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Employment Law Update

This month we talk about:

- Sex discrimination - *Ali v Capita Customer Management Ltd and Hextall v Chief Constable of Leicestershire Police*
- The Pregnancy and Maternity (Redundancy Protection) Bill 2017-19
- *Base Childrenswear Ltd v Otshudi* - injury to feelings awards and harassment
- *Owen v AMEC Foster Wheeler Energy Ltd and another* – disability discrimination

Sex discrimination - *Ali v Capita Customer Management Ltd and Hextall v Chief Constable of Leicestershire Police*

In this case, the Court of Appeal considered whether it was direct or indirect sex discrimination, or a breach of the equal pay sex equality clause, for two employers to fail to pay two male employee enhanced shared parental pay.

Facts

Mr Ali - Mr Ali was entitled to two weeks' paternity leave at full pay and then up to 26 weeks' additional leave for which he would receive statutory Shared Parental Pay (ShPP). His female colleagues were entitled to maternity pay comprising 14 weeks' full pay followed by 25 weeks' Statutory Maternity Pay (SMP.)

An employment tribunal held that Mr Ali had been directly discriminated against on the ground of his sex, but dismissed his indirect sex discrimination claim.

The EAT upheld Capita's appeal. It held that there was no direct discrimination because the purpose of Shared Parental Leave (SPL) is different to maternity leave. The primary purpose of maternity leave under the Pregnant Workers Directive is the health and wellbeing of the pregnant and birth mother, and it requires member states to provide a minimum of 14 weeks' maternity leave paid at least at the same level as statutory sick pay. This has been recognised as absolute right of women who have given birth. In contrast, the Parental Leave Directive focuses on the care of the child and makes no provision for pay.

A father taking SPL was therefore not in a comparable situation to a mother taking maternity leave. The correct comparator would be a woman on SPL, who would have been given SPL and ShPP on the same terms as Mr Ali.

Mr Hextall

Mr Hextall took 14 weeks of SPL and was paid statutory ShPP. His employer, the Leicestershire Police, had a policy allowing for 18 weeks of maternity leave at full pay.

An employment tribunal dismissed Mr Hextall's claims that he had been directly and indirectly discriminated against on the ground of sex.

On appeal, the EAT held that the tribunal had made a number of errors in relation to the indirect discrimination claim (the direct discrimination decision was not appealed) and remitted it back to a fresh employment tribunal. The tribunal had failed to clearly identify the "particular disadvantage" to which men were put. Unless the comparative disadvantage was identified with precision, the tribunal could not reach a conclusion on whether men seeking leave to care for a newborn child were put at a particular disadvantage compared with women in similar circumstances.

The tribunal had erred by holding that the provision

criterion or practice (PCP) of paying only the statutory rate for those taking SPL did not put men at a particular disadvantage, on the basis that men and women on SPL were entitled to payment of the same amount. It is of the nature of apparently neutral criteria that they apply to everyone, both the advantaged and disadvantaged groups. It is therefore no answer in an indirect discrimination claim to say that the rule applies equally to men and women.

Grounds of appeal - Mr Ali and Mr Hextall both appealed to the Court of Appeal. The Police cross appealed on the basis that the EAT had incorrectly characterised the claim as an indirect discrimination claim, rather than a breach of Mr Hextall's terms of work as modified by the sex equality clause.

Decision - The Court of Appeal dismissed Mr Ali and Mr Hextall's appeals and allowed the Police's cross appeal.

Mr Ali - The correct comparator in Mr Ali's direct discrimination claim was not a female employee who wished to leave work to look after her child but a female worker who is on SPL. That comparator would be paid the same as Mr Ali and therefore his direct discrimination claim failed because he was not treated less favourably than the comparator.

The court held that Mr Ali could not compare himself with a woman on maternity leave because the purpose of statutory maternity leave after the compulsory two-week period was not intended for the facilitation of childcare. The purpose of statutory maternity leave was:

- To prepare for and cope with the later stages of pregnancy.
- To recuperate from the pregnancy.
- To recuperate from the effects of childbirth.
- To develop the special relationship between the mother and the newborn child.
- To breastfeed the newborn child.
- To care for the newborn child.

Nothing in EU legislation contradicted the purpose expressed in the Pregnant Workers Directive that maternity leave of at least 14 weeks before and/or after confinement was given for the safety and health of pregnant workers and workers who had recently given birth or were breastfeeding.

