by the employer to do pursuant to the contract of employment.*"

So, as I said, she was successful with both of these aspects. She was also successful in relation to the Disability Discrimination claim, and what the tribunal had said is that the Employment Tribunal at first instance in deciding that the claimant was not disabled, that their reasoning was wholly inadequate.

They concluded that they had not appropriately considered the claimant's medical evidence with reference to the legal test, and that they had not considered the likelihood of reoccurrence of the condition. So again, it's not one to go into great detail today, David, but in terms of the disability status test, the test also when looking at what amounts to long-term looks at the likelihood of reoccurrence. So this was something that the Appeal Tribunal said the Tribunal had not given adequate consideration to. They also failed to consider whether it would continue to have a substantial adverse effect on her ability to do day-to-day activities without the necessary medical treatment. So again, not one for a great deal of detail today, but the test for disability status requires you to consider what would be the effect of the condition without medical intervention or medication.

David: So, you strip all of that stuff away?

Fiona: Yes. So, what they essentially said is that recovery from surgery itself could constitute a substantial adverse effect, stating that if an employee is absent from work because of treatment for an impairment, that is generally a substantial adverse effect on day-to-day activities. So, what they did in this case is they didn't make a decision there and then about whether the claimant would be successful with the claim, but rather they remitted this back to another Employment Tribunal to consider this case afresh when looking at the points that had been raised by the Appeal Tribunal.

David: So there's a lot to take from this case, and I think if we start off with the Up and out approach. It's probably the, the down and out approach now because there certainly is no green light given to this at all, and it's very difficult to see how this could stick as being a fair process.

Fiona: Yes, absolutely. I think it's certainly a wake-up call for any employers who are using this process, and while it may be that they hope that many people won't go to raise a claim because as we know, particularly if there are public judgments online, there can be a deterrent for people to raise these claims and have their performance criticised in a public judgment. But I think it's certainly a warning that if you're trying to justify a dismissal as fair with reference to the potentially fair reasons under the Employment Rights Act, you could become a little unstuck if trying to rely on the up or out model and essentially saying that they should be performing a higher grade than that they're employed to do.

David: So, it's not going to work.

Fiona: Yes.

David: So, if we put that to one side, there are learning points from a discrimination perspective.

Fiona: Point number one would be that endometriosis could certainly amount to a disability in law. Now, that was not determined here. We'll need to wait to see whether the fresh tribunal that's considering this, what they make of it, but certainly the Employment Appeal Tribunal were critical of the narrow approach the Tribunal had taken to looking at this. There's a growing awareness of conditions such as endometriosis. Now, many large employers now have specific workplace policies to deal with issues such as this and also training being issued to managers in terms of supporting employees that they manage who have endometriosis. There are also various charities such as Endometriosis UK, which have published specific guidance on the issues that can arise if workers with endometriosis are not adequately supported in the workplace and the legal claims that can arise in relation to that.

David: We did do a podcast in, I think March of last year, Fiona, when our colleague Sarah Gilzean spoke to Dr. Lucky Saraswat from Aberdeen Royal Infirmary, who is a consultant gynaecologist, and we looked at the question of endometriosis there in some depth. So, I think with the program notes for this, we'll maybe include a link to that podcast if people want to dig in a bit further. And also, during that podcast, reference was made to the endometriosis-friendly employer scheme, which we would encourage employers to look at. It certainly was a very, very good resource and provides a lot of useful information.

Fiona: Yes, absolutely.

David: So thanks very much, Fiona, and hopefully you'll be back doing another podcast before too long.

Fiona: Yes. Thanks very much, David.

David: Thanks everyone for listening. Please remember to subscribe to our podcast, leave reviews in the usual places, and tell your friends about it.

Fiona: Thanks.