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Employment Brief

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Airline wrong to refuse new working arrangements for breastfeeding employees

The employment tribunal has held that two EasyJet cabin crew were the victims of indirect discrimination after EasyJet refused to allow them to work a maximum of eight hours per day, so that they could continue breastfeeding.

Facts

The employees, Sara Ambacher and Cynthia McFarlane, who were cabin crew for EasyJet, separately made requests for their working hours to be subject to a maximum of eight hours per day, so that they were able to express milk for their babies. EasyJet policies meant that the employees were not permitted to express milk during a flight. Therefore, on the recommendation of their GPs, they requested that EasyJet arrange shifts so that they would work no more than eight hours per day, allowing them to express milk either side of their shifts. If the employees went any longer before expressing milk, there was a concern that they could develop mastitis. EasyJet were informed of the medical risks of not allowing the changed working pattern by both employees' GPs.

EasyJet refused to accommodate the employees' requests. Following a number of grievances, EasyJet agreed that the employees could perform ground duties, but their working hours could not be reduced.

The Tribunal's decision

In considering the employees' claims, the Tribunal had to assess whether the policies that *crew members fly to the flying patterns they are rostered; there is no restriction of the length of the day that a crew or staff member can complete; and crew members may be required to work more than eight hours continuously*, put women and these specific employees at a particular disadvantage. The Tribunal held that the employees were placed at a disadvantage because they were not able to secure the restriction on their working hours, enabling them to continue breastfeeding.

EasyJet tried to justify the indirect discrimination by suggesting, amongst other things, that the refusal was in order to avoid flight delays; in order to avoid individual rostering arrangements; and compliance with legal and regulatory requirements. The Tribunal did not accept that the refusal was a proportionate means of achieving these aims and considered that EasyJet had failed to demonstrate that the business needs were sufficient in order to justify the refusal.

The Tribunal also held that EasyJet had breached the Employment Rights Act 1996 by failing to carry out health and safety risk assessments and establishing that the employees should have been suspended on full pay.

What it means for your business

The implications of this case clearly go beyond the airline industry, and open up the opportunity for many working mothers who are still breastfeeding to get their employers to consider more flexible working that accommodates their requirements. It also clearly highlights the need for employers to carefully assess the needs of breastfeeding employees when considering flexible working requests, particularly the requirement to carry out an adequate risk assessment. It is important to note, however, that as this case has only been heard in the Employment Tribunal it is not binding on other courts and could be subject to an appeal, although there is no suggestion that EasyJet intend to do so.

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Discrimination arising from disability: employee's treatment must be justified

In *Buchanan v The Commissioner of Police of the Metropolis*, the Employment Appeal tribunal (EAT) has provided further guidance on whether, in a disability discrimination claim, the application of a long-term sickness absence procedure had to be objectively justified.

Facts

Mr Buchanan, a serving police officer, had a serious motorbike accident when responding to an emergency. As a result, he developed serious post-traumatic stress disorder and was disabled for the purposes of the Equality Act 2010.

After Mr Buchanan had been absent from work for eight months, he became subject to the Unsatisfactory Performance Procedure (UPP), derived from the Police (Performance) Regulations 2012. Whilst the UPP contained no express provision relating to disability, there were points in the process where allowances or adjustments could be made for disability.

Mr Buchanan reached stage two of the process. He was issued with return to work compliance notices, despite his employer being fully aware from medical advice that he would be unable to comply with the dates given.

Mr Buchanan alleged that his employer's decision to instigate and continue with the informal management action process and UPP process amounted to discrimination arising from a disability which could not be objectively justified.

The employer argued that the UPP was a proportionate means of achieving various legitimate aims, and the tribunal should therefore regard the treatment that had flowed from it as justified.

Under the Equality Act, treatment of an individual will not be indirectly discriminatory if it is objectively justified. To be justified, it must correspond to a legitimate business aim and be an appropriate and reasonably necessary way of meeting that aim.