Furthermore, EU decisions on the promotion of shared parental leave had not qualified the need, and the reasons, for the minimum 14-week maternity leave period specified in the pregnant Workers Directive.

Further, the court could not see any principle of statutory interpretation that would confer on UK SPL legislation the intention or effect of making the facilitation of childcare the predominant purpose of statutory maternity leave in weeks 3 to 14 after childbirth. The court considered that there are numerous important differences between SPL and statutory maternity leave. Statutory maternity leave was in part compulsory, could begin before birth and was an immediate entitlement even where there was no child to look after. SPL was entirely optional, could only be taken after birth and with a partner's agreement, was dependent on the mother choosing to give up statutory maternity leave and did require there to be a child to look after.

The court concluded that SPL does not alter the predominant purpose of statutory maternity leave. The predominant purpose of such leave was not childcare but other matters exclusive to the birth mother resulting from pregnancy and childbirth and not shared by the husband or partner.

Mr Hextall - The court held that the tribunal and the EAT had erred in holding that Mr Hextall's claim was not an equal terms claim. His claim was in effect that his comparator's more favourable terms of work regarding her entitlement to take time off to care for her new baby were included in his terms of work by operation of the sex equality clause in section 66 of the Equality Act 2010. He relied on that term to claim that he had not received his contractual entitlement to pay over the period when he was absent from work to care for his new baby and that he had consequently suffered a reduction in pay.

If Mr Hextall's claim had been properly characterised as falling within section 66, it could not succeed because of an exclusion which prevented him from relying on the sex equality clause where his comparator's more favourable terms related to special treatment afforded to her in connection with pregnancy or childbirth.

Although not necessary to the outcome of the appeal, the court nevertheless considered whether Mr Hextall's indirect discrimination claim could have succeeded and held that it could not. The tribunal had correctly found that it was not the provision, criterion or practice (PCP) of paying only the statutory rate of pay for those taking a period of SPL that caused a particular disadvantage to men when compared with women. Mr Hextall's true case was that men in his position were disadvantaged not by the PCP but by the fact that only a birth mother was entitled to statutory and contractual maternity pay.

Further, the correct pool of individuals for comparison purposes must be populated by persons whose circumstances are the same as, or not materially different from, the claimant. The court held that women on maternity leave are materially different from men or women taking SPL for all the reasons set out above in relation to Mr Ali's case and should therefore be excluded from the pool.

Once that was done it was clear that the PCP caused no particular disadvantage to Mr Hextall, and so the issue of justification simply did not arise.

In any event, any disadvantage to Mr Hextall would have been justified as being a proportionate means of achieving the legitimate aim of the special treatment of mothers in connection with pregnancy or childbirth.

Comment

This decision will be welcomed by employers with enhanced maternity pay policies who have been grappling with this issue since the introduction of SPL. The employees have appealed the decision and therefore this issue may not yet be completely settled.

The Pregnancy and Maternity (Redundancy Protection) Bill 2017-19

On 20 May 2019, Maria Miller MP, the Chair of the Women and Equalities Committee, introduced a 10-minute Rule Bill in the House of Commons to protect pregnant women and new mothers from redundancy. The Pregnancy and Maternity (Redundancy Protection) Bill 2017-19 seeks to prohibit making employees redundant during pregnancy, maternity leave and for six months after the end of maternity leave, except where the employer ceases to carry on business where the pregnant woman or new mother is employed.

This follows the Women and Equalities Select Committee response, published on 1 May 2019, to the BEIS consultation on proposals to extend redundancy protection for new mothers from the date they notify their employer in writing of their pregnancy to six months after their return from maternity leave. Miller's bill goes further than the government's proposals to enhance redundancy protection for pregnant women and new mothers, which are currently subject to consultation. The government proposals are based on extending the scope of the existing protection under the Maternity and Parental Leave etc. Regulations 1999. They do not include a total prohibition on redundancy. Miller's proposed bill, which is said to have cross-party support, is inspired by the German model where employers are unable to make a new or expectant mother redundant unless they have the permission of a specific public authority (this is only given in exceptional circumstances).

The bill would extend to women who experience a stillbirth or miscarriage by protecting them for up to six months from the end of their pregnancy or any leave to which they were entitled.

Base Childrenswear Ltd v Otshudi - injury to feelings awards and harassment

In this case, the EAT considered whether the tribunal had been correct to make an award in the middle of the middle Vento band in respect of a claimant's injury to feelings caused by a one-off act of racial harassment.

