

Employment Update

Update

January 2010

Employment Law

What to look out for in 2010

Even though there are only a few months until the General Election, there are still important employment law changes in the pipeline. An outline of the changes is set out below:

1. A new Equality Act expected to get Royal Assent
2. A new ACAS Code of Practice on Time Off for Trade Union Duties and Activities, which came into force on 1st January 2010
3. New Regulations prohibiting blacklisting of workers, expected to come into force between February and April 2010
4. New Regulations giving Employment Tribunals the power to pass on whistleblower allegations to the relevant authority, which are expected to apply from April 2010
5. Consultation on the default retirement age is due to come to an end on 1st February 2010
6. Immigration rules for those coming to work in the UK will be tightened from April 2010
7. A new right to request time off work for training, for employees that work for businesses with more than 250 employees, expected to come into force in April 2010
8. 'Fit notes' are due to replace sick notes in April 2010
9. The Normal Minimum Pension Age to increase from 50 to 55 from April 2010

It is also worth noting that new rights for fathers to take advantage of up to 26 weeks additional paternity leave

'transferred from the mother', will *not* be exercised in 2010. Although the legislation will come into force in April 2010, the change will only impact upon parents of babies due from 3rd April 2011.

Case law

Employees elected to office in the union can have two employers

In *The Prison Officers Association v Gough* UKEAT/0405/09/DA the Employment Appeals Tribunal (EAT) ruled that:

1. it is entirely possible to be an office holder and be an employee. Normal contractual principles needed to be applied to the role; and
2. an individual can have two employers provided the contracts of employment are compatible with each other. In this case, the claimant was an employee of both the Prison Service and the Prison Officers Association (POA).

The Facts

A prison officer, Mr Gough, had been elected to the positions of National Executive Officer and then National Vice Chairman of the POA while maintaining his job as a prison officer. His union role took up about 15% of his time. At a Pre-Hearing Review of claims brought by Mr Gough against the POA, it was ordered that he was indeed an employee of the POA. The POA appealed to the EAT against that decision.

A second claimant, Mr Cox, was treated in exactly the same way as Mr Gough, and hence the EAT judgment merely refers to the facts of Mr Gough's case.

Decision

In dismissing the appeal, the Tribunal attacked two possible arguments that Mr Gough was not an employee of the POA.

Firstly, the EAT ruled that an office holder could be an employee, applying the factors listed in *102 Social Club v Bickerton [1977] I.C.R. 911* to this particular case.

In essence, this involved the application of normal contractual principles. It was noted in this case, for example, that payment was fixed in advance, was due as of right to the claimant, was not insubstantial (about £14,000) and was paid in return for services rendered. This could be compared to a situation in which a 'bounty' is paid *after* the event, or where work is carried out voluntarily and only expenses are paid.

It was also persuasive that the claimant's work was subject to 'control and orders' of the POA, and that the 'extent and weight of the duties was considerable'.

Secondly, the EAT applied *Viasystem v Thermal Transfer [2005] IRLR 983*, and stated that it was possible to have two employers as long as the two contracts of employment were compatible with each other. The EAT rejected claims from Counsel for the POA that the compatibility issue had not been addressed in front of the original hearing. Moreover, they stressed that the focus in this case had to be whether the claimant could effectively fulfil their contracts with the POA. The Prison Service were not a potential defendant, and therefore any issues they may have had with the encroachment of POA duties into the claimant's role as a prison officer were irrelevant.

Two ECJ rulings on age discrimination show importance of case by case approach

Article 4 justification and maximum recruitment ages

In *Wolf v Stadt Frankfurt am Main (C-229/08)* the European Court of Justice (ECJ) held that a maximum recruitment age of 30 for intermediate career posts in the fire service was not contrary to the EU Equal Treatment Framework Directive (No. 2000/78) (the Directive).

Ignoring numerous questions posed by the German national court about Article 6 of the Directive, the ECJ

decided that the difference in treatment of people of different ages could be justified under Article 4(1). The following four stage test had been satisfied:

1. there was a legitimate aim;
2. there was a genuine and determining occupational requirement;
3. this requirement was linked to the characteristic discriminated against (i.e. age here); and
4. the less favourable treatment was proportionate to the legitimate aim.

However, the ECJ based its reasoning at every stage on the precise facts of the case. It observed that preserving the capacity of emergency services 'to carry out their range of functions' was mentioned within the preamble to the Directive (Stage 1); it described the tasks of the fire service (Stage 2); it quoted scientific data about at what age the more physically demanding tasks could not be performed (Stage 3); and it made statements about the proportion of officials above this age that could be sustained within the service (Stage 4).

Therefore, if any of the facts had been different, the outcome may have been different. Even a different emergency service, or a different age limit within the fire service, could have led to one or more of the tests not being satisfied. This case is certainly not a green light for the widespread use of maximum recruitment ages.

Article 6 justification and upper age limits

In *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe (C-341/08)* it was ruled that a maximum age of 68 for dentists in the German national health service 'to protect the health of patients against the decline in performance of those dentists after that age' was precluded by the Directive, but that it *could* have been justified under Article 6(1) had it also applied to private dentists.

Article 6 allows discrimination which is 'objectively and reasonably justified by a legitimate aim. If the means of achieving that aim are appropriate and justified'.

In this case, the ECJ concluded that the 'legitimate aim' of protecting public health, could be achieved either through ensuring the quality of medical professionals or, indirectly, through maintaining the 'financial balance' of the health service. Alternatively, a desire to share out employment opportunities between the generations could be a legitimate aim.

