TAYLOR WALTON SOLICITORS

NeTWork

May 2018

Employment Law Update

This month we talk about:

- Court of Appeal considers whether expectation to work long hours is a "provision criterion or practice"
- Pay Statements
- Part-time workers
- Employer not required to revoke lawful decision to dismiss following notifi cation of pregnancy
- Government Equalities Office publishes new guidance on dress codes

Court of Appeal considers whether expectation to work long hours is a "provision criterion or practice"

United First Partners Research V Carreras

An employer is obliged to make reasonable adjustments in respect of a disabled employee where a disabled person is placed at a substantial disadvantage by their employer's provision, criterion or practice (PCP).

In this case, the Court of Appeal considered whether a requirement to work long hours has to involve actual coercion in order to amount to a provision, criterion or practice.

The Claimant was employed by a brokerage firm and worked long hours. He was injured in a bicycle accident and reduced his hours. After a period of time, the Claimant claimed that he felt under pressure to increase his hours. The Claimant asserted that it was made clear to him by his employer that he was expected to work long hours due to repeated requests to work longer hours. The Claimant asserted that he felt pressure to agree to work longer hours.

In the Court's view placing pressure on an employee to work longer hours was consistent with there being a "requirement" to work long hours and such a requirement was capable of amounting to a PCP.

Employers should be alert to the fact that the definition of what is capable of amounting to a PCP is widely interpreted by the employment tribunals and ensure that employees who are disabled for employment law purposes are treated appropriately.

Taylor Walton LLP will be running a series of workshops focusing on discrimination throughout June and July 2018. To book a place, please contact events@taylorwalton.co.uk.

Pay Statements

The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No.2) Order 2018 has been made.

The Order will amend sections 8, 9, 11 and 12 of the Employment Rights Act to provide all workers with a right to an itemised pay statement and to enforce that right at an employment tribunal. The Order will bring into force the government's commitment to ensure employers provide itemised payslips to all workers, not just employees.

The Order will come into force on 6 April 2019 and will not apply to wages or salary paid in respect of a period of work before this date.

Part- time workers

Roddis V Sheffield Hallam University

In order to establish less favourable treatment under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTW Regulations), a part-time worker must identify an appropriate full-

time worker as a comparator. The comparator must be employed by the same employer, employed under the same type of contract, engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience and working or based at the same establishment as the part-time worker. Unlike claims under discrimination legislation, which allows claimants to base a claim on how the employer would have treated a hypothetical comparator, claimants under the PTW Regulations must point to an actual full-time comparator in the same employment engaged on the same or broadly similar work.

In this case, the Claimant, an associate lecturer employed under a zero hours contract, brought a claim under the PTW Regulations comparing himself with a full-time lecturer working under a permanent contract.

A employment tribunal stuck out the claim on the basis that the Claimant was not "employed under the same type of contract" as the proposed comparator for the purposes of the PTW Regulations because he worked under a zero hours contract. The Claimant appealed.

The Employment Appeals Tribunal disagreed with the employment tribunal. The EAT considered that a contract is not of a different type just because the terms and conditions it lays down are different. If a part-time worker's hours were seen as a distinctive feature of dissimilarity compared to that of a full-time worker, it would defeat the purpose of the legislation.

This case highlights the need for employers to consider differences in terms and conditions of staff carrying out similar roles to avoid breaching the legislation which protects part time workers.

Employer not required to revoke lawful decision to dismiss following notification of pregnancy

Really Easy Car Credit Ltd v Thompson

An employee's dismissal will be automatically unfair if the reason, or principal reason, for the dismissal is connected to her pregnancy. The dismissal will also amount to discrimination.

In this case the Employment Appeal Tribunal (EAT) considered how the legislation relating to pregnancy operates in practice.

In this case, Miss Thompson was a telesales operator for the Respondent company whose business was the sale of second hand cars. On 3 August 2016, the company decided to dismiss Miss Thompson because of her emotional volatility and because she did not fit in with their work ethic. Miss Thompson was still within her probationary period. The company did not immediately inform Miss Thompson and the next day she told them she was pregnant. On 5 August 2016 Miss Thompson was handed a dismissal letter, dated 3 August. She claimed that it had been falsely backdated and that the decision to dismiss had not been taken until after she told the company about her pregnancy.

Miss Thompson brought claims in the employment tribunal for automatic unfair dismissal and discrimination.

The tribunal held that the decision to dismiss had been taken on 3 August and that although the decision was unrelated to Miss Thompson's pregnancy, once the company became aware of her pregnancy it must have been obvious that her emotional volatility and other conduct was pregnancy-related. The tribunal stated that the company had failed to establish that the dismissal of Miss Thompson was in no sense whatsoever related to Miss Thompson's pregnancy. Miss Thompson's claims succeeded.

The Company appealed to the EAT. The EAT allowed the appeal. The EAT identified that the matters that should have been considered by the employment tribunal were as follows:

• Whether Miss Thompson's pregnancy itself had been the reason or principal reason for her dismissal (for the unfair dismissal claim); and

• Whether the decision to dismiss had been because of her pregnancy (for the discrimination claim).

Both matters required the company to know, or believe, that Miss Thompson was pregnant when it took the relevant decision on 3 August.

On the tribunal's findings of fact, the company made the relevant decision on 3 August 2016 and that decision was untainted by any knowledge or belief in Miss Thompson's pregnancy. The tribunal appeared instead to have found the company liable by omission and to have considered that it should have taken positive steps to revisit its decision after it learnt of Miss Thompson's pregnancy. No such obligation arose under the relevant legislation. The EAT also noted that it was not at all certain that it would be reasonable to assume that an emotional outburst must be related to pregnancy.

The EAT remitted the case to a differently constituted tribunal to expressly determine what (if anything) occurred between 3 August when the company took the decision to dismiss and 5 August when Miss Thompson was notified of her dismissal and, consequently, whether the dismissal was because of Miss Thompson's pregnancy and whether that was the reason, or principal reason, as at 5 August.

This case is a helpful example of how the legislation relating to pregnancy operates.

Taylor Walton LLP will be running a series of workshops focusing on discrimination throughout June and July 2018. To book a place, please contact events@taylorwalton.co.uk.

Government Equalities Office publishes new guidance on dress codes

On 17 May 2018, the GEO published new guidance, Dress codes and sex discrimination: what you need to know.

The guidance sets out advice for employers on their legal responsibilities when setting a workplace dress code policy and advice to employees on what to do if they believe that their employer's policy infringes their rights. It also contains examples of policy requirements that might be discriminatory and those which would be acceptable and a section answering commonly asked questions.

Although the title suggests it is confined to sex discrimination, the guidance makes fleeting reference to other issues that might arise in relation to dress codes, including religious symbols, transgender issues, health and safety, and the need to make reasonable adjustments for disabled employees.

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