UK Employment Law Round-up

November 2016 | Volume 1 - Issue 10

In this issue we look at a recent Court of Appeal decision focusing on sexual orientation protection following a refusal to bake a cake decorated with a gay rights message. We also look at the rights of breastfeeding mothers at work, and Asda's equal pay claim case, which may lead to further claims against Asda. We consider Tribunal decisions deciding employment status and rest break rights. We review the importance of having clear guidelines on job descriptions, and proposals to provide an entitlement to bereavement leave. Finally, we give an update on changes to the Immigration Rules.

"Gay cake" appeal decided

The Christian owners of a bakery in Northern Ireland have lost their appeal against a finding that their refusal to make a "gay cake" was discriminatory.

The Court of Appeal in Belfast upheld the judgment of the Belfast recorders court that Ashers Bakery had discriminated against a customer on the grounds of sexual orientation (***Lee v. McArthur & Ors [2016] NICA 39***)

A local gay rights activist had ordered a cake bearing the message "Support Gay Marriage" above an image of Sesame Street characters, Bert and Ernie. The family-run bakery refused to make the cake on the grounds that the message was against their religious views.

In response to the judgment, Daniel McArthur from Ashers Bakery said "we have always said it was not about the customer, it was about the message."

However, the judges did not agree with the family's argument that the bakery would have been endorsing gay marriage by baking the cake. "The fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either."

The judges also said, "the supplier may provide the particular service to all or to none but not to a selection of customers based on prohibited grounds. In the present case the

In this issue...

Please contact us if you would like to discuss any subject covered in this issue.

Read more on page 2>

appellants might elect not to provide a service that involves any religious or political message. What they may not do is provide a service that only reflects their own political or religious message in relation to sexual orientation."

The Court of Appeal in Belfast found that the original decision was correct and Ashers Bakery had therefore "discriminated against the respondent directly on the grounds of sexual orientation contrary to the Equality Act (Sexual Orientation) Regulations 2006".

Ashers Bakery has received significant support over the past couple of years, including from Northern Ireland's attorney general, John Larkin QC. Supporters have suggested that an appeal against the ruling could be lodged at the Supreme Court in London.

This Northern Ireland case is another example of the conflict that we have seen arise in England and Wales (most notably in some high profile Christian hotelier cases) between the anti-discrimination provisions of the Equality Act 2010 and the right to express religious beliefs under the European Convention on Human Rights.

Employers must accommodate breastfeeding mothers at work

The employment tribunal decision in *McFarlane and another v. easyJet Airline Company Ltd* ET/1401496/15 & ET/3401933/15 is a reminder to employers to accommodate female employees who are breastfeeding.

Facts

On returning from maternity leave, two female cabin crew members made flexible working requests to easyJet as they were breastfeeding and unable to express milk during their shifts. The women requested that they either not be rostered for longer than eight hours at a time or that they carry out ground duties, to enable them to express milk between shifts. easyJet refused their requests, as expressing milk was "a choice". It refused to limit their shifts to no longer than eight hours. easyJet decided this despite receiving advice from four different GPs that this could cause the crew members to suffer mastitis (painful inflammation of the breast tissue).

The employees issued claims in the Employment Tribunal alleging that they had suffered indirect sex discrimination and that easyJet failed to provide suitable alternative work.

Decision

The Tribunal found that easyJet's actions amounted to indirect sex discrimination. In requiring all crew members to work for more than eight hours, easyJet had imposed a provision, criterion or practice (PCP), which put women at a disadvantage compared to men. Under this PCP, the female cabin crew members would have had to either

accept financial loss in not taking certain shifts, or they would have to risk mastitis and/or stop breastfeeding.

easyJet argued that it had several legitimate aims which could objectively justify its PCP. The PCP included ensuring that its flights were on time and not cancelled, avoiding having to make individual rostering arrangements, and complying with regulatory requirements.

The Tribunal held the PCP was not justified, and there were no concrete examples of instances where granting longer shifts to crew members had disadvantaged easyJet. When considered against the potential health risk to women who would be required to stop breastfeeding, the Tribunal found against easyJet, stating that its argument had been "speculative".

The Employment Tribunal held that easyJet should have either offered the claimants shorter shifts, found them alternative duties or suspended them (while still receiving full pay). The claimants were awarded £8,750 and £12,500 (plus interest) respectively as compensation for their financial loss and injury to feelings.