However, the case turned on whether exceptions to the maximum age undermined the case that there was an 'appropriate and justified' regime. The ECJ considered that any attempt to achieve a legitimate aim must be 'consistent and systematic'. Yet exceptions existed in this case for dentists covering shortages, those that had not accrued twenty years experience, and, lastly, for private dentists.

The use of older dentists to cover shortages was perhaps unsurprisingly seen as consistent with any of the aims discussed. More controversially, however, the same was said of allowing dentists to accrue twenty years service. This seems illogical in cases where the aim is to maintain the quality of medical professionals, but the ECJ noted that this exception was temporary, and only affected a small number of dentists (and therefore patients).

However, the final exception for private dentists was considered to be contrary to the aim of protecting patients from incompetent practitioners. To satisfy the Directive, therefore, such a policy would need to be framed in terms of an aim to maintain financial balance in the national health service or to share out employment opportunities at a time of surplus supply.

Petersen leaves some awkward ambiguities. The ECJ merely accepted an assumption that dentists' performance declines with age, and that 68 was an appropriate upper age. Therefore, the case is of little assistance to those wanting guidance as to what might be an acceptable age limit, or as to what method might be used to derive an appropriate limit in each case. Similarly, in ruling that the *scope* of exceptions might be crucial, it leaves us guessing as to where the line may be drawn. *Petersen* also demonstrates that many cases may be won or lost on unpredictable decisions made by national courts regarding the aim of discriminatory measures.

Risk Assessments for pregnant employees only need to be carried out in certain circumstances

In *O'Neill v Buckinghamshire County Council* UKEAT/0020/09/JOJ the EAT ruled that there must be some sort of risk to a pregnant employee for a requirement for a formal risk assessment to arise. It is therefore not the case, as one might assume, that the purpose of the risk assessment is to identify if there is any potential risk to the employee.

The Facts

The claimant, Ms L O'Neill, was employed at a junior

school. Several members of staff at the school, including the head, found Ms O'Neill hard to work with, and concerns were raised about her professionalism. An investigation commenced as part of disciplinary proceedings, during which Ms O'Neill informed the school that she was pregnant. A disciplinary hearing was subsequently postponed in the light of her pregnancy, sickness and maternity leave. On returning to work Ms O'Neill resigned before this hearing could be held. She then made a claim for constructive dismissal and sex discrimination to the Employment Tribunal. Her claim was dismissed, but she appealed to the EAT.

The Decision

Firstly, the EAT concluded that there was nothing in section 3A of the Sex Discrimination Act 1975 (SDA) which could be construed as positive discrimination towards pregnant employees. It was unsuccessfully argued before the tribunal that disciplinary proceedings against Ms O'Neill should have been abandoned once it was realised she was pregnant.

Secondly, the EAT endorsed a three stage test, put forward by Counsel for the respondent, to decide when a risk assessment should be undertaken for a pregnant employee.

1. Did the employee notify the employer in writing that she is pregnant?
2. Was the work of a kind which could involve a risk of harm or danger to the health and safety of a new expectant mother or that of her baby?
3. Did the risk arise from either processes or working conditions or physical biological chemical agents in the workplace at the time specified?

All of these questions need to be answered in the affirmative, and in this case the EAT concluded that Ms O'Neill had failed to identify a risk from her work as a teacher. The general 'stress' of the job was seen as insufficient to make her case, and the EAT decided that a disciplinary procedure could not be counted as a 'process' or a 'working condition' under stage 3.

Comment

Having found that there was no obligation on the employer to carry out a risk assessment, other questions raised by the claimant became irrelevant to deciding the outcome of this case. The EAT did, however, go on to make some additional observations. While caution should be exercised in putting too much weight to overly sparse

analysis, some of these comments were nevertheless interesting.

The EAT, for example, tentatively suggested that there was nothing within the relevant regulations to demand that there be a meeting with the employee regarding a pregnancy risk assessment.

It was also cautiously suggested that for sex discrimination to result from a failure to carry out such a risk assessment, there is no need for there to be a detriment to the employee. The test for sex discrimination in these circumstances would therefore be: that there is an obligation to carry out a risk assessment and that there was a failure to carry out the risk assessment.

Employment News

UNISON report increase in workplace bullying

The public sector trade union, UNISON, commissioned Portsmouth University to carry out a survey into workplace bullying in 2009, which concluded that bullying at work has more than doubled in the last ten years and that more than one-third of workers have said that they have been bullied in the last six months.

While trends in levels of bullying are notoriously difficult to measure, the recession may well have changed the dynamic between employees and managers in many work places. Employers need to be aware that, where managers are having difficulty in dealing with greater pressure at work, or are insufficiently trained, their interactions with staff can be perceived as bullying.

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If you would like further information please contact:



Charles Pallot

T: +44 (0)1392 333906
F: +44 (0)1392 336906
c.pallot@ashfords.co.uk



Rhian Lewis

T: +44 (0)1752 526014
F: +44 (0)1752 526214
r.lewis@ashfords.co.uk



Michelle Fox

T: +44 (0)1823 232305
F: +44 (0)1823 232505
m.fox@ashfords.co.uk



Chloe Ricciardi

T: +44 (0)117 3218058
F: +44 (0)117 3218008
c.ricciardi@ashfords.co.uk