

July 2011

Employment **Update**

In this month's Update we summarise three new case decisions and bring you up-to-date on recent news

Any comments or queries?

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Case law

When does the duty to make reasonable adjustments apply?

Ms Wilcox was employed by Birmingham CAB Services Ltd. CAB requested that she relocate to a different branch, and Ms Wilcox refused. Unknown to CAB, the reason was that Ms Wilcox could not use public transport as it made her feel anxious. [More](#)

The meaning of “*ex gratia*” in a termination letter

Ms O'Farrell, an employee of Publicis Consultants UK Ltd, was dismissed on less than her three month contractual notice period. [More](#)

Duty to consider a request to work beyond retirement

Mr Ayodele was employed by Compass Group. He was informed by his employer that it intended to retire him at 65. [More](#)

Equal pay: Was the preservation of terms under TUPE a genuine material factor?

The claimants, two female employees of Skills Development Scotland (SDS), compared their pay with a male colleague, Mr Sweeney. [More](#)

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Case law

When does the duty to make reasonable adjustments apply?

Ms Wilcox was employed by Birmingham CAB Services Ltd. CAB requested that she relocate to a different branch, and Ms Wilcox refused. Unknown to CAB, the reason was that Ms Wilcox could not use public transport as it made her feel anxious. In response CAB commenced an attendance management procedure.

Initially Ms Wilcox did not inform CAB of her travel anxiety and delayed CAB's attempts to obtain a medical report. There was some evidence available to CAB that Ms Wilcox suffered from travel anxiety. Eventually, Ms Wilcox resigned and issued proceedings for disability discrimination on the grounds that CAB had not considered making a reasonable adjustment to her working arrangements.

The EAT agreed that Ms Wilcox's claim should be dismissed. CAB did not know and could not reasonably have been expected to know that Ms Wilcox suffered from a disability. In these circumstances, CAB was not obliged to consider reasonable adjustments.

Comment

This case is fact-specific. However, it is clear that employees who fail to provide their employers with relevant information, or delay their employer from obtaining adequate medical advice, may find the Tribunal unsympathetic when they later attempt to bring disability discrimination claims.

Wilcox v Birmingham CAB Services Ltd
UKEAT/0293/10

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The meaning of “*ex gratia*” in a termination letter

Ms O'Farrell, an employee of Publicis Consultants UK Ltd, was dismissed on less than her three month contractual notice period. As part of her severance package, Ms O'Farrell received an “*ex gratia*” payment. The payment was described in the termination letter as being “*equivalent to three months' salary*”.

As her contract did not include a right to pay in lieu of notice, Ms O'Farrell issued a claim for breach of contract.

The EAT agreed with the Tribunal's decision and held that the payment was truly “*ex gratia*”; it could not be considered a payment that the employer was obliged to make under a contractual term. The employer was therefore obliged to make the additional payment.

payment is a “*gift*”, as the tribunals and courts are unlikely to be sympathetic to employers and more likely to give employees the benefit of the doubt.

Publicis Consultants UK Ltd v O'Farrell
UKEAT/0430/10

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Comment

This case provides a useful reminder to employers that care must be taken when drafting termination letters.

The term “*ex gratia*” should only be used when the

Duty to consider a request to work beyond retirement

Mr Ayodele was employed by Compass Group. He was informed by his employer that it intended to retire him at 65. Compass advised Mr Ayodele that he could request to work beyond the age of 65, which he did. Mr Ayodele's request was refused without reasons, as was his appeal. Having been dismissed on reaching 65, Mr Ayodele brought a claim for unfair dismissal and age discrimination.

The Tribunal held that the claimant had been dismissed by reason of retirement and that the dismissal had been unfair. Compass appealed to the EAT.

The EAT agreed that Mr Ayodele had been unfairly dismissed and upheld the decision of the Tribunal. The duty on the employer to "consider" a request to work beyond retirement should be considered in good faith by the employer exercising that duty.

simply follow meaningless formalities, as employers must approach such requests with genuine consideration and in good faith. Often it is advisable not to have a set retirement age.

Ayodele v Compass Group UKEAT/0484/10

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Comment

This decision serves as a useful reminder to employers that although they are entitled to have a retirement policy, a degree of flexibility is required. It is not enough to

Equal pay: Was the preservation of terms under TUPE a genuine material factor?

The claimants, two female employees of Skills Development Scotland (SDS), compared their pay with a male colleague, Mr Sweeney. Mr Sweeney was paid over £12k more than they were, despite performing a similar type of work.

The claimants and Mr Sweeney had transferred under TUPE to Scottish Enterprise (SE) in 2002 and then to SDS in 2008. Prior to the 2002 transfer, Mr Sweeney had negotiated certain pay guarantees, which lasted until April 2004. His salary was then to be reviewed annually.

In 2004, SE introduced a Performance Related Pay (PRP) scheme. Employees who appeared to be overpaid would not receive annual raises or bonuses. This condition was not applied to Mr Sweeney.

After the 2008 transfer, SDS carried out a job evaluation exercise to address pay discrepancies. The exercise highlighted that the roles performed by the claimants and Mr Sweeney were of equal value. SDS argued that Mr Sweeney's terms were protected under TUPE by the 2002 transfer. It contended that the reason for the pay disparity was the genuine material factor (GMF), not tainted by the sex of the employees.

The Tribunal agreed with this position for the period up to April 2004. However, it rejected SDS's defence for the later period. SDS appealed.

The EAT upheld SDS's appeal, deciding that SDS had established a GMF and dismissed the claimants' equal pay claims.

Comment

This case highlights that a GMF defence to an equal pay claim can be established through the preservation of a comparator's terms under TUPE. Also, the passing of time will not mean that such a defence will disappear. That said, the burden remains on the employer to prove that TUPE remains the reason for the disparity.

Skills Development Scotland Co Ltd v Buchanan
UKEAT/0042/10

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News update

Changes in employment law in the second half of 2011

The eagerly awaited Agency Worker Regulations come into force on 1 October 2011. These Regulations significantly improve the rights of agency workers. Click [here](#) to read a summary of the Regulations.

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Bribery Act 2010 in force

On 1 July 2011 the Bribery Act 2010 came into force. This Act significantly strengthens anti-corruption laws in the UK. All commercial organisations need to ensure that they implement an effective anti-corruption programme, so that they (and potentially senior individuals within such organisations) do not incur liability under the Act.

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