Comment

While there is no statutory right to take time off for breastfeeding, or to express milk, failure to provide suitable arrangements to women could be an act of indirect sex discrimination. This decision is therefore a reminder to employers to ensure that they have adequate arrangements in place to accommodate female employees who are breastfeeding.

The Tribunal also held that it was not reasonable for employers to ask breastfeeding employees when they would expect to stop breastfeeding. It should not be an expectation that women will stop breastfeeding when they return to work after maternity leave, and this assumption should not be made.

Practical suggestions for employers

- Imposing a written policy for women who need to express milk while at work.
- Ensuring that existing policies do not discriminate (whether directly or indirectly) against women who are breastfeeding.
- Being aware that women who are breastfeeding need adequate breaks, and that not allowing such breaks may be detrimental to their health. Ensuring that letters from a GP are not ignored.
- Ensuring that women who are breastfeeding have somewhere to rest whilst at work (this is a legal requirement under Regulation 25(4) and 25(5) of the Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004)).
- Providing women who are breastfeeding with suitable facilities (for example, a private and hygienic place to express milk and a fridge or storage place for milk).
- Being accommodating to reasonable requests for flexible working or additional breaks on a temporary basis. This is unlikely to trigger the need for a new employment contract, as breastfeeding is temporary. If you do not grant a request, ensure that your response is reasonable and that you give reasons for why the request is not granted.
- Consider other suggestions as set out in the Acas guide: "Accommodating breastfeeding employees in the workplace".

Asda equal pay claim: comparator successfully established

In deciding that retail workers could compare themselves to warehouse workers for the purposes of equal pay, the test case of ***Brierley and others v. Asda Stores Ltd* [ET/2406372/2008]** is a reminder to employers to ensure that equal pay is established across the whole of their business.

Decision

Female employees should enjoy contractual terms that are as favourable as those of a male comparator if they are employed to carry out jobs of equal value. The key issue in the Asda case was whether the supermarket's in-store staff roles, which are mainly held by female workers, are of equal value to higher-paid jobs in its male-dominated distribution centres.

At the preliminary hearing, the Tribunal had to decide whether the Asda store workers could compare themselves to the distribution workers in an equal pay claim.

Under section 79 of the Equality Act 2010, an equal pay comparison is only valid between the claimant and

a chosen comparator if they are employed by the same employer. They also must either: (a) work at the same establishment or (b) work at different establishments but "common terms apply at the establishments".

Asda's primary argument was that the store employees and distribution centre employees were not comparable as they had different pay arrangements, and their employment contracts did not have common terms under s79 of the Equality Act 2010.

The Tribunal disagreed with this argument and held that the test for bringing an equal pay claim was met. While the terms were not identical, the court considered factors such as the terms being set by the same employer and the strong likenesses in their employee handbooks.

Asda's secondary argument was that employees' terms and conditions did not stem from the same "source". Under Article 157 of the Treaty on the Functioning of the European Union, comparators must either be employees in the same establishment or service, or their terms and conditions must be attributable to a "single source". The Tribunal disagreed with this argument. It held the employees' terms did come from the same source. Asda's executive board was in control of pay differences and it had budgetary control across both retail and warehouse employees.

The court held that the distribution workers were a suitable comparator and the store employees could therefore continue their equal pay claim.

Comment

While this was only a preliminary hearing, we will keep a careful eye on the test case as it unfolds. The decision is likely to impact on other employers in the retail space, as the disparity between the pay rates of shop floor staff and warehouse staff is not unusual.

Since this preliminary ruling, employers may wish to reassess how they carry out job-evaluation across all of their business.

What next?

This case is set to be the largest ever private-sector equal pay case. The floodgates are now open for a wave of claims against Asda. This preliminary ruling means

the test case can continue and will clear the way for over 7,000 claims (currently in waiting) to follow. The claimants in these cases are seeking compensation for historic discrimination, and the total estimated value of the claims could exceed £100 million.

The key issue left for judges to decide is whether the comparators' respective work was of "equal value" under the Equality Act 2010. This will mean the claimants will need to show that the two sets of employees had equal demands made on them in relation to effort, skill and decision-making.

Uber and the gig economy – is the law keeping up?

After a preliminary **hearing** spanning seven days (including reading the five-volume bundle and time for deliberation), an Employment Tribunal has handed down its much anticipated ruling that Uber drivers are workers rather than independent contractors. The drivers can, therefore, benefit from statutory protections. These include: 5.6 weeks' paid annual leave each year; a maximum 48-hour average working week (without an opt-out); rest breaks; the National Minimum Wage or potentially the National Living Wage, and the protection of whistleblowing legislation.

