Hewitsons' Employment
LEGAL UPDATE

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What's New

Can an implied requirement to work long hours amount to a provision, criterion or practice ("PCP") for the purposes of disability discrimination?

In the recent case of *United First Partners Research v Carreras*, the Court of Appeal held that an implied requirement that an employee work late evenings can amount to a PCP.

Mr Carreras was employed as an analyst by United First Partners Research. He initially worked long hours, typically 12 to 14 hours on each day. Mr Carreras was involved in a cycling accident which severely affected him both physically and emotionally and as a result, he worked reduced hours for the first six months after his return to work. After a while, he started to receive repeated requests from his employer to work late evenings; when he agreed, an expectation developed that he would continue to work such hours. Mr Carreras filed a formal objection to working late, following which he was reprimanded by one of the owners of the business, and he subsequently resigned.

Mr Carreras bought an Employment Tribunal ("ET") claim. Part of Mr Carreras' claim was for disability discrimination, claiming that his employer had failed to make reasonable adjustments by requiring him work late and long hours despite his ill health.

The ET held that the impairments that Mr Carreras suffered as a result of his injury amounted to a disability, and that his employer was aware of them. However, the ET found in the first instance that the employer had not imposed a PCP of late working and long hours as Mr Carreras had not been 'required' to work in the evening. The ET accepted that there may have been an expectation that Mr Carreras would work late, but held that this did not amount to force or coercion and so could not amount to a PCP.

On appeal the Court of Appeal held that the term 'requirement' for the purposes of establishing a PCP under the Equality Act 2010 did not mean that there had to be coercion and that a PCP could arise where there was simply a strong form of request

for an employee to do something. In this case, Mr Carreras' claim was that the repeated requests from his employer for Mr Carreras to work late and long hours reflected that he was expected to work evenings, and that created pressure on him to work late and long hours. The Court of Appeal therefore held that in this case, the expectation for Mr Carreras to work late and long hours amounted to a PCP.

Redundancy and the employer's duty to consider bumping

The Employment Appeal Tribunal ("EAT") in *Mirab v Mentor Graphics (UK) Ltd* considered when it is reasonable for an employer to consider "bumping" in a redundancy exercise.

In this case Dr Mirab was employed by Mentor Graphics as a Sales Director. Dr Mirab was dismissed by his employer as a result of redundancy following a decision that the role of Sales Director was no longer needed. The employer undertook a redundancy consultation process with Dr Mirab which included holding three consultation meetings with the Dr Mirab and consideration of suitable alternative vacancies.

Following his dismissal, Dr Mirab issued proceedings claiming unfair dismissal. One of the grounds that Mr Mirab relied upon in his claim was that his employer had not done enough when looking for alternatives to redundancy, as his employer had failed to consider "bumping" an employee working in the more junior role of Account Manager.

In determining whether the dismissal was fair, the ET in the first instance considered whether the employer has made sufficient effort to find alternative employment for Dr Mirab. On this point, the ET held that the employer had sufficiently considered the alternatives and held that the employer was not required to consider bumping unless the employee himself raises it.

However, on appeal, the EAT stated that the ET has erred in its approach to the consideration of alternatives. The EAT held that in deciding if a dismissal by reason of redundancy was fair it was necessary to consider whether the employer's decisions, including decisions regarding the process, lay in the range of reasonable responses. The EAT found that in this particular case, it had not been reasonable for the employer to ignore the possibility of bumping. Further, the EAT confirmed that it was not necessary to only consider where the employee raised the issue. The case was therefore remitted back to the ET for reconsideration.

Pregnancy discrimination

In the recent case of *Really Easy Car Credit Limited v Thompson* the EAT confirmed that an employer is not required to revisit a decision to dismiss an employee where the employer is later informed of the employee's pregnancy.

Mrs Thompson was dismissed by her employer during her three-month probationary period on the basis that her employer felt that she was 'emotionally volatile' and had failed 'to fit in with the employer's work ethic'. The employer made the decision to dismiss Mrs Thompson on 3 August. However Mrs Thompson was not notified of the decision to terminate her employment until 5 August. On the 4th August Mrs Thompson informed her employer that she was pregnant.

Mrs Thompson made a claim for unfair dismissal by reason of pregnancy. She argued that the real reason for her dismissal was her pregnancy, claiming that her employer had found out the day prior to her dismissal. The employer denied those claims, arguing that the decision to dismiss the employee was made on the 3 August, before receiving knowledge of her pregnancy.

In the first instance, although the ET accepted that the employer's decision to dismiss was made on 3 August, prior to Mrs Thompson informing the employer of her pregnancy, it found that upon such notification the employer should have reviewed its decision to dismiss. The ET therefore upheld Mrs Thompson's claim.

On appeal by the employer, the EAT upheld the appeal. The EAT held that the question was simply whether the reason for the employee's dismissal was her pregnancy. In this case the ET had found that at the time the employer made the decision to dismiss it did not have knowledge of the pregnancy and as such the decision to dismiss could not have been because of pregnancy. The ET had therefore found the employer liable because it had not made a positive step to revisit the decision after it learnt of the pregnancy. The EAT confirmed that there was no such obligation. The case was therefore remitted to a differently constituted tribunal for further consideration.

WHAT TO LOOK OUT FOR

ACAS statistics published

Acas has published an update on the number of employment disputes that it has dealt with via early conciliation during the dates between April and December 2017. This therefore includes the matters that have arisen since the abolition of employment tribunal fees in July 2017. During the period between April and the end of July, before the abolition of fees, ACAS received around 1,700 notifications per week. Since the end of July, when employment tribunal fees were abolished by the Supreme Court's ruling in R (on the application of UNISON) v Lord Chancellor (Brief 1075), this has risen to around 2,200 notifications per week.

The Acas statistics also show that, since 28 August 2017, there has been an increase in the number of ET1's received by 57% and an increase in the number of early conciliation notifications by 25% compared with the same period in 2016.

Deferral of employer-supported childcare schemes closure

On 13 March 2018, the government announced that existing employer-supported childcare schemes, for example childcare voucher schemes, which were originally due to close to new entrants from April 2018, will remain open to new entrants until October 2018. Employer-supported schemes are to be replaced by the government's tax-free childcare scheme going forward.

Those employees that have the potential to benefit from such schemes are likely to welcome the increased flexibility that this will provide. However, it is worth noting that this announcement merely defers the date for closure, rather than indicating that the "old" system will be retained indefinitely. Therefore, those wishing to be included in the "old" schemes should act swiftly.

For more information on any issues discussed in this update please contact Nick Hall on 01604 233233 or click here to email Nick.

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