HEWITSONS

Employment

LEGAL UPDATE

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What's new

Reasonable adjustments – when does the duty arise?

In the case of *Meier v BT* the Northern Ireland Court of Appeal (CA) had to consider whether an employer had sufficient knowledge of a job applicant's disabilities to trigger the employer's duty to make reasonable adjustments to the recruitment process.

Mr Meier had Asperger syndrome, dyslexia and dyspraxia. He had a very high IQ and achieved a 2.1 degree in Computer Science. He applied to BT for a job under its graduate programme. The recruitment process involved several stages including an online application, a Situational Strengths Test (SST), a Skype interview, attendance at an assessment centre and an interview. As part of its commitment to actively attract and recruit disabled people, BT had a Guarantee Interview Scheme whereby BT guaranteed to interview anyone with a disability who satisfied their minimum requirements for the position.

Mr Meier completed the online application. On a separate 'diversity' form, Mr Meier confirmed that he was disabled and provided details of his conditions. This form was sent to a different, outsourced organisation and BT's recruitment team were not made aware of its contents, including the fact that Mr Meier suffered from a disability. Further, it was not BT's standard practice to provide such information to the recruitment team during the recruitment process.

Following receipt of the online application, Mr Meier was asked to complete the SST. He scored low and so Mr Meier was informed that his application would not progress. Mr Meier explained that the SST was not an appropriate mechanism to test someone with Asperger syndrome and asked BT to make reasonable adjustments so that he could progress to the next stage (i.e. effectively asking them to follow their Guarantee Interview Scheme). BT refused to do so, indicating that the SST formed part of the minimum requirements for the role and that Mr Meier had not come forward to suggest that the SST format should be adjusted to account for his disability. Mr Meier brought a claim for disability discrimination due to BT's failure to make reasonable adjustments to the recruitment process to accommodate his disability.

The original Employment Tribunal (ET) held that that BT should have put procedures in place to ensure that relevant information given on the separate 'diversity' form was relayed to the recruitment

team and so knew, or ought to have known, that Mr Meier was disabled and that his disability would place him at a substantial disadvantage during the recruitment process compared with other non-disabled applicants. The ET therefore held that it would have been reasonable for BT to disregard Mr Meier's scores in the SST and instead to interview him to test whether he met the requirements for the job. Mr Meier was therefore awarded £12,500 for injury to feelings and £4,538 for loss of earnings. BT appealed the decision.

Rejecting the appeal, the CA held that the ET was entitled to conclude on the evidence that BT knew of Mr Meier's disability and failed to take steps to consider if information on the monitoring form was relevant to BT's duty to make reasonable adjustments. The CA confirmed that the duty to make reasonable adjustments lies with the employer and applies to all stages of employment, including the recruitment process.

Employee Shareholder Status – can it be terminated by execution of a subsequent agreement?

In *Barrosso v New Look Retailers Limited* the Employment Appeal Tribunal (EAT) held that a Service Agreement executed two years after an Employee Shareholder's Agreement did not terminate the employee's employee shareholder status.

As a reminder, an 'employee shareholder' refers to the situation where an employee receives at least £2,000 worth of shares in their employer in return for giving up some employment rights, such as unfair dismissal and statutory redundancy payment. Provided that certain conditions are met, there are also potential tax benefits for the employee.

Mr Barrosso was appointed the UK Managing Director for New Look in 2014. Following the sale of New Look to another company in 2015, Mr Barrosso was offered 7,000 ordinary shares in the parent company in exchange for becoming an 'employee shareholder'. Mr Barrosso signed an Employee Shareholder Agreement which satisfied the necessary formalities. Given that the arrangement was purely to take advantage of the tax benefits, Mr Barrosso was concerned at losing his statutory rights. As such, Mr Barrosso was also provided with a side letter which explained that he had the contractual right to the equivalent of an unfair dismissal award and a statutory redundancy payment, provided that he made a request in writing to New Look within three months of termination of employment to appoint an independent expert to decide if there had been an unfair dismissal or a statutory redundancy payment was due. This letter was executed as a deed in September 2015.

New Look later introduced new Service Agreements for directors which imposed new restrictive covenants and also ensured all directors were on the same standard terms. The new Service Agreement contained a clause stating that it superseded all previous written and oral agreements, made no mention of Mr Barrosso's employee shareholder status but did purport to preserve the effect of the September 2015 deed. Mr Barrosso executed the new Service Agreement in 2017. In 2018, Mr Barrosso was dismissed and he brought a claim for unfair dismissal.

The ET dismissed Mr Barrosso's claim. The ET held that Mr Barrosso's employee shareholder status had not been terminated by the March 2017 agreement. The 2017 agreement preserved Mr Barrosso's contractual rights under the September 2015 agreement and so did not intend to restore Mr Barrosso's statutory rights. Further, the 2017 agreement failed to deal with or refer to his employee shareholder status, which implies it could not have superseded the employee shareholder agreement. Mr Barrosso appealed to the EAT.

Dismissing the appeal, the EAT highlighted that employee shareholder status may be terminated by an agreement which provides that the employee could sell or give back the shares held in the company. However, in this case no such provision existed and there was no evidence to suggest that the parties had intended for Mr Barrosso to lose his employee shareholder status simply by him executing the new Service Agreement.

WHAT TO LOOK OUT FOR

Law Society's new guidance on non-disclosure agreements

On 15th August 2019 the Law Society of England and Wales published new guidance entitled "NDAs and confidentiality agreements – what you need to know as a worker" as part of a new public legal education initiative to help the public understand their rights when faced with non-disclosure agreements (NDAs).

The new guidance has been produced following concerns raised by the Women and Equalities Committee that victims of potential unlawful discrimination and harassment may be reluctant to report their experiences. Briefly, the new guidance explains what workers should do when asked to sign a confidentiality agreement, explains the limits of a confidentiality agreement and advises workers to get independent legal advice on the agreement before signing it.

The guidance can be viewed here.

Right to work checks in the event of a No Deal Brexit

The Government has updated its online guidance for employers on what right to work checks are required to be carried out on EU citizens in the UK should the UK leave the EU without a deal.

The revised guidance is available here. Employers can also sign up for email alerts to be kept informed of the latest developments.

For more information about any of the topics covered in this update please contact Nicholas Hall by clicking here.

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