The Tribunal examined in detail Uber's business model but rejected Uber's assertion that it is a provider of technology services rather than transport services. Passengers book a taxi via the Uber app and Uber drivers then decide (although the complete autonomy of this decision was questioned in this case) whether to drive that passenger to their destination and, if they do, the route taken. The passenger pays the fare to Uber by credit or debit card, Uber takes a 25 per cent service fee, and pays the balance of fares to the driver once a week.

The Tribunal looked at how the arrangement works in reality, rather than as described in Uber's contracts, to decide whether the drivers are workers as opposed to independent contractors. For example, the Tribunal noted that if a driver declines three trips in a row while logged on to the app and so is ostensibly available to work, the app will forcibly log him/her out for 10 minutes. The Tribunal also noted that Uber bans drivers from agreeing a higher fare with a passenger than is set by Uber and that Uber usually pays for any cleaning if a passenger soils a car.

In summary, the Tribunal decided that Uber is a taxi service and employs drivers to provide that service in a way which, in several key respects, Uber controls. Consequently, the drivers fell within the statutory definition of a worker, as they worked under contracts to personally perform services for another party (Uber) that is not a customer of a business undertaking carried on by them. However, we note that this contract did not actually exist (as no express agreement was in place) but the Tribunal inferred one from the facts as found by it. It may be that the scope for doing so will be one ground on which Uber appeals against the Tribunal's judgment.

The Tribunal found that, while drivers can turn off the app and be dormant drivers, once the app is on, the driver has a licence to operate and is able and willing to accept assignments. Once this happens, the driver is on working time until one of those conditions stops applying.

For the purposes of the National Minimum Wage Regulations, the Tribunal stated that the work carried out by drivers is not "time work" or "output work". This is because the driver's right to pay is not limited to when he is carrying a passenger and does not depend on him completing a particular number of trips. Accordingly, the work was classified as "unmeasured work". This means that pay is likely to be calculated by reference to time when the driver is logged in to the app in his licensed territory and ready for passengers, not just the time spent driving passengers to their destinations.

This decision is fact-specific. Further, Uber has already announced its plan to appeal against it. The outcome is however likely to have wide-ranging implications for the gig economy, which claims to benefit individuals by giving them flexibility to work how, when and for whoever they please, in an increasingly interconnected and digitally virtual employment sphere.

The employment landscape is changing rapidly and the challenges to the existing statutory framework presented by the Uber case show the law might need to change to keep up. In support of its decision, the Tribunal cited an earlier judgment which identified the policy behind the definition of "worker" is to extend statutory protection to individuals who are vulnerable to exploitation in the same way as employees. While not a new issue, as shown by case law referred to in the Uber judgment, perhaps social policy and the law which reflects it need to change due to the rise of the gig economy and its associated benefits for those seeking flexibility. This is an area where many businesses will keep a close eye for developments.

R&R – what the Working Time Regulations say

The Working Time Regulations 1998 (WTR) provide for a right for workers to take a 20-minute rest break where the working day is longer than six hours. The WTR enable a worker to bring a claim if an employer has refused to allow the exercise of the right to a rest break. In ***Grange v. Abellio London Ltd* 2016 UKEAT 0130/16/1611** the Employment Appeal Tribunal (EAT) had to decide if Mr Grange's employer had refused his entitlement to take a rest break.

Mr Grange worked for Abellio London Ltd (Abellio) as a relief roadside controller (RRC). His working day was eight and a half hours. This was meant to include a half hour lunch break. However, Mr Grange was often too busy to be able to take his lunch break. In 2012, Abellio decided to address this by reducing the working day for all RRCs to eight hours only, and asking them to work through without a break.

In 2014 Mr Grange brought a grievance that since 2012 his employer had made him work without a break. His grievance was not upheld, and so Mr Grange brought a claim to an Employment Tribunal that Abellio had refused to allow him to exercise his right to a 20-minute rest break.

The Employment Tribunal focused on the meaning of the word "refusal". It referred to previous case law from the EAT which had held that a "refusal" was a distinct act in response to a positive act by a worker. The Employment Tribunal found Mr Grange had not committed a positive act – he had not made a request to take a break when the working day changed to eight hours. Before 2012 Mr Grange was free to take a break. Despite it being difficult to find time, Abellio never refused it.