Tribunal decision

The Tribunal held that it was the procedure generally, rather than the procedure's application to Mr Buchanan, which had to be justified and found for the employer. It was not, the Tribunal held, necessary to justify the specific actions taken under the procedure.

Mr Buchanan appealed to the Employment Appeal Tribunal (EAT).

The EAT decision

The EAT overturned the Tribunal's decision. The UPP contained various steps which needed decisions by managers, for example decisions as to if and when to move to the next stage of the procedure. It was those decisions and actions of the employer that constituted the "treatment" which had to be justified for the purposes of the Equality Act. Consequently, it was the application of the UPP to Mr Buchanan that needed to be justified and not the procedure itself.

What does this mean for employers?

Where an absence management procedure or policy gives an employer a degree of discretion as to the action to be taken, it is the application of the procedure to the individual circumstances that will need to be objectively justified and not the procedure generally. It is therefore important for those who are responsible for implementing the policy/procedure to receive training on the Equality Act and how to apply it in practice.

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Can a tribunal set aside a settlement agreement where a person does not have mental capacity to enter it?

In *Glasgow City Council v Dahhan*, the Employment Appeal Tribunal (EAT) held that it had jurisdiction to set aside a settlement agreement because the claimant had lacked the mental capacity to enter into it.

Facts

The case involved Mr Dahhan, who was employed by Glasgow City Council as a teacher. He brought claims against the Council for direct discrimination, harassment and victimisation on the grounds of race.

The parties subsequently entered into a settlement agreement and Mr Dahhan gave up all claims arising from his employment with the Council, with the exception of personal injury claims that were not apparent at the time of signing the agreement, and pension claims. The Tribunal was informed that Mr Dahhan wished to withdraw his claims which were dismissed under the Tribunal Procedure Rules.

Mr Dahhan subsequently asked the Tribunal to reconsider the dismissal of his claims stating that he had lacked capacity to make decisions at the time of entering into the settlement agreement and that he was not capable of instructing his solicitor.

A preliminary hearing was held in the Employment Tribunal. The Employment Judge held that the Tribunal did have jurisdiction to set aside the settlement agreement on the ground that it was invalid because Mr Dahhan did not have the capacity to enter into the agreement at the time it was entered into.

The Council appealed.

The EAT decision

The EAT dismissed the appeal. It rejected the Council's argument that a distinction should be drawn between invalidity on the ground of absence of consent (for example, as a result of misrepresentation, economic duress or mistake), and invalidity on the ground of lack of capacity to contract.

The EAT noted that section 203 of the Employment Rights Act 1996 and sections 144 and 147 of the Equality Act 2010, which govern the enforceability of settlement agreements, require a settlement agreement to be valid in both form and substance if a Tribunal is to be prevented from hearing a claim settled by it. Where it is claimed that one party had no capacity to contract, the Tribunal is under an obligation to examine that issue. If evidence establishes a lack of capacity, the tribunal cannot find the agreement to be enforceable.

What does this mean for businesses?

Previous cases have considered whether settlement agreements should be set aside because of errors or misrepresentation. This is the first case that has been decided based on capacity to contract.

Settlement agreements that are entered into by employees that lack mental capacity can fail in their entirety. This means that, potentially, all claims initially thought to be covered by the settlement agreement could in fact be brought against an employer subject to jurisdiction arguments in individual cases. Employers dealing with employees who might not have capacity will want clear medical evidence that the employee is able to enter into the agreement. The outcome of validity and mental capacity cases will be fact sensitive and vary in each case.

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Does protection from disclosure apply to just the content of settlement negotiations or the fact that negotiations have taken place?

The concept of "pre-termination negotiations" or "protected conversations" was introduced by the Enterprise and Regulatory Reform Act 2013. Section 111A Employment Rights Act 1996 (ERA 1996) allows employers and employees to have confidential discussions regarding ending of the employment relationship, even where there has been no previous dispute.

Those discussions will then be inadmissible as evidence in any subsequent Tribunal proceedings for unfair dismissal (with the exception of automatically unfair dismissal claims).

