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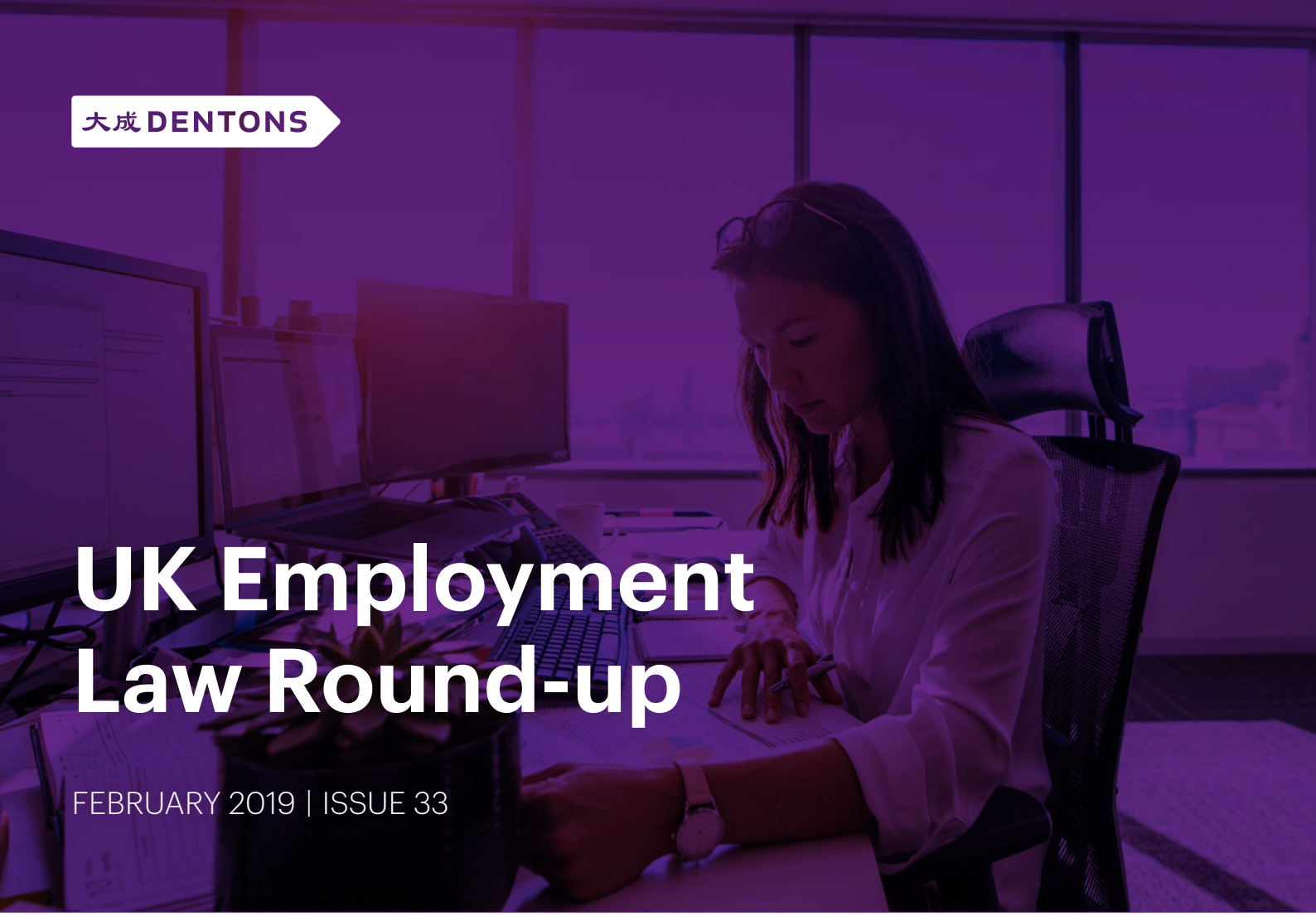

UK Employment Law Round-up

FEBRUARY 2019 | ISSUE 33

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: the use of non-disclosure agreements/ confidentiality clauses in settlement agreements; whether a complaint about defamation can be a protected disclosure for the purposes of the whistleblowing legislation; the latest developments in the on-going Asda equal pay claims; and what employers can learn from the new Acas guidance on age discrimination and the successful age discrimination claim recently brought by an 88 year old medical secretary.