Mr Grange did not accept there needed to be an express refusal. He appealed to the EAT. The EAT considered the case law relied upon by the Employment Tribunal and a second case which found an employee was not required to expressly ask for a rest break. Due to the conflict, the EAT studied the words of the EU Working Time Directive, which the WTR implement in the UK. It came to a conclusion that the right Directive intends a rest break to be actively respected by employers for the protection of workers' health and safety. Therefore, an employer should afford the worker the entitlement to take a rest break, and that an entitlement would be "refused" if the employer put into place working arrangements that fail to allow a break to be taken.

The EAT allowed Mr Grange's appeal and sent the case back to the Employment Tribunal. The Tribunal is to decide if Abellio put in place working arrangements that failed to allow workers to take rest breaks.

The case acts as a reminder to employers of the importance of recognising a worker's entitlements under the WTR, even if an employee does not kick up a fuss about the same. Looking to the future, the WTR legislation stems from the EU, meaning that in theory, the UK's departure from the EU would allow the UK to repeal or amend the WTR. However, it is unlikely that Brexit would lead to a wholesale overhaul of the legislation.

Domestic staff and unfair dismissal: lessons learnt

While everyone hopes the employer/employee relationship will continue without a hitch, issues can of course occur. In these situations, it is best to have clear roles and responsibilities set out for each party so it is easy to see if someone is not keeping up with expectations.

Take the recent unfair dismissal case between Robin Pyke and his employers, Mr and Mrs Gottschalk. It is unclear from the facts whether Mr Pyke was a housekeeper, gardener, nanny, "live in manager," or a combination of all of them, leading to most of the confusion.

Mr Pyke's dismissal followed Mrs Gottschalk finding out that his partner was staying at the property he was looking after without her knowledge. The Gottschalks also claim Mr Pyke abused his position of trust by using the family's cars without permission and running a side business (dog sitting) from the property. Mr Pyke had been working for the family for 13 years in many roles, starting first as the gardener before changing roles to the "house manager." The family often travelled to different overseas homes and left Mr Pyke to look after the property alone.

During the Tribunal, the Gottschalks stated they were under the assumption their staff "don't count the hours" and expect them to "go the extra mile" when working for them. The couple stated that Mr Pyke left the home in a disappointing condition. There were issues with the

cleanliness of the house and his "over familiarity". Mr Pyke believes the family placed too many demands on him, leaving him overworked and stressed.

While the Tribunal will decide the unfair dismissal claim and whether the proper procedures were followed, it raises several important points for employers. Employers should make sure that job roles are referred to in the employment contract. If the employee's role changes, employers should update the contract or issue a side letter to reflect the necessary changes.

The contract should include clear boundaries for employees about what behaviour is acceptable or not. This is increasingly important for a role such as this that involves the employee living in the employer's home. For example, if an employee has access to a car, it should be clear in the contract under what circumstances they can use it. Once clear expectations are set, both parties will know whether either is falling short of their obligations. For example, if Mr Pyke knew to notify the Gottschalks (or how much notice to provide) before having his partner stay over, this issue could have been more easily discussed and negotiated between the parties.

It is important to have clear guidelines on job descriptions and roles for employees to assist with expectations and to avoid issues further down the line. Whilst a clear contract will not guarantee disputes will not occur between the parties, it is the best case for certainty parties can have. The need to formalise and update employment contracts remains a pressing point in the news for employees and employers alike.

Dealing with bereavement in the workplace

Bereavement is a topic that no one wants to deal with, let alone discuss in the workplace. However, research shows that one in 10 employees are likely to be affected by bereavement at any one time.

Current position

Surprisingly, the UK is behind many other countries by not offering a statutory right to bereavement leave. For example, Albania currently offers five days, Israel seven days and Canada three days. Some employers will offer employees compassionate leave in these circumstances. However, how long is at the employer's discretion. Five days is currently the average paid leave employees are given. Employees therefore have to rely on other means, such as sick leave or unpaid time off. There is therefore still a significant gap in the law as to how employers should help employees at this difficult time.

Employers should also consider how their policies may affect employees with religious beliefs and ensure that their leave policy does not discriminate. For example, some religions have different beliefs and cultures surrounding bereavement and therefore some employees may need more time off work. In Hinduism, relatives must observe a 13-day mourning period after cremation. Similarly in Judaism, family members do not go to work and stay home for seven days following a death. Unless an employer could objectively justify refusing the longer leave required, this may amount to indirect religious discrimination under the Equality Act 2010.