In *Faithorn Farrell Timms LLP V Bailey*, the Employment Appeal Tribunal (EAT) considered whether section 111A covers not just the details of offers made, but also the fact that pre-termination discussions have taken place.

Facts

Faithorn Farrell Timms LLP (FFT) employed Mrs Bailey as a secretary from 16 March 2009 until she resigned in February 2015. Mrs Bailey had worked part-time but towards the end of 2014, FFT made it clear that this would not be an option going forward. Mrs Bailey therefore initiated settlement discussions on 10 December 2014.

By 7 January 2015, the parties were in dispute and, on that date, Mrs Bailey's solicitor wrote a "without prejudice – subject to contract" letter. The letter mainly set out Mrs Bailey's position and then included an offer at the end.

Correspondence was sent by FFT which was not marked without prejudice. Similarly, it set out its position, with only passing reference to the settlement discussions.

Mrs Bailey's solicitor wrote again to FFT on a without prejudice basis.

Mrs Bailey subsequently raised an internal grievance and made it clear that she was openly relying on matters set out in her solicitor's letters that were marked without prejudice. FFT did not suggest that Mrs Bailey was wrong to refer to the without prejudice correspondence on an open basis. It also referred to the correspondence in its grievance report.

Mrs Bailey brought a tribunal claim for constructive and unfair dismissal and sex discrimination. In her particulars she referred to initiating settlement discussions. FFT denied the claims although it did not at the time object to her open references to the various documents. Further, it did not suggest that the documents were the subject of without prejudice privilege or otherwise inadmissible.

The question of admissibility was raised at the Employment Tribunal hearing. The Tribunal found that documents were not rendered wholly inadmissible either by common law "without prejudice" rules or by section 111A. On section 111A, the Tribunal gave the view that the exclusion from evidence only covers the details of any settlement offer made or discussion held and not the simple fact of there having been such of offers or discussions.

FFT appealed and Mrs Bailey cross appealed to the Employment Appeal Tribunal (EAT).

The EAT held that section 111A covers not just the offers made, but the fact that pre-termination discussions have taken place. The EAT went further and held that section 111A must also extend to an employer's internal discussions, for example between different managers and Human Resources.

The EAT also had to consider whether privilege under section 111A, like without prejudice privilege, can be waived. The EAT held that it cannot.

What this means for businesses

The case provides helpful clarification on the scope of section 111A and its interaction with the common law without prejudice rule. Businesses should be clear in their decision making process when approaching a potential settlement. Employers need to consider what the risks are and which rules might apply to what is said.

There can be complicated scenarios when negotiations could be covered by both the without prejudice rule and section 111A. In the context of section 111A, a tribunal can consider evidence in relation to a discrimination claim, but then disregard it in relation to unfair dismissal arising from the same facts. This will obviously give rise to practical problems for tribunals to ensure that they are not influenced by the evidence they have heard.

Therefore, section 111A should be relied on only in relation to unfair dismissal claims. Where there are potential discrimination issues, and a dispute has arisen, then the common law without prejudice rule should be used.

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Does the client need to be the same for there to be a service provision change under TUPE?

In *CT Plus (Yorkshire) CIC v Black and others*, the Employment Appeal Tribunal (EAT) considered whether an employment tribunal was correct to find there was no service provision change, for the purposes of regulation 3(1)(b)(ii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), on the basis that a new contractor was providing a service for its own commercial purposes and not on behalf of the Council.

Facts

CT Plus Ltd (CT) held a subsidised contract with the Council to operate the park-and-ride bus service to the city centre. However, it was open to another bus operator to decide to run a commercial service on the same route subject to giving notification to the relevant Government agency. If so, the subsidy would cease, although the operator of the subsidised service could choose to continue to operate the service without subsidy if it considered it to be viable.

In July 2013, Stagecoach gave notice to VOSA that it wanted to operate the route commercially and the Council gave notice to CT to terminate the subsidised contract. In September 2013, Stagecoach began to operate the route commercially, and CT stopped its service at the same time.