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IN THIS ISSUE

Can NDAs/confidentiality clauses survive in the #MeToo era?

The use of NDAs/confidentiality clauses in the employment context has been thrust back into the spotlight over recent weeks. This article explores whether there is still a legitimate place for their use in the post #MeToo era.

"*Unethical*", "*intimidate victims into silence*", "*protecting the powerful*" are some of the recent views that have been expressed on the use of non-disclosure agreements (NDAs) by employers. The spotlight was, primarily, thrust onto the use of NDAs/confidentiality clauses when reports first emerged of employees allegedly being forced to enter into them by Harvey Weinstein and subsequently Sir Philip Green. In the wake of these allegations there were calls for action to be taken to prevent employers using NDAs/confidentiality clauses to conceal allegations of wrongdoing. In response, we have seen the UK government pledging to end the "*unethical use*" of NDAs, the Solicitors Regulation Authority issuing a Warning Notice about their use and, most recently, the Law Society publishing guidance on the use of NDAs/confidentiality provisions as part of any settlement to end workplace relationships.

NDAs/confidentiality clauses: what is the difference?

The widespread interchangeable use by the media of the terms NDA and confidentiality clauses in relation to harassment cases has caused some confusion. NDAs are, typically, used entirely legitimately by businesses to protect commercially confidential information or trade secrets and to prevent this information being shared inappropriately. These agreements are commonplace across most industries and serve as an essential and legitimate means for protecting commercially sensitive information.

Confidentiality clauses, in relation to settling workplace claims and specifically harassment claims, are usually found in settlement agreements. These clauses tend to include terms which are commonly referred to as NDAs as they are, typically, used to avoid reputational damage by preventing employees from disclosing information regarded as confidential, even if not in the category of trade secrets. For example, a confidentiality clause in a settlement agreement will often set out what an employee can and cannot talk about in relation to his or her employment and the circumstances that led to the parties entering into the settlement agreement. Essentially, the settlement agreement itself is not an NDA as such, but the confidentiality clauses it contains may have a similar effect.

Settlement agreements

Despite the negativity currently surrounding NDAs/confidentiality clauses, it is important to remember that settlement agreements are still an essential and legitimate tool for avoiding litigation and settling disputes.

In most workplace disputes, allegations will be made against one or both parties in some shape or form. However, the rights and wrongs of these allegations will never be determined under a settlement agreement. It is, therefore, unsurprising that reputational matters are a key consideration in most settlement negotiations. When an employer is faced with particularly damaging allegations, it will naturally want these to remain confidential as a condition of any settlement.

The alleged actions of a few employers, who are accused of having engaged in serious wrongdoing and then forced employees into accepting confidentiality obligations as part of a settlement, have, unfortunately, tainted all employment settlement agreements and their respective confidentiality clauses.

Enforceability of NDAs/confidentiality clauses

According to one report, NDAs/confidentiality clauses are "*being used to intimidate victims into silence*". Contrary to how matters have recently been reported, NDAs/confidentiality clauses do not prevent all disclosure by an employee or former employee.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- People Management – Susan Doris-Obando outlines how best employers can use restrictive covenants while ensuring they remain enforceable
- Scottish Grocer – Mark Hamilton offers practical advice on an employer's pension obligations for part-time staff.

If you have ideas for topics you'd like us to cover in a future round-up or seminar, please tell us here.

Any NDA/confidentiality clause that seeks to prohibit an employee from legally "*blowing the whistle*" and making a protected disclosure or a complaint to a regulator or law enforcement agency will be unenforceable.

In order to benefit from the protection of the whistleblowing legislation, the employee must reasonably believe that the information he or she is disclosing shows at least one of six categories of specified wrongdoing and that the disclosure of that information is in the public interest. The categories of wrongdoing are:

- commission of a criminal offence;
- breach of a legal obligation;
- miscarriage of justice;
- danger to health and safety;
- damage to the environment; and
- deliberate attempt to conceal any of the above wrongdoing.

