

Age Discrimination – Qualifications and Pay Structure

Under the Employment Equality (Age) Regulations 2006, it is indirect discrimination for an employer to apply a provision, criterion or practice that is, on the face of it, age neutral but which puts people in a particular age group at a disadvantage, unless it can be shown to be a proportionate means of achieving a legitimate aim.

In *Homer v Chief Constable of West Yorkshire Police*, the central question was whether or not the introduction of a new career pay grading scheme, which required legal advisers employed by the Police National Legal Database (PNLD) to have a degree in order to qualify for the highest pay grade, discriminated against persons aged between 60 and 65 compared with younger workers. The new scheme was introduced to combat difficulties in recruiting and retaining staff.

Terence Homer was due to retire in 2009 at the age of 65. He was 61 when the new pay scheme was introduced in 2005. He had joined the PNLD as a legal adviser after retiring from the police force. Although he did not have a law degree, his experience in criminal law qualified him for the post. By 2005, however, having a degree in law was a requirement of the job. Although his employer offered to pay for him to undertake a law degree, Mr Homer didn't think it was worth his while as there was insufficient time for him to complete a part-time degree before his retirement.

Mr Homer brought a claim of indirect age discrimination on the grounds that the requirement that legal advisers had to have a degree in order to meet the criteria necessary to qualify for the highest pay threshold put persons in the same age group as himself at a particular disadvantage. This was because they could not, in practice, benefit from gaining the qualification and this lack of opportunity had the effect of eroding their status.

The Employment Tribunal (ET) upheld Mr Homer's claim and the Chief Constable of West Yorkshire Police appealed against the decision.



The Employment Appeal Tribunal (EAT) found that although the degree requirement was a barrier to appointment to the highest pay grade, it was a barrier that applied equally to employees of all ages. The financial disadvantage that resulted from not having sufficient time to complete a degree before retirement was an inevitable consequence of age, not a consequence of age discrimination.

The Court of Appeal has now upheld the EAT's decision. Lord Justice Mummery said that the object of the Regulations 'is not to legislate against the general unfairness of age, whether juvenile or geriatric'. The particular disadvantage complained of in this case resulted not from Mr Homer's age but from the fact of his impending retirement.

It is interesting to note that the claimant in this case did not make the argument that insisting on employees having a degree in order to achieve the highest pay grade was itself indirect discrimination. The growth in recent years of the numbers going on to higher education means that a greater proportion of young people have been educated to degree level than their older colleagues.

Contact us for advice on any discrimination law issue.

Out of Court Settlement in Landmark Case

An out of court settlement has now been reached in the long-running case of *Coleman v Attridge Law*, which confirmed that employees are protected from 'associative discrimination' under the Disability Discrimination Act 1995 (DDA).

Sharon Coleman contended that she had been discriminated against on the grounds of her son's disability. Amongst her claims of unfair treatment were that she was not permitted to work from home, even though other employees were allowed to do so to care for non-disabled children, and that she was placed in a pool of staff selected for redundancy after she said that she intended to make a formal request for flexible working in order to care for her son. Ms Coleman claimed that her employer's actions had created a hostile environment which forced her to resign.

Ms Coleman brought proceedings against her employer under the DDA and for unfair dismissal. She claimed that the effect of the EC Equal Treatment Directive was to outlaw associative discrimination and it was therefore open to the Employment



Tribunal (ET) to construe the DDA accordingly.

The question was referred to the European Court of Justice (ECJ), which ruled that the Directive was intended to guarantee such protection. In the ECJ's view, where an employer treats a non-disabled employee with caring responsibility for a disabled child less favourably because of the child's disability, this is contrary to the prohibition of direct discrimination laid down in the Directive. Likewise, the Directive also protects the employee

from unwanted conduct amounting to harassment that is related to the disability of the employee's child.

The Employment Appeal Tribunal subsequently held that since all domestic legislation must be read in a way that is compatible with European law, typically arising out of a Directive, 'so far as it is possible to do so', the DDA can be interpreted so as to apply to adverse treatment by reason of the disability of another person. In this case, to give effect to the ECJ's decision, words should be added to Section 3A of the DDA to the effect that 'a person also directly discriminates against a person if he treats him less favourably than he treats or would treat another person by reason of the disability of another person'. Likewise, words should be added to Section 3B so that the DDA protects an employee from harassment for a reason which relates to the disability of another person.

The case had been remitted to the ET to consider the merits of Ms Coleman's claim, but the parties have now agreed an out of court settlement.

Time Off Work for Jury Service

Nowadays, avoiding jury duty is not easy. The Criminal Justice Act 2003 reduced the list of those persons disqualified from being jurors and removed many of the reasons that had previously been accepted for the avoidance or deferral of service.

Surprisingly, there is no statutory provision requiring employers to allow staff time off work for jury service. The Juries Act 1974 obliges a person who has been summoned for jury service to perform the duty unless that person comes under the category of those excused service or has been specifically excused by the court. Therefore, an employer who refuses an employee time off for jury service could be fined for being in contempt of court.

The Employment Relations Act 2004 provides specific redress for employees who are dismissed or suffer any other detriment as a result of taking time away from work for jury service. Refusing to allow an employee to return to work after jury service is automatically unfair dismissal and there is no qualifying period of employment which the employee has to serve for this protection to apply.

