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EMPLOYMENT LAW BULLETIN

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Welcome to our February edition of the employment law bulletin.

As larger employers prepare for their 2019 gender pay gap reporting, we consider the Government's new guidance on understanding your pay gap and developing an action plan to narrow the gap.

We report on the Supreme Court's important decision in R (*on the application of P*) v *Secretary of State* for the Home Department about the rules on disclosing multiple spent convictions when applying for jobs with children or vulnerable adults.

We also look at the Pensions Ombudsman case of *The Estate of Mrs S* which highlights the significant financial risks to employers of failing to communicate clearly with a pension scheme on the status of members.

Our report on the EAT case of *Gan Menachem Hendon Ltd v Ms Zelda De Groen* covers the interesting case of a teacher at an orthodox Jewish nursery whose cohabitation with her boyfriend led to her dismissal.

Finally, may I remind you of our forthcoming events:

- **An update on handling disciplinary issues**
  Breakfast Seminar, Leeds, 16 April 2019
  For more information or to book
- **Employment Law Update for Charities 2019**
  A full day conference, Leeds, 18th June 2019
  For more information or to book

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Contents

Wherever you see the BAILII logo simply click on it to view more detail about a case

Should applicants for work with children or vulnerable adults have to disclose spent convictions?

Supreme Court upholds decision that the rules on disclosing multiple spent convictions in an enhanced DBS check are disproportionate and incompatible

When do spent convictions have to be disclosed?

As a general rule, spent convictions and cautions do not have to be disclosed to a prospective employer. However, if a candidate is seeking work in an "excepted occupation", including roles working with children or vulnerable adults, an enhanced DBS check will be required and this will list all previous convictions, including in some cases spent convictions.

In 2014 the rules were revised to filter out single convictions for non-violent, non-sexual offences with no custodial or suspended sentence after 11 years (or five and a half years where the offence was committed under the age of 18). A job applicant for a role in an excepted occupation with more than one spent conviction, however, must disclose all spent convictions regardless of the nature of the offence or penalty imposed.

Case: R (on the application of P) v Secretary of State for the Home Department

The joined applications included that of Ms P who has for some time unsuccessfully sought work as a teaching assistant. In 1999, she was convicted of theft for stealing a book worth 99p and of a further offence of failing to appear in court. Because she had more than one spent conviction, each was disclosable in her applications for work with children. She committed these offences when she was suffering from undiagnosed schizophrenia. Her condition has since been diagnosed and is successfully controlled by medication. She has not offended again. Ms P has been faced with the difficult decision of having to disclose her medical history in order to explain the circumstances of her convictions.

Another applicant, Mrs Gallagher, was convicted in 1996 for two offences: failure to wear a seatbelt while driving and for failing to ensure that her children were wearing theirs. She was convicted once again in 1998 of similar offences. In 2014, she applied for a social work role which required disclosure of multiple spent convictions. Mrs Gallagher disclosed her 1996 convictions. She failed voluntarily to disclose her 1998 convictions but these were disclosed on the enhanced DBS check. Mrs Gallagher's job offer was withdrawn on the basis that she had been dishonest in her application.

The Supreme Court decision

The Supreme Court agreed with the lower courts that the rule on disclosing multiple spent convictions is incompatible with the European Convention on Human Rights (the Convention). A public authority can only interfere with the right to respect for privacy under Article 8 of the Convention if that interference is in accordance with the law and is necessary in a democratic society (for example to protect public safety, to prevent crime and for the protection of health or morals). The judges noted that the disclosure rules apply no matter the nature of the offences, their similarity to each other, the number of occasions involved, or the intervals of time separating them. They decided that this interference with the right to privacy could not be regarded as a necessary or proportionate means of informing employers about the likelihood of an applicant offending in the future.

The Supreme Court also determined that the rules are disproportionate in the way they deal with warnings and reprimands given to young offenders. The judges commented that such warnings should have a wholly instructive purpose and that their use as an alternative to prosecution was designed to avoid unnecessarily blighting a young offender's later life and career. They held that having to disclose such warnings to an employer is inconsistent with this purpose.

Comment

Where legislative rules are declared incompatible with the Convention, the rules continue in force, but the matter will go back to the Government to reconsider the rules. It is therefore likely that changes will be made in the future to the rules on disclosing multiple spent convictions and cautions received during childhood.

Employers who work with children and vulnerable adults will be well aware of the safer recruitment rules. However, it is important that applicants are not rejected because of a criminal record without considering the particular risks of employment. Employers should carefully consider: whether the conviction is relevant to the position applied for; the seriousness of the offence; the length of time since the offence was committed; whether there is a pattern of offending; whether the applicant's circumstances have changed since the offending behaviour took place; and any explanation offered by the applicant.

The Government has stated that it is committed to continued membership of the Convention and individuals will continue to be able to take cases to the European Court of Human Rights, even after a "no deal" exit from the EU. However, there remains some uncertainty over the way human rights cases will be dealt with in UK courts in the future. The Government has suggested that it will replace the UK Human Rights Act 1998 with a UK Bill of Rights, but it has postponed any such major change to constitutional legislation while the Brexit process is underway.