Turning specifically to allegations of harassment, could an employee or former employee, who has entered into a settlement agreement containing confidentiality clauses restricting his or her ability to disclose information relating to the circumstances of the settlement, make a protected disclosure in respect of allegations of harassment? In brief, the answer is yes. Harassment could potentially fall within the majority of the six categories of wrongdoing. The harassment may constitute a breach of the Equality Act 2010 which prohibits sexual and other harassment, and this would therefore be a breach of a legal obligation. Depending on the nature of the harassment, it could be a criminal offence if, for example, the harassment amounted to an assault. Equally, if there is an existing culture in the workplace of tolerating harassment, there may be a danger to the health and safety of other employees by also exposing them to the harassment.

In addition, the protection under the whistleblowing legislation is also subject to the disclosure being made to the following categories of people only:

- the employer;
- the person responsible for the relevant failure or wrongdoing;
- legal advisers;
- Government Ministers;
- a person prescribed by an order made by the Secretary of State – this includes HM Revenue and Customs, the Audit Commission, NHS England, the FCA and the Office of Communications (Ofcom); or
- a person who is not covered in the above list, provided certain rigorous conditions are met. This could include a non-prescribed regulator, MPs, the police and perhaps even the media. However, to qualify for the protection the employee must make the disclosure in accordance with a number of stringent conditions.

Concerns about the use of NDAs/confidentiality clauses

Why then, if employees can still legally make disclosures of information which the settlement agreement sought to keep confidential, are NDAs/confidentiality clauses being so widely criticised?

The reality is that most employees who have entered into a settlement agreement will not blow the whistle on a former employer. The most likely reason for this is that they will simply be unaware that they can without breaching the terms of their settlement agreements. It is also likely that, without legal advice, an employee would be unsure about how to make a protected disclosure relating to the wrongdoing of a former employer. It is not hard to imagine an employee who had entered into a settlement agreement being extremely wary of jeopardising any compensation received as part of the settlement. The employee is likely to be equally as fearful of exposure to any liability to the employer for loss suffered as a result of the disclosure of the information.

In addition, in light of the recent reported inappropriate use of NDAs/confidentiality clauses, there appears to be a strong belief that perpetrators of wrongdoing are able to simply pay their way out of extremely damaging situations. It would seem that it is this view that has generated the most criticism of the use of NDAs/confidentiality clauses.

The future of NDAs/confidentiality clauses: what's next?

All of the signs seem to suggest that the use of NDAs/confidentiality clauses is going to be subject to greater regulation. However, at this stage there is no indication that they should be completely abolished. Neither the SRA Warning Notice, nor the recent guidance issued by the Law Society prohibit the use of NDAs/confidentiality clauses, rather both documents clearly explain how far these clauses can legitimately go.

The Law Society guidance explicitly sets outs the disclosures which cannot be restricted by a NDA/confidentiality clause. These include:

- making a protected disclosure or blowing the whistle;
- reporting misconduct, or a serious breach of regulatory requirements, to a regulator;
- reporting an offence to the police or other law enforcement agency and/or co-operating with a criminal investigation; and
- reporting, in the public interest, any serious wrongdoing to a law enforcement agency, relevant regulator or equivalent person which has a proper interest in receiving that information.

The other key takeaway point from the Law Society guidance is that any NDA/confidentiality clauses must be easily understood by all parties. The Law Society advises that they should be drafted in clear and simple English and that it is good practice to give anyone signing an NDA/confidentiality clause time to consider the implications of agreeing to the restriction, including giving them sufficient time and opportunity to obtain independent legal advice.

It is clear that the recent scrutiny of the use of NDAs/confidentiality clauses can be attributed to recent high profile cases where serious wrongdoing has allegedly been committed by an employer who is believed to have used the NDA/confidentiality clause as a way of covering up such wrongdoing and preventing it from becoming public knowledge. The new guidance on NDAs/confidentiality clauses makes clear that they should not be used to silence victims inappropriately or allow individuals to hide allegations that they have committed serious wrongdoing.

Settlement agreements and their associated NDAs/confidentiality clauses are an invaluable tool for resolving disputes in the workplace, both from an employer's and an employee's perspective. Even in the post #Me Too era it is hard to envisage circumstances where the use of NDAs/confidentiality clauses will be completely abolished. At times, the reputational protection that they offer is just as valuable as the funds that would be spent defending a course of litigation. However, what is obvious is that, if they are to survive, they must be drafted and used in a legal and appropriate manner.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Office romances: is love in the air in your workplace this Valentine's Day?
- Are employers doing enough to support employees who have caring responsibilities?
- Constructive knowledge of disability: when should employers reasonably know of an employee's disability?