Miss Otshudi worked for Base Childrenswear Ltd (Base) for three months before she was called into a meeting without notice and summarily dismissed. Base claimed this was on the ground of redundancy. Miss Otshudi believed it was because of her race. Following her dismissal, Miss Otshudi submitted a grievance and appeal against her dismissal to Base. Base did not respond to the grievance or the appeal.

Miss Otshudi brought a claim of racial harassment in the employment tribunal. Shortly before the hearing, Base changed its case to allege that Miss Otshudi was dismissed because of suspected theft, although these allegations had never been raised with her.

The tribunal held that Miss Otshudi's dismissal was an act of racial harassment. At a subsequent remedies hearing the tribunal awarded Miss Otshudi:

- £16,000 for injury to feelings, the tribunal considering that the extent of her injury to feelings fell within the middle of the middle Vento band.
- £5,000 aggravated damages in respect of Base's post-dismissal conduct, including its failure to respond to Miss Otshudi's grievance, its conduct during the tribunal proceedings (initially maintaining its position that she was dismissed for redundancy, its failure to respond to disclosure requests and its late alteration of its response to allege Miss Otshudi was dismissed for suspected theft) and its failure to apologise to her.
- £3,000 for personal injury in respect of the depression Miss Otshudi suffered for three months after her dismissal.
- An uplift of 25% due to Base's failure to follow the Acas Code in respect of Miss Otshudi's grievance or her dismissal.

Base appealed on the grounds that the tribunal had placed the injury to feelings award in the wrong Vento band and no account had been taken of the overlap between awards for non-pecuniary losses. The appeal also stated that the tribunal had taken into account irrelevant matters and that the awards were excessive.

The EAT upheld the appeal in respect of the aggravated damages award only.

In relation to the injury to feelings award, the fact that the tribunal had made a finding in respect of only one act of harassment did not mean that it was required to assess the award for injury to feelings to fall within the lowest Vento bracket . Whether the discrimination was a one-off act or a course of conduct was a relevant factor for the tribunal to take into account, but it was not determinative. The tribunal had correctly focused on the effect the discriminatory act had had on the particular claimant. On the tribunal's findings of fact in this case, it had permissibly concluded that this was a serious matter that gave rise to an injury to feelings award falling within the middle of the middle Vento band.

With regard to the total award, the tribunal had stood back and considered the total award and decided that given the facts of the case the award was not manifestly excessive. The EAT agreed with its reasoning and considered the overall award was not excessive on the particular facts of the case.

This case is a reminder that when assessing injury to feelings, the tribunal should focus on the effect the discrimination has had on the claimant. A one-off act can potentially be more serious or have the same effect as a course of conduct. The case also illustrates the risks of a failure to follow the Acas Code when summarily dismissing an employee, even where they have only been employed for a few months and have no unfair dismissal rights.

Owen v AMEC Foster Wheeler Energy Ltd and another – disability discrimination

In this case, the Court of Appeal considered whether an employer's decision to withdraw the offer of an overseas posting on medical grounds, for an employee with multiple disabilities, amounted to disability discrimination.

Mr Owen has double below-knee amputations and type 2 diabetes. He also suffers from hypertension, kidney disease, ischaemic heart disease and morbid obesity. When working as a chemical engineer for Amec Foster Wheeler Energy Ltd (AFWE) in Reading, Mr Owen was offered a 12-month posting to Sharjah in the United Arab Emirates (UAE). He had been requested by AFWE's client to take up this assignment as a member of the project management team, which related to a large hydrocarbon gas processing facility in Saudi Arabia.

Prior to the posting, Mr Owen was required to undergo a medical assessment with an external occupational health provider. In preparation for this, Mr Owen completed a medical questionnaire in which he confirmed some, but not all, of his medical conditions (for example, he did not disclose his amputations or his kidney problems). The doctor carrying out the assessment raised concerns about whether Mr Owen's disabilities rendered him unfit for the overseas assignment. Although the demands of the job were comparable to Mr Owen's existing role in the UK, the doctor thought there was a high risk of Mr Owen needing medical attention during his time overseas, largely because of his medical history, poor control of his diabetes and blood pressure, and the fact that he had already had a heart attack.