Guidance to help Employers close the Gender Pay Gap

The Government Equalities Office publishes new guidance as 2019's gender pay gap reporting deadline approaches

As the deadline draws close for 2019 reporting on the gender pay gap, for those employing over 250 staff, the Government Equalities Office ("GEO") has published two new pieces of guidance.

Whilst gender pay gap reporting has its critics, GEO research suggests the new reporting obligation has seen an increased awareness and understanding of issues which can impact on the gender pay gap, has facilitated discussions including significantly at board level and has increased the number of employers who view closing the gap as a priority.

Eight Ways to Understand Your Gender Pay Gap suggests questions to help identify different potential causes of the gender pay gap; looking at recruitment, promotion and advancement and the rate and percentage of men and women leaving, at different levels of seniority.

This remains a generic approach but does enable employers to delve deeper into their particular sector and identify wider societal issues that underlie any imbalance.
Understanding the reasons for your particular gender pay gap is key in identifying what you can reasonably do to tackle that gap. This is the first of Four Steps to Developing a Gender Pay Gap Action Plan, which draws together the experiences of employers who have already successfully developed and implemented effective action plans. The guidance highlights the importance of engaging with staff, with clear buy-in from senior people which will help embed any actions so that they become part of your culture, your normal way of working.
All action plans will evolve and require sufficient time to do so through monitoring, review and regular re-evaluation with the support of an identified champion within your organisation to drive this process.

Council liable for losses due to teacher's reliance on incorrect TPS in-service death benefits statements

Late teacher's estate awarded damages for school's failure to inform the TPS that she had exhausted sick pay and was not in pensionable service.

The impact of long term absence on pensionable service under the Teachers' Pension Scheme (TPS)

Under the rules of the Teachers' Pension Scheme (TPS), a teacher will not be in "pensionable service" once he or she receives less than half rate sick pay. The scheme also provides that a death in service grant will not be payable if a member dies more than 12 months after leaving pensionable service.

Case: The Estate of Mrs S (Pensions Ombudsman)

Mrs S was a part time teacher employed by Liverpool City Council at St Paul's Catholic Junior School. She developed a melanoma and had periods of long term sickness absence. She expressed a wish to return to work, but unfortunately her condition worsened and she was unable to do so. Eventually, she exhausted her sick pay entitlement. The school governing body agreed with Mrs S that she could remain on payroll on no pay. The council continued to report to the TPS that Mrs S was an employee.

Mrs S received statements from the TPS (one five months and another 16 months after her sick pay ended). Both stated that she was in pensionable service and would be entitled to a death in service grant of around £114,000. She found out that her condition was terminal but decided not to apply for ill-health early retirement because she thought her family would be better off if she died in service.

Following her death, Mrs S's husband received notification that a death grant of £18,703.62 was payable, along with an annual spouse's pension and long term children's pension, each of around £3,000. When he was not able to resolve his complaint with the TPS, he complained to the Pensions Ombudsman.

The Pensions Ombudsman decision

The Ombudsman decided that Mrs S had relied on the TPS statements in her decision not to apply for ill-health retirement and that she was unaware of the amount which would have been available to her if she had taken ill-health retirement and commuted her benefits.

The TPS submitted that it was very likely that Mrs S would have been accepted for enhanced ill-health retirement benefits, given that her condition was terminal. It calculated that, along with annual pension payments, she could have commuted her ill health benefits for a tax-free lump sum of just over £100,000.

The Ombudsman found that the TPS guidance to employers about what was meant by pensionable service was clear enough and that the council had failed to make necessary enquiries to avoid this mistake. He determined that the council's failure to inform the TPS that Mrs S was no longer in pensionable service was negligent and had led to the TPS providing her with incorrect statements on which she relied. The Ombudsman concluded that it was more likely than not that Mrs S would have applied for ill-health retirement if she had been aware of the lower level of benefits available to her family should she die while out of pensionable service. He directed that the council should pay to Mrs S's estate the maximum benefits which Mrs S would have received if she had made such an application (minus the amounts already

paid by the TPS). It is likely that this will be over £100,000.

Comment

Employers should be aware of the importance of regular and accurate communication of relevant details about employees to any relevant pension scheme. Where negligence leads to pension / death in service grant losses, there is a real risk that the employer could find themselves liable for very large sums in damages.

In some cases, employers have a positive duty to draw an employee's attention to contractual benefits, such as pension benefits. This occurs where the terms of the contract have not been negotiated with the individual employee, the contract includes a valuable benefit which the employee will only receive if they take some action themselves, and the employee cannot reasonably be expected to know about the benefit unless it is drawn to their attention. This is known as the "Scally duty" following the case of Scally v Southern Health & Social Service Board [1991] IRLR 522. This duty did not apply to Mrs S as it was shown that she knew she had the right to apply for ill-health retirement.