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Can a complaint about defamation be a protected disclosure for the purpose of a whistleblowing claim?

This article looks at whether a complaint about defamation can be a protected disclosure for the purposes of the whistleblowing legislation. The Employment Appeal Tribunal (EAT) says yes, it can, in the case of Ibrahim v. HCA International UKEAT/0105/18.

The law

The Public Interest Disclosure Act 1998 came into force on 2 July 1999, inserting sections 43A to 43L and 103A into the Employment Rights Act 1996 and providing protection for workers reporting malpractices by their employers, or third parties against victimisation or dismissal.

The legislation creates two levels of protection for whistleblowers:

1. the dismissal of an employee will be automatically unfair if the reason, or principal reason, for their dismissal is that they have made a "protected disclosure"; and
2. workers are protected from being subjected to a detriment on the ground that they have made a protected disclosure.

Demonstrating that the employee has made a qualifying disclosure is the first step in establishing protection under the whistleblowing legislation.

A qualifying disclosure is a disclosure of information which, in the reasonable belief of the worker making it, tends to show that one or more of six types of malpractice has taken place, is taking place or is likely to take place (section 43B(1), Employment Rights Act 1996). The six types of malpractice are:

1. criminal offences;
2. breach of any legal obligation;
3. miscarriages of justice;
4. danger to the health and safety of any;
5. damage to the environment; and
6. the deliberate concealing of information about any of the above.

Further, the worker must have a reasonable belief that the disclosure is in the public interest.

Whether a qualifying disclosure is also protected broadly depends on the identity of the person to whom the disclosure is made. The legislation encourages disclosure to the worker's employer in the first instance and such disclosures, as well as disclosures to a "responsible" third party or a "prescribed person", are likely to gain protection relatively easily. However, other wider disclosures, for example to the media, will only be protected in very limited situations.

Ibrahim v. HCA International Ltd UKEAT/0105/18

The Claimant, Mr Ibrahim, was employed as an International Patient Co-ordinator and worked as an interpreter for Arabic-speaking patients at the Respondent's private hospital.

He alleged that he made two protected disclosures to his employer: one on 15 March 2016 during a meeting with the Respondent's Director of Rehabilitation and the second on 22 March 2016 during a meeting with the Respondent's Chief Human Resources Officer. During the first meeting he said he asked the Respondent to investigate "false rumours" which were circulating about him in the workplace. He said that it was rumoured he had been involved in breaches of patient confidentiality and that a co-worker had been "slandering him" to his colleagues. During the second meeting on 22 March 2016, he said he told his employer that he felt "degraded, humiliated, shocked and confused" by the rumours. He said he told her he felt the rumours were so serious he needed to clear his name and restore his reputation. The Claimant alleged that, as a result of raising the concerns, he was removed from his role and "kicked out" of the International Relations Office.

The Employment Tribunal's findings

At a preliminary hearing before the Employment Tribunal, the Respondent argued that complaining about a rumour was not sufficient to amount to a disclosure of information, which tended to show that a breach of a legal obligation had occurred and, therefore, the Claimant's allegations could not constitute a protected disclosure. The Tribunal accepted the Respondent's argument and went on to find that, in any event, the case failed because the disclosures had not been made in the public interest. The case was dismissed.

The Employment Tribunal's decision was appealed and the EAT was asked to consider whether the tribunal had correctly interpreted and applied section 43B(1)(b), Employment Rights Act 1996 in two respects:

1. whether the Claimant's allegations could amount to a protected disclosure; and
2. whether the Claimant's allegations could be said to have been made in the public interest.

In order for the appeal to succeed, the EAT had to find in favour of the Claimant in respect of both grounds of appeal.

Before the Employment Appeal Tribunal

On the first ground of appeal, the EAT noted that the Claimant had listed "damage to reputation/defamation" as a claim in his originating ET1 and that, despite not having framed his claim in the appropriate legal terminology, it was clear that the Claimant was alleging he had been defamed by what he called the "false rumours". The EAT went on to find that section 43B(1)(b) was broad enough to include defamation and that the Tribunal had erred in concluding that the Claimant had not identified a legal obligation that may have been breached.

