HEWETT RECRUITMENT

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May 2019 Employment Law Bulletin

Welcome to our Employment Law Bulletin for May 2019.

This month's bulletin contains a number of recent Tribunal cases about direct and indirect discrimination, as well as reasonable adjustments and mistaken beliefs in discrimination claims. We also look at the recent increases to the Vento bands for non-financial compensatory awards for discrimination claims as well as a topical case about the right to receive the minimum wage for on call workers.

Adverse treatment of gay employee amounts to discrimination

Mr Maplin, an openly gay Head teacher at Tywyn Primary School, faced disciplinary proceedings when he had sex with two 17 year old males he met on Grindr. After an investigation, the Local Authority decided that Mr Maplin had not committed any criminal offence, nor were there any child protection issues. However the School instigated disciplinary proceedings against Mr Maplin, the process of which contained a number of procedural errors. Mr Maplin subsequently brought a claim of direct discrimination on the basis of sexual orientation.

Both the Employment Tribunal and Employment Appeal Tribunal agreed that discrimination on the basis of Mr Maplin's sexual orientation could be inferred due to the School's actions. Therefore the burden of proof had reversed and the School were unable to provide a satisfactory explanation for their conduct.

Discrimination on the basis of sexual orientation is one of the protected characteristics under the Equality Act 2010. Cases like Mr Maplin's are hard to come by as Claimants can struggle to find direct evidence of discrimination on the basis of sexual orientation. This is because the initial burden of proof is on the Claimant to show that in the absence of any other explanation, the facts show that the Respondent had directly discriminated the Claimant. Nevertheless, this case is a useful reminder for employers that in the absence of any suitable explanation, the facts could be inferred by a Tribunal as discriminatory treatment.

Indirect discrimination claims

Mr Harvey was a bus driver with the Oxford Bus Company. Mr Harvey and his colleagues were required to work 5 days a week, including Fridays and Saturdays. However, Mr Harvey is a Seventh Day Adventist and therefore asked his employer if he could not work between sunset on Fridays and sunset on Saturdays. As a result, the Respondent rotated the Claimant onto a bus service that accommodated his request, albeit this was not a permanent arrangement. The Claimant subsequently brought a claim of indirect discrimination on the

basis of religion and belief, namely that the provision, criterion or practice of requiring bus drivers to work 5 days a week, including Fridays and Saturdays, placed the Claimant at an unjustified disadvantage.

Although the Employment Appeal Tribunal accepted the Respondent was trying to maintain a harmonious workforce, and that their requirement could have a negative impact upon the Claimant, it was not certain whether there was a negative impact upon the wider workforce. The case has been remitted to the Employment Tribunal to consider the justification for the Respondent to impose a potentially discriminatory rule.

Businesses should be mindful of any policies, procedures or practices they operate within the organisation, especially if it potentially has a negative impact upon certain groups of employees, such as those with religious beliefs. This is why carrying out Equal Monitoring Surveys is a useful means of overseeing the makeup of your workforce, and checking whether any of your requirements could be considered as having an indirect discriminatory impact across your organisation.

Disability discrimination arising from mistaken belief

In iForce v Wood, the Claimant was a disabled person suffering from osteoarthritis. When the Respondent asked the Claimant to move to a cooler and damper area, the Claimant declined due to the perception that the area at the new workstation would exacerbate her disability. The Respondent refuted the Claimant's explanation, stating that the temperature and humidity levels were not materially different. As a result of the Claimant's refusal to obey the Respondent's instructions, the Claimant was subsequently issued with a written warning.

The Claimant argued that the written warning amounted to unfavourable treatment arising from a disability, but this was rejected by the Employment Appeal Tribunal. The Employment Judge held that the claim of unfavourable treatment arising from a disability is an objective test, namely that there must be a connection between the incident, namely the written warning, and the disability, i.e. did the Respondent issue the Claimant with a written warning because of their disability? It was held that the Claimant was mistaken in her belief that the move would exacerbate her disability and was therefore unable to provide an adequate reason why the Respondent's treatment was unfavourable, especially given that the Respondent could show objectively that their request was not unfavourable.

Discrimination arising from a disability occurs when A treats B unfavourably because of something arising in consequence of B's disability. This case serves as a useful example to highlight that mistaken perceptions between the alleged unfavourable treatment and the "something" will not be sufficient, as an actual causal link must be established by the Claimant.

Vento bands for discrimination claims increased

In discrimination claims, Claimants are able to claim non-financial losses for injury to feelings. Although the Equality Act 2010 does not provide any guidance as to how injury to feelings are calculated, the leading case of Vento has provided a clear set of guidelines with three bands of potential awards:

1. Lower band: less serious cases where the discrimination is an isolated or one-off occurrence.
2. Middle band: serious cases which do not merit an award in the top band.
3. Top band: the most serious cases where there has been a lengthy campaign of discrimination.

The Vento bands were initially set in 2002 and since 2017 have been adjusted on an annual basis to take into account inflation. Following a recent announcement by the Presidents of the Employment Tribunals (England & Wales) and (Scotland), the new Vento bands are as follows:

1. Lower band: £900-£8,800
2. Middle band: £8,800-£26,300
3. Upper band: £26,300-£44,000.

As discrimination rights apply to individuals from the recruitment process onwards, it is imperative your organisation regularly reviews its working practices, policies and procedures to ensure that you are following best practice and acting within the law. Whilst many forms of discrimination are easy to identify, the effect of modern day working means it is increasingly difficult to identify indirect discrimination claims such as holiday entitlements, dress codes, working hours and staff benefits.

Minimum wage for on call workers

A number of businesses rely upon their employees to be on call, and the recent case of Frudd v Partington Group considered whether workers are entitled to the minimum wage if they are on call.

Mr and Mrs Frudd were the receptionist team at a caravan park. Two to three days a week, they were required to be on call when their shifts finished, typically between 4.30pm-8pm, until approximately 7am-8am in the morning. They were paid when they were called out during the night, but were not paid for simply being on call. The issue arose because Mr and Mrs Frudd were regularly working until 10pm during the high season.

The Employment Judge held that the time spent between the conclusion of Mr and Mrs Frudd's shift (approximately 4.30pm-8pm) until 10pm was "work time" and therefore Mr and Mrs Frudd were both entitled to be paid at least the minimum wage. However, from 10pm onwards, apart from occasions when they were called out, they were not working and therefore not entitled to be paid the minimum wage.

This case highlights the difficulties businesses face when assessing whether or not on call workers are working for the purposes of the minimum wage. A similar case about sleep in shifts is the Mencap case which also highlighted this issue. Minimum wage cases are fact sensitive and therefore employers should review their pay arrangements where they require their employees to be on call to ensure there is no breach of minimum wage legislation.

Employment Workshops at mfg Solicitors

Our Employment Workshops take place at our Kidderminster office at Adam House, Birmingham Road, Kidderminster, DY10 2SH from 9am until 12pm when a light lunch will be served, and are £15 per person.

The dates and topics of our upcoming Employment Workshops are as follows:

- 20th June – The Welfare of your Workforce
- 26th September – Disciplinary Management in Practice
- 21st November – Protecting your Business

To register, please email our Marketing Manager at ellizabeth.armstrong@mfgsolicitors.com.

Contact mfg Solicitors

The Employment team at mfg Solicitors are specialists with a significant amount of experience assisting clients with their employment and HR issues, ensuring that the advice to businesses is commercial, practical and relevant to their individual requirements.

If you have any employment or HR issue, please do not hesitate to contact Sally Morris on 01905 610410 or at sally.morris@mfgsolicitors.com.