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Employment Law BULLETIN

Welcome to our May employment law bulletin.

This bulletin includes two landmark Supreme Court cases on age discrimination as well as cases in the European Court and in the EAT.

As will be seen from our news section, the outcome of the coalition government's "red tape challenge" is a significant review of employment and equality law, with ramifications for all employers.

May I remind you of our forthcoming events:

Click any event title for further details.

Annual Employment Law Update for Charities
· Full Day Seminar, 14th June 2012.

The Employment Relationship: Managing Change
· Breakfast Seminar, 7th August 2012.

and in conjunction with ACAS in the north east:

Business Transfers and Understanding TUPE
· Full Day Practical Workshop, 21st June 2012.

Dr John McMullen, EDITOR **john.mcmullen@wrigleys.co.uk**

Click on any of the headings below to read more

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

1: The Queen's Speech

BACK TO TOP

The Queen's Speech was delivered on 9 May 2012. A number of Bills will be introduced into the next parliamentary session. Of chief interest to HR professionals are the Enterprise and Regulatory Reform Bill and the Children and Families Bill.

The bills are intended to implement key government reforms of employment law, including an overhaul of the employment tribunal system, the encouragement of earlier resolution of employment disputes, the introduction of a period of shared parental leave and the extension of the right to request flexible working arrangements.

2: The equalities red tape challenge and the reform of the Equality and Human Rights Commission

BACK TO TOP

15 May the Government announced the outcome of the red tape challenge's spotlight on equalities and the Government response to the consultation about reform of the Equality and Human Rights Commission.

The proposals are to streamline the employment tribunal process and to abolish the third party harassment provisions in the Equality Act (which makes employers liable if a member of staff is harassed by, for example, a customer). There is also a proposal to remove the socio-economic duty from the Act which, had it been brought into force, would have compelled public bodies to consider wider socio-economic issues when developing policy.

The Government has also stated its intention to review the public sector equality duty and to examine whether this is the best way to ensure public bodies consider the impact of their decisions on different groups. As expected, the Equality and Human Rights Commission will be directed to focus on core functions and it will function with fewer powers and duties. There will be tighter financial controls, a budget review and the recruitment of a new chairman and a smaller board.

3: Justified early retirement of a partner at the age of 65

BACK TO TOP

In ***Seldon v Clarkson Wright and Jakes (a partnership)*** the Supreme Court held that a law firm had identified legitimate aims (staff retention, workforce planning, and dignity) which could potentially justify its compulsory retirement of a partner in a law firm at the age of 65. Under the Equal Treatment Framework Directive of the EU, direct age discrimination must be justified by reference to social policy objectives and the individual aims of a firm are not necessarily sufficient. However, the Supreme Court held that the three aims put forward by the law firm amounted to social policy objectives for this purpose. These were

- retaining associates by being able to offer them the opportunity of partnership after a reasonable period
- facilitating partnership and workforce planning with realistic expectations as to when vacancies would arise
- contributing to a congenial and supportive workplace culture by limiting expulsion of partners through performance management

However the case was remitted to the employment tribunal to consider whether the firm's chosen retirement age of 65 was a proportionate means of achieving the aims identified: in other words could the firm have chosen a different method of achieving the aims above stated? These might include a phased retirement, a consultancy or other means different from an abrupt retirement age.

But for abolition of the default retirement age the effect of this case would be limited to partnerships, but now that the default retirement age has been abolished, the principles in this case are of universal application. But it will be a hard job for most employers to justify a mandatory retirement age in view of the need to establish the social objectives and also to prove that the retirement age was a proportionate method of achieving these aims.

4: *Homer v Chief Constable of West Yorkshire Police*

BACK TO TOP

The Supreme Court also handed down its decision in ***Homer v Chief Constable of West Yorkshire Police*** on the scope of indirect discrimination on the ground of age.

At the age of 51 Homer began working for the Police National Legal Database. He had no degree in law, but, when he was appointed, a law degree was not a requirement of the job, provided the post holder had other qualifications and exceptional skills or experience in criminal law. Homer had those experience and skills. A new grading structure was then introduced. There were three promotion thresholds, the third and final one requiring a law degree. Because of this requirement Homer could not get to level three unless he embarked on a part time law degree alongside his day job, which would have taken 4 years. When the new requirement came in Homer was 62, and being required to retire at 65 (this was before the abolition of the default retirement age), he would not have been able to enjoy the level three promotion before he had to leave PNLD.

He brought a claim of age discrimination under the Employment Equality (Age) Regulations 2006 (see now Equality Act 2010). His claim was for indirect discrimination in that he had been subject to a provision, criterion or practice which put persons of his age group (including him) at a particular disadvantage compared with other persons.

The EAT and Court of Appeal had rejected Homer's claim. Their view was that what put Homer at a disadvantageous position was not his age, but his impending retirement. His position was therefore comparable with any other employees nearing the end of their employment, for whatever reason.