In relation to the second ground of appeal, the EAT reminded itself of the guidance provided by the Court of Appeal in relation to the public interest test in the case of Chesterton Global Limited (T/A Chestertons) v. Nurmohamed [2017] EWCA Ci 979. In Chesterton, Underhill LJ noted that, when considering whether a disclosure has been made in the public interest, a Tribunal judge has to ask itself: (a) whether the worker believed at the time that he was making it that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

In the present case, the EAT considered that the Tribunal had, having heard all of the evidence, made a finding in fact that the Claimant's only concern was that false rumours had been made about him and the effect of those rumours on him. At the time the Claimant said he made his disclosures to his employer, he did not raise concerns of data protection breaches, nor did he focus on the patients and how the alleged rumours might affect them. Accordingly, the EAT held that the Tribunal was entitled, on the evidence, to find that the Claimant was, in making the disclosure, seeking only to protect his own personal interests.

As a result, the EAT held that the second ground of appeal failed and the Employment Tribunal's judgment was upheld.

Comment

As there is no financial cap on compensation in whistleblowing claims, and no requirement for claimants to have a minimum period of service before they can bring a claim, such claims can be an attractive option for claimants who do not have the requisite service to bring an unfair dismissal claim and a costly lesson if an employer gets it wrong.

This case is a useful reminder to us all that a "breach of a legal obligation" for the purposes of whistleblower protection is extremely wide and can cover a whole host of concerns. It is also a useful reminder that an employee does not necessarily need to frame their complaint in precise legal terminology in order for it to succeed although they do, clearly, have to be motivated by something other than self interest in order to satisfy the public interest element of the test set out in section 43B(1)(b).

Latest Court of Appeal decision allows retail staff to continue their long-running battle for equal pay

In the long-running case of *Asda Stores Ltd v. Brierley and others* [2019] EWCA Civ 44, the Court of Appeal has upheld the Employment Tribunal's (ET) and the Employment Appeal Tribunal's (EAT) decisions that mainly female employees working in-store are entitled to compare themselves to mainly male employees working in distribution centres for the purposes of bringing an equal pay claim. In this article we look at the history of this case, the Court of Appeal's decision and consider the implications this may have for employers in future, even if the claimants do not, ultimately, succeed in their claims.

Background

The case first began with equal pay claims issued in 2008 and, over time, we understand that approximately 7,000 Asda employees have been added as claimants. Mainly female employees working in Asda retail stores have sought to compare themselves to mainly male employees working in Asda's distribution centres for the purposes of their equal pay claims. The claimants allege that the work they perform is of equal value to their comparators, but that the comparators are paid substantially more than they are. The claimants allege that the differential in pay arises from a historical belief that the work done in the distribution centres is a man's role and so is worth more. Without exception, Asda's stores are on separate sites from its distribution centres.

Despite the first claims having been issued as long ago as 2008, this case has not gone beyond dealing with the preliminary issue of whether the claimants are, in fact, entitled to compare themselves to their chosen comparators.

Relevant legislation

As many of the claims here were brought prior to the enactment of the Equality Act 2010 (EA), the issues to be determined fall to be considered under both the EA and the Equal Pay Act 1970 (EPA). In order to bring a claim under the EA, a claimant must identify a comparator of the opposite sex:

- performing equal work (in this case, work of equal value);
- for the same or an associated employer;
- at the same establishment or at a different establishment to which common terms and conditions apply.

Case law has established that "common terms" need not be identical. It has also established that if, hypothetically, a comparator would have been employed on their existing terms if they moved to the same establishment as the claimant (whether or not this might actually happen), then "common terms" can be found to exist. The provisions relating to "common terms" under the EA are worded slightly differently from those under the EPA and it has been unclear whether:

- it was enough that employees in the claimants' group were on "common terms" with employees in their comparators' group (as under the EPA); or
- whether, under the EPA, the claimants and their chosen comparators had to have any similarity in their terms.

Both the relevant provisions of the EA and the EPA are referable to Article 157 of the Treaty on the Functioning of the EU under which the key question is whether there was a "single source" responsible for the inequality of terms. The claimants argued that, if they were not entitled to compare themselves to their chosen comparators under the EA and the EPA, Article 157 had direct effect so as to allow their claims to continue in any event.