Stagecoach provided its own buses; it took over nothing directly from CT and also recruited its own team of drivers. It declined to take on CT's drivers, saying that there was no transfer under any of the provisions of TUPE. CT disagreed and brought a tribunal claim.

The decision

The case was concerned with the service provision change (SPC) provisions contained within TUPE and in particular the question whether activities were carried out "on a client's behalf".

CT's case was that Stagecoach was a subsequent contractor carrying out the same activities "on the client's behalf", the Council being the client. The employment tribunal rejected this argument, holding that Stagecoach was not carrying out the activities on the Council's behalf, but as a commercial venture on its own behalf. In the Employment Judge's view, although both Stagecoach and the Council derived benefit from a successful service, Stagecoach was operating the service in its own commercial interests - the Council was no more than an interested bystander.

This reasoning was upheld by the Employment Appeal Tribunal.

What is the significance of this case?

This case highlights that for there to be a service provision change under TUPE, the client, on behalf of which the services are carried out, must be the same before and after the transfer of the activities. If the client does not remain the same after the service provision change, then there will not be a service provision change under TUPE.

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Forthcoming changes: are you ready?

Apprenticeship Levy

The Apprenticeship Levy will affect employers in all sectors but will only be paid from April 2017 on annual pay bills in excess of £3m; apparently less than 2% of UK employers will pay it. The purpose of the levy is to help deliver new apprenticeships and HMRC have now published draft regulations covering the calculation and payment of the levy.

Further draft regulations are expected relating to assessment, repayment, recovery from third parties and records. The draft regulations also set out the information to be provided to HMRC, including the requirement to notify HMRC in the first month of the tax year of the allocation of the £15,000 annual allowance between different payroll references of the same or connected companies or charities.

A consultation on the draft regulations closed on 14 November 2016 but it is clear that *employers with an annual pay bill (the amount on which secondary Class 1 NICs are payable, but including salary amounts falling below the secondary threshold and chargeable at zero per cent)* over £28 million in 2016/17 need to "engage" with the Apprenticeship Levy unless they believe their total pay bill for 2017/2018 will be less than £3 million.

Employers should be reviewing their own pay bill now to see if they will be required to comply, in which case they will need to start considering how they can meet their obligations whilst awaiting the final regulations.

Public Sector Exit Payments

The consultation on reforms to public sector exit payments has now closed and the government intends to proceed with its plans to:

- set a maximum tariff for calculating exit payments at 3 weeks' pay per year's service;
- introduce a cap of up to 15 months' salary on all redundancy payments;
- set a maximum salary for the calculation of exit payments. As a starting point, the government will expect this to align with the existing NHS Scheme salary limit of £80,000;
- taper the amount of lump sum compensation an individual is entitled to receive as they get close to the normal pension or target retirement age of the pension schemes to which they belong, or could belong, in that employment;
- reduce the cost of employer-funded pension top-up payments, such as limiting the amount of employer-funded top-ups for early retirement, or removing access to them and/or increasing the minimum age at which an employee is able to receive an employer-funded pension top-up.

This consultation is separate from two other recent initiatives to curb spending in public sector exit payments (neither of which are yet in force):

- The imposition of a cap of £95,000 on the total aggregate value of most public sector exit payments. Draft regulations have been published but not yet been laid before Parliament.
- The power to require high earning employees leaving the public sector to repay some or all of their exit payments if they return to public sector employment within 12 months of their departure. Again, draft regulations have been published but not yet laid before Parliament. The government has indicated that these reforms could achieve savings of up to £250 million a year, and bring public sector exit terms in line with those commonly available in the private sector.

Gender pay gap reporting – final version of the regulations expected shortly

The draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 (GPRR) will apply to private and voluntary sector employers in England, Wales and Scotland with 250 or more employees (but it is expected that they will be extended to public sector employers).

Under the proposals, large employers will be required to publish their overall mean and median gender pay gaps (GPG). In addition, the GPRR will require employers to divide their pay distribution into four bands and work out the number of men and women in each quartile. The draft regulations set out a specific annual date of 30 April for employers to take the snapshot of what employees are being paid, beginning in 2017 (though it is anticipated that this will be brought forward to 5 April 2017).

