TAYLOR WALTON SOLICITORS

NeTWork

June 2016

Employment Law Update

This month we talk about:

- Referendum result - UK to leave the EU
- Ill health dismissals and the ACAS Code
- Prohibition on headscarf in the workplace
- Does an employee have to be forced to do something for it to be a provision, criterion or practice?

Referendum result - UK to leave the EU

On 24 June 2016, the EU referendum result was announced with a majority of voters deciding that the UK should leave the EU. Once the government notifies the European Council that the UK has decided to leave the EU, the two-year period for the negotiation for exit under Article 50 of the Treaty of the European Union can start.

Until the details of the UK's exit have been determined, the direct legal implications for UK businesses are unclear. Once there is more clarity on the impact of "Brexit", Taylor Walton will provide you with coverage on the likely implications on employment law for employers in the UK.

Ill health dismissals and the ACAS Code

Holmes v QinetiQ

In this case, for the first time the Employment Appeal Tribunal (EAT) has addressed the question of whether or not the employment tribunal's power to increase or decrease an award of compensation by up to 25% for failure to comply with the requirements of the ACAS Code of Practice on Discipline and Grievances (the ACAS Code) extends to dismissals on grounds of ill health.

The Claimant was dismissed on grounds of ill health on the basis that he was no longer capable of performing his job. He brought claims for disability discrimination and unfair dismissal.

The employer conceded that the dismissal was unfair because of a failure to obtain an up to date occupational health report prior to dismissal. The Claimant contended that the ACAS Code applied and that he was entitled to an increase in compensation of 25%.

The Employment Tribunal ruled that the ACAS Code only applies to dismissals involving culpability and that no increase should be made.

The EAT agreed with the employment tribunal that the ACAS Code did not apply. The EAT held that the ACAS Code applies to all cases where an employee's alleged act or omissions involve culpable conduct or performance on their part that requires correction or punishment. Whilst this would include misconduct and poor performance, the EAT stated that it was difficult to see how ill health dismissals fell into this category.

Whilst this case confirms that employers are not obliged to follow the provision of the ACAS Code in cases where an employee is dismissed for ill health, employers should bear in mind that the ACAS Code sets out standards of best practice which may be applicable in such cases and that employers are still required to act reasonably in such cases. Employers should also be alert to the fact that the position would be different where the ill health leads to a disciplinary issue such as a failure to comply with sickness absence procedures. The ACAS Code would apply to any related disciplinary process.

Prohibition on headscarf in the workplace

Achbita v G4S Secure Solution NV (G4S)

The Advocate General has given an Opinion that a Belgium company's dress code banning employees from wearing visible religious, political or philosophical symbols in the workplace, which was used to prevent a Muslim employee from wearing a headscarf, did not amount to direct discrimination.

Ms Achbita began working for G4S in 2003. Ms Achbita is a Muslim. In April 2006, she began to wear a headscarf at work despite a company rule which prohibited the wearing of any visible signs of political, philosophical or religious beliefs.

Ms Achbita was dismissed for breach of the rule and brought a claim for discrimination based on religion and belief in the Belgian Courts. The Belgian Labour Court held that there had been no discrimination. During an appeal of that decision, the Belgian Supreme Court stayed the proceedings and referred a preliminary question to the ECJ, asking whether the headscarf ban amounted to direct discrimination in circumstances where a dress code prohibited all employees from wearing outward signals of political, philosophical and religious beliefs at work.

Advocate General Kokott gave her opinion that such a ban does not constitute direct discrimination based on religion if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace.

However, such a ban may amount to indirect discrimination. The Advocate General thought that such discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer provided that the employer acted proportionately. In that connection, the Advocate General noted that the following factors should be taken into account:

- the size and conspicuousness of the religious symbol;
- the nature of the employee's activity;
- the context in which the employee has to perform that activity; and
- the national identity of the Member State concerned.

Many commentators have been surprised by the comments of the Advocate General in this case. In particular, the Advocate General does not take account of the fact that some religions place more emphasis than others on visible symbols and a great deal of importance has been placed on the concept of "neutrality". We will keep you updated with developments relating to this case in future editions of NeTWork.

Does an employee have to be forced to do something for it to be a provision, criterion or practice?

Carreras v United First Partners Research

In this case the EAT has held that an expectation for a disabled employee to work long hours amounted to a provision, criterion or practice for the purposes of a disability discrimination claim based on a failure to make reasonable adjustments.

Mr Carreras was employed as an analyst for a brokerage firm, United First Partnership Research (United), from October 2011 to 14 February 2014. In July 2012, Mr Carreras suffered a serious bike accident and had to take several weeks off work. When he returned to work, he continued to be affected by physical symptoms from the accident namely dizziness, fatigue, headaches and difficulty with concentrating. As a result he had difficulty working late in the evenings. Prior to the accident, Mr Carreras had regularly worked long hours, typically from 9am until 9pm.

In the first six months after his return, Mr Carreras worked no more than eight hours a day. Thereafter, until the end of 2013, Mr Carreras tended to work from 8am to 7pm. From October 2013, he came under pressure to work later. Initially, requests were made for him to work later, which progressed to an assumption that he would do so. Mr Carreras felt that he might be made redundant or lose his bonus if he did not work late.

On 14 February 2014, Mr Carreras sent an email to one of the owners of the business, Mr Mardel, objecting to working late in the evenings due to tiredness. In a verbal exchange later that day, Mr Mardel told Mr Carreras in a raised voice that if he did not like it he could leave. Mr Carreras left the office and subsequently resigned.

Mr Carreras brought unsuccessful claims in the employment tribunal for unfair constructive dismissal and disability discrimination alleging that United had failed to make reasonable adjustments in relation to the requirement to work long hours.

In relation to the disability discrimination claim, an employment tribunal accepted that Mr Carreras was disabled but found that United had not failed to make reasonable adjustments since the PCP pleaded by Mr Carreras, a requirement to work long hours, had not been made out. The employment tribunal noted that an expectation to work long hours is not the same as a "requirement".

Mr Carreras appealed to the EAT.

The EAT upheld Mr Carreras' appeal. The EAT stated that the employment tribunal had adopted a too narrow approach to the PCP. The EAT noted that the employment tribunal has scrutinised the degree of compulsion to work late rather than looking, more

broadly, at the reality of the situation. The reality of the situation was that Mr Carreras felt obliged to work late as his employer had requested and then expected him to do so. Although a simple request cannot be a provision, criterion or practice, the employer in this case had done more than request that the Claimant work late. There had been an expectation and an assumption that he would do so. This amounted to a PCP.

As no findings were made about the nature and extent of the disadvantage, or whether any adjustments would have been reasonable, the case was remitted to the same employment tribunal.

This case is a useful reminder that many workplace arrangements are capable of amounting to a PCP. Where a disabled employee complains about any particular arrangements, proper consideration should be given as to whether the duty to make reasonable adjustments is triggered.

If you have any questions about these or other employment issues please call:
Heather Cowley (Partner & Head of Employment Law Department) on 01582 731161.
Alternatively you can contact Heather via email at heather.cowley@taylorwalton.co.uk