Potential changes in the law

Following research by the National Council for Palliative Care, the Parental Bereavement Leave (Statutory Entitlement) Bill 2016-17A will seek to deal with the circumstances following the death of a child. The bill has now received its second reading debate in October 2016 and would introduce a two-week statutory paid leave for employees who suffer the loss of a child. While under the current law, a parent of a stillborn child would be granted leave, a parent who loses a five year old would not. This Bill therefore tries to reflect and balance this clear inconsistency in the law.

Whereas most employers would be sympathetic in such a terrible situation, the Bill, if enacted, would create certainty for both employer and employee. If introduced, this Bill will make the UK one of the most generous jurisdictions for bereavement leave, above the countries quoted above.

What can employers do at the moment?

While we wait for any statutory provisions on bereavement leave, employers looking for more support and guidance can consider Acas's helpful guide. Acas

comments that while bereavement in the workplace can be challenging to manage, a compassionate and supportive approach demonstrates that an employee is valued and supported. Consequentially, this should help to reduce sick leave and improve employee retention.

An employer should always consider its duty of care to employees and should try to deal with each individual on a case-by-case basis. Each employee will go through the grief process differently, and so Acas suggests this needs to be understood and respected by both employers and colleagues. For example, some people may want to return to work quickly, whereas others may need more time and support.

The Acas guide also offers support for various scenarios, including the death of a family member, death of a child and death of a colleague. Within this, it sets out a list of steps employers should consider implementing in the early days after an employee's bereavement. For example, how much contact and dialogue to have with the employee, whether they want colleagues to know and contact them, and how to review and readdress the situation after the initial grieving process.

Employers should also consider any amendments to working arrangements following a bereavement. For example, the death of a spouse may lead to a request for part-time or flexible working to deal with child care arrangements. Employers should be mindful of any requests and determine how they can accommodate them.

UK immigration rule changes

The government announced the following changes to the Immigration Rules on 3 November 2016:

Tier 2

The following changes will affect all certificates of sponsorship assigned by Tier 2 sponsors on or after 24 November 2016:

- increasing the Tier 2 (General) salary threshold for experienced workers to £25,000, with some exemptions;
- increasing the Tier 2 (Intra-Company Transfer) salary threshold for short-term staff to £30,000;
- reducing the Tier 2 (Intra-Company Transfer) graduate trainee salary threshold to £23,000 and increasing the number of places to 20 per company per year; and
- closing the Tier 2 (Intra-Company Transfer) skills transfer sub-category.

The government has not yet announced a date from which intra-company transfer migrants will be liable for the immigration health surcharge.

Non-EEA partners

The government has introduced a new English language requirement for non-EEA partners and parents. This affects those applying to extend their stay after two and a half years in the UK on a five-year route to settlement under Appendix FM (Family Member) of the Immigration Rules (introduced in July 2012).

The new requirement will apply to partners and parents whose current leave under the family Immigration Rules is due to expire on or after 1 May 2017.

The English language requirement applies to most immigration applications. This includes those seeking to enter the UK for employment under the points-based system, and students seeking to enter the UK under Tier 4 of the points-based system.

Dentons is the world's first polycentric global law firm. A top 20 firm on the Acritas 2015 Global Elite Brand Index, the Firm is committed to challenging the status quo in delivering consistent and uncompromising quality and value in new and inventive ways. Driven to provide clients a competitive edge, and connected to the communities where its clients want to do business, Dentons knows that understanding local cultures is crucial to successfully completing a deal, resolving a dispute or solving a business challenge. Now the world's largest law firm, Dentons' global team builds agile, tailored solutions to meet the local, national and global needs of private and public clients of any size in more than 125 locations serving 50-plus countries.

www.dentons.com

Contacts

Michael Bronstein
Partner
D +44 20 7320 6131
michael.bronstein@dentons.com

Sarah Beeby
Partner
D +44 20 7320 4096
sarah.beeby@dentons.com

Ryan Carthew
Partner
D +44 20 7320 6132
ryan.carthew@dentons.com

Gilla Harris
Partner
D +44 20 7320 6960
gilla.harris@dentons.com

BRAND-954-UKEmploymentLawRoundUpNewsletter_November-2016_v4-29/11/2016