Hewitsons' Employment LEGAL UPDATE

September 2017
Vol.19 No.9

Asda equal pay claims

In the case of *Asda Stores Ltd v Mrs S Bierley & Others* the Employment Appeal Tribunal ("EAT") confirmed that a group of lower paid, mostly female, employees who work in Asda's retail stores can compare themselves to higher paid men who work in the distribution centres for the purposes of equal pay. The claim was brought by over 7,000 former and current employees of Asda, claiming pay dating back to 2002. The store workers argued that they carry out work of equal value to the men in the distribution centres, but are paid less.

In the first instance the Employment Tribunal held that the store workers could compare themselves with higher paid men in the distribution centres. Asda appealed against this decision to the EAT. One of Asda's key arguments was that the two groups of employees could not be compared as there was no single source of pay and conditions. The basis of this argument was that the retail stores and the distribution centres were managed by different bodies and as such there were different methods of setting pay in each workplace. The EAT agreed with the Employment Tribunal's decision that there was a single source of pay and conditions in this case. Whilst the retail and distribution centres were managed by different bodies, the evidence showed that the Executive Boards reviewed the setting of pay at both centres and that therefore this was simply a case of a large organization delegating decisions in relation to pay to other internal bodies. The EAT explained that a single source simply meant a common source and that just because there is a presence of an overall parent company, which delegates certain decisions to a subsidiary, this does not prevent there being a single source of pay and conditions in respect of the claimants and their comparators.

The EAT also confirmed that the "North hypothetical test" is still available for claimants to rely upon under the Equality Act 2010. The "North hypothetical test" is used where a claimant cannot identify a comparator for the purposes of equal pay at their establishment, and allows a claimant to compare themselves to a hypothetical employee, if that hypothetical employee would have been employed on broadly similar terms to do their job at the claimant's location. This test was available under the Equal Pay Act 1970, but the wording was not replicated in the Equality Act 2010 and so Asda argued that this test was no longer good law. However, the EAT confirmed the "North hypothetical test" is still applicable in equal pay claims.

Early conciliation certificate accepted despite naming two respondents

The EAT in the case of *De Mota v ADR Network and anor* confirmed that an early conciliation certificate was still valid, and so the claimant could still rely on this certificate in issuing his

claim to the Employment Tribunal, despite that certificate naming two respondents.

Mr De Mota was employed as a HGV driver by ADR Network, who assigned him to work for the Co-Operative Group Ltd. Mr De Mota brought a claim for unfair dismissal, breach of contract, unlawful deduction from wages, holiday pay and notice pay. He completed one early conciliation form and named both ADR Network and the Co-Operative Group Ltd as respondents. He included an address which is used by both ADR Network and the Co-Operative Group. Acas did not reject his form and issued an early conciliation certificate naming the prospective respondent as "ADR Network and the Co-Operative Group". However, when Mr De Mota brought his claim to the Employment Tribunal, the judge rejected his claim on the basis of non-compliance with the requirements in respect of early conciliation. The Judge ruled that as the early conciliation certificate did not name either of the respondent companies and instead named a company that did not exist and so could not be relied upon.

Mr De Mota appealed to the EAT. The EAT allowed the appeal and confirmed that Mr De Mota could rely on the early conciliation certificate in order to bring his claim. The EAT confirmed that the purpose of the early conciliation procedure was to provide the opportunity for conciliation to be considered, there is actually no requirement for conciliation itself. The EAT ruled that the tribunal was only deprived of jurisdiction if there was no early conciliation certificate. Their view was that Parliament did not intend for the process leading up to the issue of an early conciliation certificate to be subject to criticism or examination by the tribunal and so Mr De Mota should not be prevented from bringing his claims in these circumstances.

WHAT TO LOOK OUT FOR

Vento bands consultation - increase in compensation for injury to feelings

The Presidents of the Employment Tribunals in England and Wales and in Scotland have published their response to the recent consultation in respect of the Vento bands. Vento bands are the bands of compensation for injury to feelings in discrimination cases. The consultation was to consider how the Vento bands could be amended to take into account the rate of change of inflation, following the case of *De Souza v Vinci Construction (UK) Ltd* where the Court of Appeal ruled that a 10% uplift should apply.

The response sets out the new bands as follows:

- A lower band of £8,000 to £8,400 for less serious cases
- A middle band of £8,4000 to £25,200 for cases that do not merit an award in the upper
- An upper band of £25,200 to £42,000 for the most serious cases

The most exceptional cases will be capable of exceeding the upper band limit of £42,000.

The new bands apply to claims presented on or after 11 September 2017. However, the tribunal may adjust the bands to reflect inflation for any claims presented before that date.

For further information on the consultation, the full response can be viewed here.

Premature and sick babies - ACAS guidance

ACAS has issued new guidance for employers in relation to workplace support for parents with premature or sick babies.

The guidance reports that over 95,000 premature or sick babies are born every year in the UK and provides practical guidance for employers in terms of dealing with employees who are the parents to sick or premature babies. ACAS advises employers to approach all communication in a sensitive and compassionate manner, ask the parents what they would like them to tell their colleagues about the situation, be flexible in allowing fathers or partners of the mother to take time off and remind fathers and partners about their eligibility for paternity leave and when this can be taken. Employers should also be flexible in allowing additional time off for appointments and treatment when parents return to work and potentially offering extended leave or flexible working. The guidance also includes advice for handling the death of a premature or sick baby.

The new ACAS guidance can be viewed here.

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