Employers would also have to publish the difference between their mean (and possibly median) bonus payments paid to men and women, and the proportion of male and female employees that receive bonus pay. Bonus information will be worked out over a 12 month period, rather than taken from snapshots.

Employers must publish their GPG information on their website (and retain online for three years), accompanied by a written statement confirming that the information is accurate. They can report their gender pay figures with a narrative by way of further explanation, although this will not be a legal requirement. Employers will then be expected to publish their gender pay gap on an annual basis. They must also upload the information to a government-sponsored website, and league tables showing how well companies are tackling their GPG may result.

In terms of non-compliance, at present, there are no enforcement provisions or sanctions proposed. However, the government has indicated that it will run periodic checks and possibly "name and shame" employers who have not complied, and ultimately sanctions may be introduced. Negative publicity may act as a sufficient deterrent to non-compliance.

- In the event of a significant GPG (greater than the national average which is currently 19.8%), employers will need to consider adopting an action plan to take steps to improve their recruitment, pay, promotion, flexible working and family friendly practices.
- Employers are rightly concerned that this will raise awareness of pay gaps, and possibly lead to an increase in equal pay litigation, which is now affecting the private sector far more than previously, as evidenced by the mass claims being brought by workers of Asda Stores. Employers need to be proactive in collecting and analysing their data, prior to the commencement date to identify whether a gap is likely to exist, and allow time for a considered strategy to be prepared.

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In the know: global mobility employment contracts

As Britain has decided to leave the EU, it is now more important than ever that businesses undertake careful strategic planning when considering the immigration status of their international workforce and implications for global mobility. While you may prefer for your employees to remain on a UK contract to prevent complexities, this is not always achievable in practice, and global mobility contracts can assist to reflect both local and foreign laws. Here we consider the different types of global mobility employment contract from secondments, to transfers and dual employment.

Secondments

Secondments permit an employee to be temporarily transferred to work for the benefit of a foreign company while continuing to be employed by their UK employer, preserving employee benefits. The employee also benefits from the legislative protections applicable to UK employees. In most cases, the host company will pay a fee to the UK company in return for the employee's services. In the event that an employee will not continue on a UK employment contract, a letter of assignment is required to amend the contract to support the assignment and any new duties of the employee in the host country.

Transfers

When transferring UK employees to an overseas branch, immigration laws will often restrict employees given that some countries require individuals to have an employment contract with a local entity before granting them a work permit. Therefore, UK businesses usually establish a legal entity within a host nation in order to transfer and assign their employees. Employers will need to be mindful of tax implications and take into account any benefits payable on termination of an employee's contract.

Dual Employment

Dual employment can be rather complex but allows for two simultaneous employment relationships to benefit both the host and UK employer. Employers must consider payroll, benefits, taxation, and employment obligations when operating in two separate jurisdictions. The key is to be transparent on the division of employee responsibilities between the two employers. However, if a dispute does arise there may be potential liability for both the UK and host employer. Often, to meet the particular global mobility needs of a business, the existing contractual relationship is varied, for example a UK employee could be on a leave of absence for the purpose of their foreign assignment. Employers seeking to maintain dual contracts should give appropriate attention to how the employment laws of the UK and host country interconnect.

What does it mean for businesses?

Whichever type of contract is in place, when employees commence a local contract with a foreign entity, the host country employment law will apply. However polices on equality, anti-discrimination and health and safety may differ across jurisdictions. Even where a UK contract is maintained, the practical effect may be that the employee falls under both jurisdictions. From a UK perspective, where there are differences, it is imperative to maintain the higher standard to ensure your business' international reputation is protected.

It is vital that the employer's HR functions are conscious of the challenges and issues that may arise when planning secondments or permanent moves for employees with full knowledge of the relevant country's employment immigration and tax laws.

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We hope you have found this brief interesting and informative.

This Employment Brief aims to introduce you to legal issues and is not a substitute for taking appropriate specialist advice in individual cases.

We will be happy to assist - please contact a member of the team.

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