The Department for Education commented in submissions that it was "extremely unusual" for a teacher to remain an unpaid employee, as happened in this case. Employers, including schools and academy trusts, should note that remaining on payroll is not necessarily the same as being in pensionable service under the rules of a pension scheme and it is important to be clear with employees about this difference.

Although it was not relevant here, in cases where long term sickness benefits are only available if the employee remains employed, there is a risk of disability discrimination claims arising following dismissal. (See our recent article on this point here.)

Chris Billington, Head of Education at Wrigleys comments: "All cases are specific to their facts but we do come across similar situations where employers have sought to protect the TPS entitlements of teaching staff who have moved into non-teaching, often executive roles and particularly within academy trusts. This case should be a wake-up call to employers who put the school at risk of a significant financial liability where those roles cease to satisfy "pensionable service"."

Was nursery teacher's dismissal for co-habiting outside marriage discriminatory?

EAT: teacher's dismissal could not be discriminatory on the basis of the employer's religion or belief but was discriminatory on the ground of sex

Religion or belief discrimination

Direct discrimination can occur when someone is treated less favourably because of religion or belief. A lack of religion or belief is also a protected characteristic. The religion or beliefs of the alleged discriminator are not relevant. The key question is, was the belief or lack of belief of someone the other than discriminator a reason for the less favourable treatment?

This was one of the key points made by the Supreme Court in the recent case of Lee v Ashers Baking Co Ltd [2018] UKSC 49. In that case, a bakery's refusal to prepare a cake with the slogan "support gay marriage" was held not to be discriminatory on the grounds of religious belief

because the belief in question was that of the bakery and not the customer (or someone else).

Case details: Gan Menachem Hendon Ltd v De Groen

Ms de Groen was a teacher at an ultra-orthodox Jewish nursery. She attended a nursery social event with her boyfriend who mentioned to one of the directors of the nursery that they lived together. Following this, the headteacher and the managing director of the nursery met with Ms de Groen in the staffroom without giving notice of the meeting. Ms de Groen was asked to confirm (even if it was not true) that she did not live with her boyfriend so that they could inform concerned parents that this was the case. The headteacher and managing director expressed their views at this meeting that co-habiting before marriage was wrong, that Ms de Groen should consider counselling if she had problems with the idea of marriage and that, at the age of 23, time was passing for her to have children.

Ms de Groen refused to lie about her private life and suggested that she could bring a claim because of the way she had been treated. There followed a disciplinary process which led to Ms de Groen's dismissal on the basis that she had contravened the culture, ethos and religious beliefs of the nursery and had damaged the nursery's reputation (risking financial loss to the nursery because of parental reaction).

Ms de Groen brought a number of claims, including direct discrimination, indirect discrimination and harassment on the grounds of both sex and religion or belief. An employment tribunal upheld all of her claims.

On appeal, the EAT disagreed with the tribunal's conclusions on religion or belief discrimination. In particular, it noted that the tribunal had determined that the nursery had discriminated against the claimant on the basis of its own religious beliefs. It had not made sufficient findings from which it could decide that the claimant had been less favourably treated because of a lack of religious belief.

The EAT made clear, following the Ashers Baking case, that the religious belief of the alleged discriminator cannot found a claim for religion or belief discrimination. It must be the religion, belief or lack of religion or belief of someone else which is the reason for the less favourable treatment.

The EAT agreed with the tribunal's finding that Ms de Groen had been directly discriminated against and harassed in relation to her sex.

Comment

This case is a useful reminder that a lack of belief is a protected characteristic under the Equality Act 2010. In this case, evidence in tribunal did not prove that the dismissal and other treatment was because of the claimant's lack of belief. The focus of the tribunal was, incorrectly, very much on the beliefs of the employer.

However, it is possible that similar circumstances could lead to a finding of religion or belief discrimination where the reason for the less favourable treatment or harassment was found on the evidence to be the claimant's lack of belief. The EAT confirmed that this could happen, for example, where the discriminator and claimant shared the same religion but differed in their particular beliefs. For example, as in this case, a disagreement about whether co-habiting outside marriage was against the tenets of the religion.

In some circumstances, employers can defend a direct discrimination claim by showing that it

is an “occupational requirement” to have or not to have a particular protected characteristic. An employer with a religious ethos may be able to show that it is an occupational requirement for some employees to have a particular religious belief. This will only apply where there is a genuine reason why the employee must have the belief to fulfil the role. The occupational requirement must also be a proportionate means of achieving a legitimate aim. If there is a less discriminatory way of achieving the employer’s aim, it will not be found to be proportionate.

The EAT agreed with the tribunal in this case that the dismissal was not the result of the application of an occupational requirement and that the nursery could not have defended the claim on this basis.

Employers should carefully consider whether a requirement to have a particular protected characteristic is a genuine requirement for the role. In the context of an educational institution with a religious ethos, there may be a genuine requirement for some roles, such as pastoral leadership roles, to be filled by people practising the faith, but this will not extend to all employees.

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