CHILTERN HR

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NEWSLETTER

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1. Indirect discrimination can be claimed by person not possessing a protected characteristic

The European Court of Justice has held that an indirect discrimination claim can be brought by a person not possessing a protected characteristic.

In this case a non-Roma individual ran a shop in a district in Bulgaria which is predominantly populated by Roma. The electricity supplier to the district installed electricity meters over 4 metres higher than those installed in other districts. The reason for the difference was that there had been a large number of cases of tampering with electricity meters and a frequent occurrence of unlawful connections to the electricity network in Roma districts. The height of the meter prevented her from reading it and assessing how much electricity she was using and she alleged that her electricity bills were excessive compared to her actual consumption and suspected that the electricity supplier had applied an excessively high consumption value to compensate for losses elsewhere in the district.

What does this mean?

Contrary to the UK position as reflected in section 19 of the Equality Act 2010 the concept of associative discrimination can no longer be regarded as confined to direct discrimination law as European law takes precedence.

A person may, therefore, claim indirect discrimination even though they do not possess the protected characteristic which has given rise to the discriminatory practice in question if they are suffering alongside a disadvantaged group.

What should employers do?

Employers should be alert to the possibility of inadvertently discriminating against staff who suffer a disadvantage alongside a group who suffer a disadvantage as a result of them having a protected characteristic.

2. Proving indirect discrimination

The Court of Appeal has given guidance on proving indirect discrimination in a case where statistics suggested that a group of employees, who were from black and minority ethnic (BME) backgrounds and over the age of 35, had suffered a disadvantage because the statistics showed that they were less likely than younger non-BME to pass a generic test which was required in order to be promoted to senior positions.

What does this mean?

The Court of Appeal said that the employees needed to be able to show why the provision, criterion or practice had disadvantaged the group and why it had disadvantaged the individual employees because even if it was established that a disadvantage existed in relation to the group as a whole this did not mean that it followed that a particular employee failing the test was the result of them being an older BME employee because whilst it might have been, it could also have been for unrelated reasons.

If neither the employees nor the employer was able to explain precisely why the race and/or age groups to which the employees belonged were disadvantaged in the way suggested by the statistics, it would in principle be open to the employees to rely on the statistics as evidence supporting the assertion that each employee was personally disadvantaged by the provision, criterion or practice in the same way as was the group as a whole. The employees would need to argue that the statistics proved facts from which, in the absence of any other explanation, the tribunal could decide that (subject to objective justification) their claim for indirect discrimination was made out. If they were able to do this the burden of proof would then shift to the employer who could then challenge individual claims. The Court of Appeal gave by way of an example of a challenge a scenario where an employee had failed the test because they had arrived significantly late and had not completed the questions.

What should employers do?

Employers should be alert to the possibility of inadvertently discriminating against groups of staff when creating and implementing policies.

3. Fit for Work service national roll-out completed

The Fit for Work service is now available in all of England and Wales.

The free service offers assistance to employees who have been absent from work for more than 4 weeks due to illness. This includes a telephone based health assessment followed by a personalised return to work plan.

Employers are able to participate with the employee's permission and from the autumn employers will be able to refer employees to the service (at present only GPs can).

More information on the service can be found here http://fitforwork.org/.

4. Sickness and holidays

The Employment Appeal Tribunal has held that sick workers do not need to demonstrate an inability to take annual leave in order to benefit from carry over.

What does this mean?

Workers on sick leave are not required to show that they are physically unable to take annual leave because of their medical condition in order to carry over accrued unused statutory holiday to a subsequent leave year. It is sufficient that they are absent on sick leave and do not choose to take annual leave during that period.

However, the right to carry over leave is not unlimited. The Working Time Directive only requires (at most) that workers on sick leave can take annual leave within a period of 18 months of the end of the leave year in which it accrues.

What should employers do?

Employers should allow workers who are absent due to long term sickness to carry forward annual leave for 18 months of the end of the leave year in which it accrues.

5. Hot weather guidance

Acas has published new guidance to help employers manage workplace challenges due to the hot weather. It advises employers to:

- Ensure that workplace temperatures inside buildings during working hours are 'reasonable';
- Switch on any air conditioning and use any blinds or curtains to block out sunlight;
- Ensure that staff who work outside are wearing appropriate clothing and use sun screen to protect from sunburn;
- Provide suitable drinking water in the workplace;
- Consider relaxing dress codes or uniform requirements, for example by relaxing rules for wearing ties or suits;
- Consider making adjustments for Muslim staff who fast each day from sunrise to sunset during Ramadan, for example by holding meetings in the mornings when energy levels are higher or by considering a temporary change in working hours;
- Consider making adjustments for vulnerable workers such as young and elderly workers, pregnant workers and those on medication, for example by giving them more frequent rest breaks and by ensuring that ventilation is adequate by providing fans, or portable air cooling units;
- Encourage staff who travel to work by train to check with local train operators whether any speed restrictions are in place or any cancellations are expected so that they can plan their journeys to work accordingly.

6. Handling pay and wages

Acas has published new guidance on handling pay and wages aimed at small firms and line or team managers in larger organisations.

It includes guidance on the basics, on choosing a pay system, paying new staff, wage slips, deductions and overpayments, pay during absences from work and pay when an employee's employment ends.

7. Dismissal was unfair

The Court of Appeal has held that a senior employee who had 34 years' unblemished service before being summarily dismissed for gross misconduct, having committed a serious breach of health and safety policy was unfairly dismissed because no reasonable employer would have dismissed him in the circumstances.

He had entered a sewer with a contractor to carry out an inspection without using breathing equipment.

What does this mean?

The 'band of reasonable responses' is not infinitely wide. When deciding whether an employer had acted reasonably or unreasonably in deciding to dismiss a tribunal should make its decision 'in accordance with equity and the substantial merits of the case'. It should not be a matter of procedural box-ticking

There is no special rule about assessing the reasonableness of a dismissal on conduct grounds where the alleged misconduct involves a breach of health and safety requirements.

The dismissal was unfair because the employee had not been trained in the significance of a relatively new safe system of work form, the employee had previously exercised his discretion whether to use breathing apparatus and his earlier decisions had not resulted in disciplinary action as his employer had been prepared to rely on his skill, knowledge and experience. It was also unfair by comparison with the disciplinary treatment of another employee involved in the same incident, who had been in overall charge and who was only given a written warning and required to undertake an improvement plan.

What should employers do?

Employers should always take specific legal advice before disciplining an employee.

8. Compulsory retirement was lawful

The Employment Appeal Tribunal has held that the compulsory retirement of police officers aged 48 or over with at least 30 years' service (pursuant to a power under the Police Pensions Regulations 1987) following budget cuts was lawful.

What does this mean?

The compulsory retirement of the police officers could be objectively justified as it was a proportionate means of achieving the legitimate aim of achieving 'efficiency' and was therefore not indirectly discriminatory on age grounds.

What should employers do?

Employers should always take specific legal advice before making forced retirements.