However, this rule does not apply where:

- the absence of an employee on jury duty will have a serious adverse effect on the business;
- the employer brings this to the employee's attention;
- the employer requests that the employee applies either to be excused from serving or to have their call-up deferred; and
- the employee unreasonably fails to do so.

Applications for deferrals on the basis of work commitments will be considered on an individual basis.

An employer is not required by law to pay an employee who is absent on jury service. Jurors are, however, entitled to claim for travel and subsistence and for loss of earnings.

If you need advice on whether or not you can legitimately refuse an employee's request for time off work, contact us for advice.

Sickness and Annual Leave

The question as to whether employees who are off work due to sickness for more than a year are entitled to paid statutory holiday under the Working Time Regulations 1998 (WTR) was dealt with in the case of *Stringer and others v HM Revenue and Customs*. The matter was referred to the European Court of Justice, which ruled that, under the EC Working Time Directive, employees who have been on sick leave for a long period should be allowed to take accrued holiday on their return to work or be paid in lieu at their normal rate of pay if the employment relationship ends without them returning to work.

Whilst this decision made it clear that the WTR do not properly implement the Directive into UK law, the House of Lords ruled that holiday pay counts as wages and, where it has not been paid, a claim can be brought under Section 23 of the Employment Rights Act 1996 (ERA) for an unlawful deduction from wages. Under the WTR, there is normally a three-month time limit for bringing a claim. Where a claim is brought under the ERA, however, if it can be shown that there has been a series of unlawful

deductions then, provided the claim is brought within three months of the last deduction, there is no time limit on how far back the claim can go.

The decision of the House of Lords has opened the way for backdated claims by employees on sick leave who have been denied their entitlement to paid holiday. Several cases had already been stayed pending this ruling and one such (*Rawlings v The Direct Garage Door Company Ltd.*) has now been heard.

Mr Rawlings was on long-term sick leave throughout 2004 and 2005 and until April 2006, when he terminated his employment. His employer had paid him four weeks' holiday pay in relation to the year 2004, after he gave notice in early December that he intended to exercise his right to paid holiday under the WTR and specified his holiday dates as being from 2 to 30 December. However, his employer refused to pay him any holiday pay for 2005 and 2006. Mr Rawlings brought a complaint of an unauthorised deduction from wages under the ERA.



The Employment Tribunal ruled that Mr Rawlings was entitled to four weeks' pay for 2005 and a proportion of four weeks' pay for 2006. His employer was therefore ordered to pay the sum of £1,554.92 as an unauthorised deduction from wages.

The effective management of sickness absence is important, particularly in the current economic climate. It is a complex area of employment law and the cost of getting it wrong can be high. We can advise you on your individual circumstances to ensure you avoid the potential pitfalls.

New Minimum Wage Rates

New rates for the National Minimum Wage (NMW) will come into force on 1 October 2010.

As announced last year, the adult rate of the NMW is to be extended to 21-year-olds when the new rates come into effect.

The revised rates are as follows:

- The adult hourly rate of the NMW will increase from £5.80 to £5.93;
- The development rate (which will cover workers aged 18-20 years) will increase from £4.83 to £4.92; and
- The rate for workers aged 16 and 17 will increase from £3.57 to £3.64.

In addition, an apprentice minimum wage of £2.50 per hour is to be introduced. The new rate will apply to those

apprentices who are under 19 and those who are aged 19 and over but are in the first year of their apprenticeship.



From 1 October 2010, the accommodation offset will rise from £4.51 per day to £4.61.

Unfair Dismissal – The Burden of Proof

In unfair dismissal cases, where an employer has established that the employee's dismissal was for one of the potentially fair reasons set out in the Employment Rights Act 1996 (ERA), whether the dismissal was fair or unfair will depend on whether or not the employer's actions were reasonable in all the circumstances. The burden of proof does not rest with either one of the parties involved. The Employment Tribunal (ET) hears the claimant's case that the dismissal was unfair and the employer's explanation of why it was not.

In *Bradford and Bingley (B&B) v McCarthy*, Mr McCarthy claimed that he had been unfairly dismissed after he was made redundant following a reorganisation in which two jobs were combined. One of the directors had a clear preference for the other candidate and Mr McCarthy claimed that the decision to appoint her and to dismiss him was made in advance of the selection process.

The Employment Tribunal (ET) was satisfied that B&B had in place insufficient safeguards to ensure that the selection process was conducted objectively. Because the employer chose not to call other personnel involved in the process to give evidence to the hearing, there remained significant doubt as to whether the selection criteria had been applied fairly. The ET therefore concluded that the dismissal was unfair.

B&B appealed on several grounds. In its view, the ET had fallen into error in imposing the burden on the employer to prove that the dismissal was fair. It had imposed a requirement that the interview process was objective, rather than one that a reasonable employer would have used, and had put a burden on the employer to call particular witnesses.

The Employment Appeal Tribunal dismissed the appeal on these grounds. In such cases, it often happens that the evidence of one party to a dispute points to a particular



conclusion. That does not mean that the burden of proof switches to the other party to disprove the evidence. In this case, there was clear evidence of bias in the decision-making process. B&B therefore needed to rebut the evidence pointing to unfairness and had failed to do so.

The case was remitted to the same ET, however, because the ET had omitted to deal with the question of whether Mr McCarthy would have been selected for redundancy even had proper procedures been followed (ERA Section 98A2).

Contact us for advice on any dismissal or redundancy matter.



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