## *Employment: Redundancy: Aramark (UK) Limited v Fernandes UKEATS/0028/19/SS*

James Tunley

*The Employment Appeal Tribunal recently published the judgment in* Aramark (UK) Limited v Fernandes *and clarified the extent to which employers are required to search for alternative employment for an otherwise redundant employee.*

In the current climate there will inevitably be an increased focus on redundancies. This decision is a useful reminder of the limits of the duty to take reasonable steps to redeploy employees and the proper operation of section 98(4) Employment Rights Act 1996.

In this case a section of the workforce was at risk of redundancy following the closure of an oil rig. Following the selection process Mr Fernandes was one of those at risk. Whilst alternative options were discussed at a consultation meeting, nothing suitable had arisen and he was dismissed. Mr Fernandes brought a claim for unfair dismissal arguing that he should have been offered 'ad hoc' work on a zero-hours contract, which is what was offered from time to time to a bank of workers (who were not employees of Aramark) when there was a shortage of staff.

The Employment Tribunal had ruled in favour of Mr Fernandes after finding that it would have been reasonable for the respondent to have consulted him about the ad-hoc work which was available and its failure to do so rendered his dismissal unfair.

The Employment Appeal Tribunal, however, allowed the appeal. It noted that placing Mr Fernandes on the list of 'ad hoc' workers would not have avoided a dismissal. It would have provided the prospect of work but would not guarantee or secure it. The reasonableness of the decision whether or not to place Mr Fernandes on the list fell outside the ambit of section 98(4), which is concerned solely with the reasonableness of the dismissal and the alternatives to it.

Whilst placing Mr Fernandes on the list of workers available for work when called upon would have mitigated the adverse effect of being dismissed, it would not have affected the decision to dismiss in the first place. Therefore, the rights and wrongs of the employer's decision was not a matter that fell to be considered within the scope of an unfair dismissal claim.

Before employers dismiss an employee by reason of redundancy, they have to take reasonable steps to look for alternatives to dismissal by redeploying them into other roles. However, it is clear from this decision that the duty does not require an employer to go further and explore other possibilities of keeping an employee in work.

## *Commercial: Business Interruption Insurance*

Adam Swirsky

The High Court has handed down its much anticipated decision in ***FCA v Arch Insurance (UK) Ltd and others [2020] EWHC 2448 (Comm)***, a test case brought by the FCA seeking clarity on the meaning and effect of certain non-damage business interruption insurance policy wordings, as applied in claims made in light of the current COVID-19 pandemic. The decision is complicated, running to over 150 pages. There is to be a further hearing to consider any applications to appeal. Such an appeal will be direct to the Supreme Court.

It seems unlikely that this decision will be the end of the matter. However, the court tended to support the interpretation advanced by the FCA on behalf of policyholders. If the decision stands, then it will be favourable to many policyholders. Given the complexity of the decision, it is difficult to summarise, however, the FCA has taken the following key points from the judgment:

- In order to establish liability under the representative sample of policy wordings considered by the court, the FCA argued for policyholders that the 'disease' and/or 'denial of access' clauses in the representative sample of policy wordings provide cover in the circumstances of the Covid-19 pandemic, and that the trigger for cover caused policyholders' losses.
- The judgment says that most, but not all, of the disease clauses in the sample provide cover. It also says that certain denial of access clauses in the sample provide cover, but this depends on the detailed wording of the clause and how the business was affected by the Government response to the pandemic, including for example whether the business was subject to a mandatory closure order and whether the business was ordered to close completely.
- The test case has also clarified that the Covid-19 pandemic and the Government and public response were a single cause of the covered loss, which is a key requirement for claims to be paid even if the policy provides cover.

Ultimately, each policy will need to be considered on its own merits. So whilst the decision will provide some comfort to policyholders, it seems likely that with or without an appeal, there continues to be scope for insurers to avoid or, at least, attempt to avoid paying out and, therefore, for litigation (the court did not find that the defendant insurers to be liable across all of the twenty-one different types of policy wording in the representative sample).

## *Employment: Paranoid Delusions, but No Disability: Sullivan v Bury Street Capital Limited UKEAT/0317/19/BA, 9 September 2020, Choudhury J*

Barbara Zeitler

Section 6 of the Equality Act 2010 ('EqA') provides that a person is disabled for the purposes for the Act if s/he has a physical or mental impairment that has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities. An impairment is considered to have a long-term effect if it has lasted for at least twelve months; or is likely to last for at least twelve months; or is likely to last of the rest of that person's life.
Mr Sullivan, who had suffered from paranoid delusions during his employment, appealed against an Employment Tribunal finding that he was not disabled with the meaning of EqA, therefore rejecting his disability discrimination claim against his employer (but upholding his unfair dismissal claim).

Mr Sullivan was employed as a Senior Sales Executive. From the outset of his employment, his employer had concerns about his attitude and time-keeping. In early 2013 Mr Sullivan had a short-term relationship with a Ukrainian woman. Following a traumatic relationship breakdown, he believed he was being stalked by Russian gangs. As a result of his mental health difficulties, Mr Sullivan's attendance and performance at work were affected, but by September 2013 there had been an improvement. Mr Sullivan received psychological treatment, and even though his paranoid delusions continued, he was able to concentrate on his work. An employee who joined the company in 2014 was unaware of Mr Sullivan's paranoia. In April 2017 Mr Sullivan's mental health deteriorated again. Later that year, the employer's long-standing concerns about Mr Sullivan's behaviour and timekeeping deepened. Following a performance and remuneration review, Mr Sullivan informed his manager that he would be signed off sick for four weeks. The employer decided to terminate his employment.

The EAT upheld the ET's finding that Mr Sullivan's delusions, although having a substantial adverse effect in 2013 and again in 2017, were temporary and intermittent and that it was not likely that the adverse effect would last for twelve months or that it would recur. Mr Sullivan, therefore, did not qualify as a disabled person. The ET had also been correct in deciding that the employer did not know and could not reasonably be expected to know of the disability.

This case shows that the ET is required to assess closely whether an impairment has a long-term effect, and that fluctuations in the effect of an impairment may mean that a claimant is unable to bring her/himself under the statutory definition of disability under EqA.