The Supreme Court (Lords Hope, Brown, Mance, Kerr and Lady Hale) disagreed with this analysis and upheld Homer's appeal. Persons in the position of Homer were disadvantaged because of a reason (retirement) that directly related to their age. It could not be correct to equate leaving because of impending retirement with other reasons for doing so. Lady Hale also points out that the form of words used in the Age Regulations (see now the EA 2010) were intended to make it easier, rather than more difficult, to establish indirect discrimination.

Although Homer was indirectly discriminated against on ground of age it was still open for the employer to justify the discriminatory requirement. That issue was remitted to the employment tribunal for consideration in the light of the Supreme Court's useful guidance on these issues.

5: Can an unsuccessful job applicant get disclosure about the successful candidate?

BACK TO TOP

Can a worker, who claims plausibly that she met the requirements listed in a job advertisement, and who did not get the job, get disclosure of information indicating whether the employer engaged another applicant at the end of the recruitment process?

The CJEU in ***Meister v Speech Design Carrier Systems GmbH*** says not.

Ms Meister, a Russian national, applied for the post of “experienced software developer” with Speech Design. Her application was rejected without an interview. It was not disputed that her level of experience corresponded with the requirements of the post.

She brought discrimination claims on ground of her sex, age and ethnic origin. She also claimed that production of the successful candidate’s file would show that she (Meister) was more qualified than that person.

However the CJEU held that Article 8(1) of the EU Race Equality Directive (No.2000/43), Article 10(1) of the EU Equal Treatment Framework Directive (No.2000/78) and Article 19(1) of the EU Equal Treatment Directive (No.2006/54) were not to be interpreted as entitling a person in Ms Meister’s position to have access to the successful candidate’s file.

On the other hand, it must be ensured that a refusal of disclosure by the employer did not compromise the objective of these Directives. Therefore it could not be ruled out that an employer’s refusal to grant access to the information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. Consideration of those factors (which, the Court added, might also include, in the present case, the fact that Meister was at least equally qualified and was not even called for interview) was a matter

for the National Court.

6: Was an LLP equity member working in Tanzania a worker, and did an employment tribunal have jurisdiction to hear both whistleblowing and equality claims under the *Lawson v Serco* test?

BACK TO TOP

In ***Bates Winkelhof v Clyde & Co LLP*** claimant was an LLP equity member of Clyde & Co based in Tanzania where she worked on behalf of the LLP and with a Tanzanian law firm with which the LLP had a joint venture. She reported that a colleague had paid bribes to secure work and to secure the outcome of cases. Subsequently she was expelled from the LLP.

She wished to make sex discrimination and whistle-blowing claims but had to overcome two hurdles. First, as an LLP equity member, was she protected by employment and equality legislation? Secondly, given that she worked in Tanzania, did the employment tribunal have jurisdiction to hear her claims?

There was no difficulty with her equality claim, since LLP members are protected by section 45 of the Equality Act 2010. But to bring a claim arising from whistle-blowing she had to establish that she was a worker as defined by Section 230(3)(b) of the Employment Rights Act 1996. The employment tribunal was entitled to conclude she was personally contracted to the LLP, and was a worker, particularly in view of her entitlement to a fixed minimum profit share from the firm.

Furthermore, agreed the EAT, there was jurisdiction to hear both claims since she fell within the third category of overseas workers protected by British employment law identified in *Lawson v Serco* [2006] ICR 250. She was an expatriate employee, having equally strong connections with Great Britain and British employment law as with the foreign jurisdiction in which she worked. She worked for a global law firm with a global reach, headquartered in London. She was, mutatis mutandis, “our man in Havana”.

7: If an employee works 100% of his time for a single client, is he necessarily assigned to an organised grouping of employees for the purposes of a service provision change and the transfer of his employment under TUPE?

BACK TO TOP

In ***Seawell Ltd v Ceva Freight (UK) Ltd*** the claimant (Mr Moffat) was employed by Ceva Freight (UK) Ltd, which provided logistics and freight forwarding arrangements for Seawell, which owned offshore drilling platforms. Seawell then terminated this arrangement and took the service back in house. Seawell was not the only client of Ceva, but Mr Moffat spent 100% of his time on the Seawell contract, with other employees spending smaller percentages of time on this contract and the rest of their time on other contracts. An employment tribunal found that either Mr Moffat himself could comprise an organised grouping of employees or, alternatively, if the organised grouping of employees included Mr Moffat and colleagues, Mr Moffat was assigned to that organised grouping of employees as he spent 100% of his time on the service. On these alternative bases he transferred under TUPE.

The EAT disagreed. There was no basis for finding in this case that there was a group of employees specifically organised for this particular contract. An organised grouping of employees denotes a deliberate putting together of a group of employees for the purpose of the relevant client work. As the EAT put it: "it is not a matter of happenstance".

There was no such conscious employee grouping on the facts of the case. As such there was no service provision change and no relevant transfer. In this regard, the previous EAT authorities of *Argyll Coastal Services v Stirling* (EAT S/0012/11) and *Eddie Stobart Limited v Moreman* (EAT/0223/11) were to be followed.

If you’d like to contact us please email john.mcmullen@wrigleys.co.uk