Mr Shaughnessy, AFWE's Operations Director, subsequently informed Mr Owen that he would not be allowed to take up the posting. Mr Shaughnessy based his decision on the medical concerns, stressing that it would not be in Mr Owen's interests or consistent with AFWE's duty of care to send him to the UAE. While he was aware that this decision could be detrimental to the business, he considered that the company's duty of care to Mr Owen should be prioritised.

Employment tribunal and EAT decision - After pursuing an internal grievance, which was dismissed, Mr Owen brought employment tribunal claims alleging direct and indirect disability discrimination and a failure to make reasonable adjustments. An employment tribunal unanimously rejected the direct discrimination claim. It found that an employee without Mr Owen's disabilities who had been identified as high risk in a medical assessment would not have been treated any differently. The medical assessment provided a complete non-discriminatory reason for the decision not to assign Mr Owen to the UAE.

In relation to indirect discrimination, it was accepted that the requirement to pass a medical examination to a certain level before being sent on international assignment was a provision, criterion or practice (PCP) that could result in a particular disadvantage in consequence of Mr Owen's disabilities. However, a majority of the tribunal found that the PCP was a proportionate means of achieving the legitimate aim of ensuring that those who go on an overseas assignment are fit to do so, that health risks are properly managed, and that individuals are not subject to health risks as a result of the assignment. There were no other proportionate ways of achieving that aim without undertaking a medical assessment, and that assessment had been reasonably and fairly undertaken in the instant case.

It was also accepted that the same PCP gave rise to the duty to make reasonable adjustments. However, the same majority of the tribunal held that, since a medical assessment was necessary, there was no reasonable adjustment that could have been made to avoid the substantial disadvantage at which that assessment placed Mr Owen.

The EAT rejected Mr Owen's appeal against the tribunal's decision. The EAT upheld the tribunal's findings in relation to direct discrimination, indirect discrimination and reasonable adjustments.

Mr Owen appealed to the Court of Appeal.

Grounds of appeal - Mr Owen argued that the tribunal had erred in its approach to the hypothetical comparator and that the reason AFWE did not post him to the UAE (that is, the outcome of the medical assessment) was indissociable from his disabilities. He submitted that whatever the benign motive of the employer may have been, there was an inherent link between the reason why it acted as it did, and his disabilities; in effect he argued that AFWE's reasons were a proxy for his disabilities.

Mr Owen also challenged the tribunal's findings on reasonable adjustments and indirect discrimination.

Decision - The Court of Appeal dismissed the appeal.

Direct discrimination - The court observed that the concept of disability is not a binary one, and that it is not the case that a person's health is always entirely irrelevant to his or her ability to do a job. For those reasons it thought that the concept of indissociability, which has been applied to other protected characteristics such as race or sex, does not readily translate to the context of disability discrimination.

Reasonable adjustments - The court held that there was no error of law in the tribunal's approach to reasonable adjustments, and that it could not be criticised for its finding that Mr Shaughnessy's reliance on medical advice was reasonable. It also held that, in reaching its conclusion that the requirement to pass a medical assessment to a certain level before being posted overseas was objectively justified, the tribunal had been entitled to rely on independent medical evidence from Dr Patterson, an occupational health doctor employed by AFWE but who had not been involved in the medical assessment, as to the general medical risk in the UAE.

Indirect discrimination - In relation to indirect discrimination, the issue was whether AFWE had shown that there was a legitimate aim, and that the PCP was a proportionate means of achieving that aim. The tribunal's approach was lawful and its conclusions sound. There had been concern in the tribunal proceedings that the medical evidence did not address why the assignment to the UAE would pose a higher risk to the employee than that which he already faced daily in the UK. However, that gap had been filled to some extent by the evidence of Dr Patterson, explaining why the particular medical facilities in the UAE and the high temperatures there might increase the risks. The tribunal had not referred to this evidence in its decision on indirect discrimination, but had clearly been aware of it.

A person in Mr Owen's position may have a better chance of success bringing their claim under section 15 of the Equality Act 2010 concerning discrimination arising from disability,, where neither a comparator nor a PCP is required. However, discrimination arising from disability is subject to the same objective justification test as that which applies to indirect discrimination; that is, whether the treatment is a proportionate means of achieving a legitimate aim. Since the tribunal had found objective justification to be established, a section 15 claim would therefore have been likely to fail in this case.

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

The information given in this update was, at the time of publication, believed to be a correct statement of the law. However, readers should seek specific legal advice on matters arising, and no responsibility can be accepted for action taken solely in reliance upon such information.