Employment Tribunal and Employment Appeal Tribunal decisions

Both the ET and the EAT agreed with the claimants that they were entitled to compare themselves to their chosen comparators on the grounds that:

- Article 157 did have direct effect in the UK;
- where terms came from a "single source" an employee was automatically able to bring their claim under Article 157;
- Asda's executive was a "single source" of terms and conditions; and
- there were common terms between the claimants and their chosen comparators which would apply if the location of the distribution centres happened to be the same as the retail stores, so that they formed one establishment.

Asda appealed to the Court of Appeal.

Court of Appeal decision

Following an in-depth analysis, the Court of Appeal agreed with the ET and the EAT that the claimants are entitled to compare themselves to their chosen comparators, even though those comparators work in separate establishments. The Court of Appeal came to its decision based on domestic law and did not believe it necessary to consider the applicability of European Union (EU) law in any detail (although it did pass some relevant comment).

The Court held that the relevant provisions of the EA did not change the law set out previously in the EPA in relation to the existence of "common terms". The Court confirmed that the relevant test, under both the EA and the EPA, is that, where the claimant and her comparator work at separate establishments, "common terms" must apply for employees of the claimants' group and employees of the group at each of the separate establishments. It is irrelevant whether the claimant and her comparator have, themselves, any similarity in their terms.

However, the Court disagreed with the approach taken by the ET and the EAT in determining whether the terms between retail store employees at one establishment were broadly similar to those of the distribution centre employees at another. It held that the correct test is whether the terms of the two groups of employees are broadly similar across their respective sites *as a whole*, so that a distribution centre employee would be employed on the same terms regardless of which site they actually worked at.

The Court of Appeal did agree with the ET and EAT's finding that, in this case, Asda applied "common terms" for retail store employees and distribution store employees wherever they worked. The Court also held that this would apply even where, in practice, the two groups of employees would never actually work at the same establishment. Accordingly, the claimants were entitled to compare themselves to their chosen comparators, and the ET had not erred in declining to strike out their claims on this basis.

On the EU law element, the Court of Appeal commented that, as both the retail store employees and the distribution centre employees were employed on terms set by the same employer, they were derived from a "single source". However, on the question of the direct effect of Article 157, the Court commented that, had this been determinative, it would have been necessary to refer this issue to the European Court of Justice. As it happened, the claimants were able to continue with their claims under domestic law, so no such reference needed to be made.

Asda applied for permission to appeal to the Supreme Court but this was denied.

Comment

Whilst the Court of Appeal's decision does not change the law as such, it does highlight how broad an equal pay claim based on work of equal value might be. It is not automatically obvious that supermarket employees working within retail stores can compare themselves to employees working in distribution centres where their job descriptions and the locations at which they work are quite different. However, it is clear that the equal pay legislation may go so far as to require equality of pay for all employees working for the same, or associated, employers where their work provides equal value for the employer. This applies regardless of how the business is structured, or where (in the UK) the employees are located.

By no means does this mean the end for Asda's defence of the claim. The comparator point is preliminary issue and the ET is yet to hear the merits of the claim or to consider whether, in actual fact, the work performed by the retail and the distribution staff is work of equal value. That will be the real turning point of the claim.

Given the financial and reputational consequences if the claim against Asda is successful, it remains a possibility that Asda could seek permission directly from the Supreme Court to appeal the Court of Appeal's decision on whether the claimants are entitled to rely upon their chosen comparators.

Age discrimination: hitting the headlines

This article looks at recent news in relation to age discrimination, specifically the guidance which was published by Acas this month and the successful claim brought by the 88 year old secretary, Eileen Jolly (Jolly v Royal Berkshire NHS Foundation Trust).

Age discrimination has featured in the news multiple times this month. Acas published new guidance on age discrimination at work, and an 88-year-old medical secretary, Eileen Jolly, became the oldest person ever to win an age discrimination claim. According to Acas, age discrimination is one of the most common forms of unfair treatment at work. Both younger and older employees across the UK have reported experiencing discrimination based on their age, so it is an issue which employers should be aware of.

