

# Employment Club Update

February 2010



## Recent Cases On Age Discrimination

The European Court of Justice ("ECJ") has held that a German law which disregarded periods of service before the age of 25 when calculating service related notice periods was discriminatory on grounds of age.

An employee started her employment in 1996 when she was 18 and was dismissed in 2006. As a result of the law, only three years of her employment was counted when calculating her notice period. The ECJ had no difficulty in establishing that younger workers were thereby treated less favourably. However, it then went on to consider whether such treatment was objectively justifiable.

The justification put forward was that younger workers had a greater degree of personal and occupational mobility and limiting their rights to notice pay allowed employers 'greater flexibility in personnel management'. However, the law was not a proportionate means of achieving a legitimate aim as it applied to all employees recruited before the age of 25 regardless of their age at the date that they left the organisation.

In a separate case, the ECJ held that a German law fixing a maximum age of 30 when recruiting fire-fighters was lawful. It was a legitimate aim of the law to ensure a sufficient number of fire-fighters were fit and able to perform their duties before their retirement from such duties at age 50.

## Contractor Not An Employee

An independent contractor who was engaged to provide services to a Company via an agency was not an employee as he had twice refused a request by the Company for him to become an employee.

The Employment Appeal Tribunal found that "...the would-be employee has at all times asserted the opposite, with his eyes wide open and articulately understanding the advantages to be gained from remaining as an independent contractor."

This ruling will provide some comfort to employers who are unsure of the status of their staff. However, such cases always turn on their facts and great care must be exercised by employers.

## New 'Whistleblowing' Law

For some years now employees have been able to complain to an Employment Tribunal if they have been treated less favourably by their employer as a result of making a 'protected disclosure' which exposes unlawful, dangerous or fraudulent behaviour.

The Government now proposes to alter the Tribunal claim form so that if an employee consents, any such claim about an employers activities can be brought directly to the attention of the relevant enforcement authority.

The changes apply to claims arising after 5th April 2010. Employers should be wary as employees may use such claims as leverage in negotiating higher settlements.

## Pregnancy Risk Assessments

The EAT has held that there is no legal duty to carry out a health and safety risk assessment for a pregnant worker unless three conditions are satisfied:-

- 1 The employee has notified the employer in writing of her pregnancy
- 2 The work is of a kind that might involve the risk of harm to the mother or the unborn baby
- 3 The risk arises from processes, work conditions or physical, chemical or biological agents

If an assessment is not then carried out, a discrimination claim is a real risk.

## Disability—Meaning of Long Term

In Disability Discrimination claims an 'impairment' must last or be likely to last for at least 1 year. However, what if an employee suffers from two separate impairments which individually last for less than 1 year but collectively last longer?

The EAT has held that, provided the second condition (in this case leg pain) resulted from the first (back pain), then the requisite 1 year period is established for the purposes of bringing a claim.

## Right To A Fair Trial Ruling

A teaching assistant who was dismissed for allegedly kissing a 15 year old pupil has successfully challenged the decision of the school governors to dismiss and report the employee to the Independent Safeguarding Authority because he was denied legal representation at his disciplinary hearing.

Legal representation was appropriate at the hearing and any appeal as any decision would fundamentally limit the employee's ability to practice his profession.

*These notes are for guidance purposes only. We believe the contents to be correct but it should not be taken as sufficiently accurate or full to apply in any specific situation without first referring to us. We would be pleased to advise on any specific issues or problems.*

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