Hewitsons' Employment LEGAL UPDATE

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Applicant with Asperger's subjected to disability discrimination

In the recent case of *Government Legal Service v Brookes*, the Employment Appeal Tribunal (EAT) has considered whether requiring a job applicant with Asperger's syndrome to sit a multiple choice test at the first stage of a recruitment process was discriminatory.

Ms Brookes, a law graduate with Asperger's syndrome, applied to the Government Legal Service (GLS) for a trainee solicitor role. All applicants were required to sit an online 'situational judgement test' (SJT), which involved the applicant completing multiple choice questions. A month before sitting the test Ms Brookes contacted GLS and requested the SJT be adjusted by allowing her to submit answers in a short narrative form. Ms Brookes was told that an alternative test format was not available. Ms Brookes scored 12 out of 22 for the SJT, two points off the pass mark of 14, and therefore Ms Brookes' application did not progress further. Ms Brookes filed Employment Tribunal (ET) claims for disability discrimination.

Upholding Ms Brookes' claims, the ET held that GLS had applied a provision, criterion or practice (PCP) of requiring all applicants in the trainee recruitment scheme to take and pass the online SJT. Having heard expert medical evidence, it concluded that the PCP generally placed people with Asperger's syndrome at a particular disadvantage compared to those without. Whilst the PCP pursued the legitimate aim of testing a fundamental competency required of GLS trainees, the means of achieving that aim were not proportionate given the less discriminatory alternative adjustment which was available as proposed by Ms Brookes. GLS was ordered to pay £860 in compensation, apologise and the ET also made a recommendation for GLS to review its procedures in terms of recruiting disabled applicants. GLS appealed.

On appeal the EAT held that the ET had been entitled to come to the conclusions it did based on the finding the ET had made and the medical evidence before it. The EAT stated that the ET, "*was presented with what appeared to be a capable young woman who, with the benefit of adjustments, had obtained a law degree and had come close to reaching the required mark of 14 in the SJT, but had not quite managed it. The tribunal was right to ask itself why, and was entitled to find that a likely explanation could be found in the fact that she had Asperger's, and the additional difficulty that would place her under due to the multiple choice format of the SJT.*" The EAT did not accept GLS' argument that the format of the test was inextricably linked to the core competency being tested. Instead, the EAT held that the decision-making powers of the small number of candidates with Asperger's could properly have been measured by permitting them to answer the SJT in narrative form and that any logistical inconveniences to the employer did not outweigh the factors on Ms Brookes' side.

"On call" and "sleep-in" shifts may count for National Minimum Wage purposes

In three joined cases, the lead case being *Focus Care Agency Ltd v Roberts* the Employment Appeal Tribunal (EAT) considered in each case whether workers who are on call or carrying out sleep-in shifts, who are on standby for the duration of the shift, are entitled to be paid the national minimum wage (NMW) for the whole shift or just for the periods during which they are awake and carrying out their duties.

In the lead case, Mr Roberts was a care worker employed by Focus Care Agency Ltd (Focus) supporting vulnerable adults. Mr Roberts worked a sleep-in shift during which no specific tasks were allocated but he was under a continuing obligation to remain at his post in case he was needed to deal with any incidents. Mr Roberts would have been disciplined if he had left his post.

The Employment Tribunal (ET) held that, on the basis Mr Roberts was effectively on call constantly, he was performing work throughout his shift and so entitled to receive NMW for his whole shift. Focus appealed.

The EAT upheld the ET's decision, indicating that the fact an employee has little or nothing to do does not mean that they are not working. The EAT stated that, when determining whether an individual is working at any particular time, a multi-factorial evaluation should be taken and provided the following guidance on factors that should be considered when deciding whether a person is working by being present:

The employer's purpose in engaging the worker (e.g. is the employer subject to a regulatory or contractual requirement to have someone present?).

The extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer (e.g. could the worker be disciplined if they left their post during the shift?).

The degree of responsibility undertaken by the worker and the types of activities that they may be called upon to perform.

The immediacy of the requirement to provide services should an emergency arise (e.g. is the worker the person who decides whether or not to intervene or are they woken up by someone else who has the immediate responsibility to decide whether or not to intervene?).

WHAT TO LOOK OUT FOR

Gender Pay Gap information published on Government website

Since the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (Regulations) came into force on 6th April 2017, employers (defined as those with 250 or more employees on 5th April of each year) have started to publish their gender pay gap information on the Government's gender pay gap data website.

The information can be accessed here.

Government response to Committees' Report on high heels and dress codes in the workplace

The Government has published its response to the House of Commons Petitions Committee and the Women and Equalities Committee joint report entitled "High Heels and Workplace Dress Codes".

Published on 25th January 2017, the joint report was undertaken following Nicola Thorp's petition calling for it to be made illegal to require women to wear high heels at work. Ms Thorp was a receptionist who had been sent home from work without pay for wearing flat shoes in breach of a dress code requiring women to wear two to four inch heels.

The report concluded that being required to wear high heels is damaging to female workers' health and wellbeing and that certain other dress code requirements make some female workers feel uncomfortable and sexualised by their employer. The report made the following recommendations:

- The government should review this area of the law.
- Adaptation of "less favourable treatment" test to place greater weight on the subjective element.
- Prescribing legitimate aims for indirect discrimination cases.
- Raising awareness and providing advice on how to resolve disputes.
- Detailed guidance on dress codes.
- Increased powers of enforcement including financial penalties.

The Government published its response to the Committees' report on 20th April 2017. Any recommendations that would require legislative change were rejected by the Government on the belief that existing discrimination laws were sufficient to protect women subject to discriminatory dress codes. Instead, the Government favoured a review of the guidance available and an increase in awareness campaigns, with the Government Equalities Office working with ACAS and the Health and Safety Executive to publish updated guidance on dress codes during Summer 2017.

Hewitsons at the Cambridge Roar B2B Exhibition

Cambridge employment law Partners Valerie Lambert and Elizabeth Swinburn will be attending the annual Cambridge Roar B2B Exhibition at Quy Mill Hotel and Spa on the 29th June. Please look out for the Hewitsons stand at the event and pay us a visit. For more information on the exhibition please click here

For more information on any of these updates please contact Nick Hall on 01604 233233 or click here to email Nick.