Acas guidelines

The guidance (which can be found here) aims to support employers in preventing unfair treatment at work and eradicating bias against older and younger workers. The guidance features information on activities and processes in the workplace where there is an increased risk of age discrimination happening. A number of pitfalls are highlighted, including:

- managers must not suggest, assume or try to force an employee to retire, although any employee can be asked (albeit carefully) about their work plans in the short, medium and long term from a workforce planning perspective (for example, during an appraisal);
- when recruiting, it is preferable to set out the types of experience required for a post, rather than to require a number of years' experience; and
- managers should not allow any bias to play a part in decisions regarding promotions or when allocating training opportunities – assumptions should not be made about an employee based on their age, including in relation to their ambitions and training needs.

The guidance also advises on the risks of using ageist language and stereotyping within the workplace, and when an employer may lawfully treat an employee differently because of their age.

Jolly v. Royal Berkshire NHS Foundation Trust

While the Acas guidance will help employers understand how they should act towards their employees, the recent employment tribunal decision in *Jolly v. Royal Berkshire NHS Foundation Trust* provides a good example of "what not to do".

The Claimant, Ms Jolly, commenced employment with the Respondent when she was 61 years old and she worked for the Trust until 2017, by which time she was in her mid-eighties.

From 2005 to 2015, the Claimant worked as a medical secretary for a consultant surgeon, Mr Smith. As part of this role, the Claimant kept a list of patients who were waiting for non-urgent surgery. When patients who were waiting for non-urgent surgery phoned the hospital, the Claimant would check that they were on the list and confirm their contact details.

In addition, there was a separate non-urgent surgery list which was maintained by another employee. There was a rule that patients should not wait more than 52 weeks from their initial referral for surgery. It was this other employee's responsibility to identify any patients who had been waiting nearly 52 weeks and to alert Mr Smith if this was the case. Mr Smith gave evidence that the Claimant had no responsibility for identifying patients who were close to the 52-week limit. He was clear that her work was reliable and meticulous during her time working for him.

In 2015, the Claimant's role changed and she received very little training in connection with her new role. Around this time, the other employee who was responsible for the non-urgent surgery list left the Respondent's employment.

In September 2016, the Claimant arrived at work and was informed that she was being investigated and put on "special leave" (which the Tribunal found was, in fact, a suspension). She was told to collect her belongings and was escorted from the premises.

The Claimant subsequently received a letter informing her that the Respondent was concerned about her capability due to "a third serious incident in two years regarding 52-week breaches of the referral to treatment standard in the waiting list." The Claimant had no idea what the first two serious incidents were. Even the Respondent's witnesses could only identify one previous incident, and they all agreed that it was not the Claimant's fault.

No investigation was carried out to establish whether the Claimant had, in fact, been responsible for any breaches. Nevertheless, the capability process proceeded and the Claimant was invited to an interview. She was unable to obtain union representation for the meeting (as she was given only two days' notice) and requested that it be postponed. The interview was rescheduled (this time with four days' notice), but the Claimant had a pre-arranged medical appointment on the proposed date. The Respondent refused to rearrange the interview again and it proceeded without the Claimant present. This was, as the Respondent's line manager eventually accepted, unreasonable.

The Claimant was later invited to a review meeting and subsequently dismissed on the grounds of her "catastrophic failure in performance". The Respondent decided that providing further training to the Claimant would not be appropriate.

The Claimant appealed against her dismissal, but the Respondent initially failed to reply and later claimed that the Claimant's appeal had been submitted out of time. The Claimant pointed out that her appeal had, in fact, been made in time, but she never received a response and her appeal was never heard.

Ultimately, the Tribunal decided that the Respondent had treated the Claimant less favourably on the basis of her age and also on the basis of disability (the Claimant had arthritis and a heart condition). There was no basis to find that there had been a catastrophic failure in her performance. She had not been offered training where it would have been appropriate (and the reason for this was inferred to be her age) and the Respondent had not followed its own capability procedure. Her dismissal was "tainted by discrimination" and the judge commented that there was suspicion that the Claimant had been a scapegoat.

The Acas guidance and the *Jolly* case both serve as a reminder of the importance of treating employees consistently, no matter what their age. Employers of all sizes should ensure that their managers are aware of the high-risk areas outlined in the guidance and review their recruitment and performance management procedures to ensure that they are not discriminatory.

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