



What's new

Equal Pay

In the recent case of *Asda Stores Limited v Brierley*, the Court of Appeal has upheld the decision that staff working on the supermarket's shop floor can compare themselves to warehouse staff for the purposes of equal pay.

Over 7,000 store-based employees, the majority of whom were female, felt that their customer-facing roles were undervalued when compared with higher paid staff working in Asda's distribution centres, who were predominantly male. They were engaged under different regimes and management structures, with supermarket staff employed on 'retail terms' and warehouse staff employed on 'distribution terms'. For equal pay comparisons, claimants and their comparators need to be working at the same establishment, or at establishments where common terms are observed.

The Court of Appeal agreed with the Employment Appeal Tribunal that there were common terms generally between the claimants and comparators. The retail and distribution terms were broadly comparable and the differences were not significant enough to undermine this. Although they were employed at different establishments, both supermarket and warehouse employees had common terms and conditions that would apply regardless of where they worked. As a result of this, the equal pay claims could proceed.

The Court of Appeal confirmed that a hypothetical test could be applied to consider if different terms would apply if staff were moved to do their own jobs at the other site (even if, in reality, this would never happen). Looking beyond such a comparison, claimants still need to demonstrate that the roles are of equal value and that there is no reason for the unequal pay other than sex discrimination.

Automatically Unfair Dismissal and TUPE Transfers

In the recent case of *Hare Wines Limited v Kaur*, the Court of Appeal has held that having purely personal reasons for a dismissal linked to a TUPE transfer does not stop the dismissal from being automatically unfair.

Mrs Kaur worked as a cashier in H&W Wholesale Limited ('H&W'), a wine wholesale business. She had a long-standing, strained relationship with one of her colleagues, Mr Chatha. Neither of them was strictly to blame but they had difficulty working together. Mr Chatha was going to become a director of Hares Wines Limited ('HW').

Due to financial reasons, H&W had to stop trading. It was decided that HW would take over the business and so TUPE would apply. On the day of the transfer, Mrs Kaur was dismissed by H&W. The dismissal letter simply stated that this was because it had to stop trading. However, Mrs Kaur was told that Mr Chatha did not want her at HW, and so did not want her employment to transfer across, due to their poor relationship.

Mrs Kaur brought a claim for automatic unfair dismissal. The Employment Tribunal found that, because the sole or main reason for the dismissal was the transfer, her dismissal was automatically unfair in law. HW unsuccessfully appealed to the Employment Appeal Tribunal and the Court of Appeal.

The Court of Appeal agreed that the reason for the dismissal was the transfer. This was supported by the fact that Mrs Kaur was dismissed on the day of the transfer and the poor relationship between her and Mr Chatha had gone on for many years without H&W seeking to dismiss her. The Court of Appeal noted that, although a dismissal can potentially be fair due to an economic, technical or organisational reason, the law does not recognise any category of 'personal' reason to prevent such a dismissal from being automatically unfair.

Religious Discrimination

In the recent case of *Gan Menachem Hendon Limited v De Groen*, the Employment Appeal Tribunal ('EAT') has held that a teacher who was dismissed for living with her boyfriend was not subjected to religious discrimination.

Ms De Groen worked at an ultra-orthodox Jewish nursery. Some of the parents found out that she was living with her boyfriend. As cohabitation outside marriage was against their beliefs, the nursery was concerned that this would damage their reputation. They asked Ms De Groen to say she no longer lived with her boyfriend so the message could be relayed to parents, even though this was not true. Ms De Groen refused to lie and was dismissed for acting contrary to the nursery's 'culture, ethos and religious beliefs'. She brought claims for direct sex discrimination and harassment, and direct and indirect religious discrimination. The Employment Tribunal upheld all of her claims in the first instance.

However, the EAT allowed the nursery's appeal against the claim of religious discrimination claims. It clarified that the law protects people with 'protected characteristics', such as religion or belief. The religion of the individual is therefore what is relevant, not the religion of the discriminator. The Tribunal in the first instance was wrong because Ms De Groen was not discriminated against due to her own religious beliefs (or lack of belief) but those of the nursery. Less favourable treatment due to the employer's own religious belief does not establish direct discrimination. The EAT also found that there was no indirect religious discrimination, although it upheld Ms De Groen's sex discrimination claims.

Working Time Directive

The Advocate General ('AG') in *Federacion de Servicios de Comisiones Obreras v Deutsche Bank SAE* has suggested that, in order to comply with the Working Time Directive, employers must keep records of actual hours worked for those who have not expressly agreed to work overtime, individually or collectively.

In the case, a Spanish trade union wanted a declaration that a bank had to record the actual number of hours its employees worked to ensure that working time laws were complied with. This comes from both national law and EU law, under the Working Time Directive. The Spanish Court was unsure if their law complied with EU law so it referred questions to the European Court of Justice ('ECJ'). The AG said the ECJ should decide that EU law requires employers to record actual daily working time for full-time workers who have not agreed to work overtime. This is essential in ensuring compliance with working time laws, such as the limits on the length of each working day and daily and weekly rest periods. Although the AG's opinion is not binding, it is usually followed by the ECJ.

If the ECJ agrees, there may be a question over whether English law complies with the EU Directive. Although our Working Time Regulations require employers to keep records showing that the weekly working time and night work limits are not exceeded, it does not cover daily or weekly rest and does not require all hours of work to be recorded.

WHAT TO LOOK OUT FOR

Age Discrimination: New Acas Guidance

Acas has published new guidance on age discrimination which provides useful insight for employers, managers and HR professionals to reduce the risk of age discrimination in the workplace. Age discrimination is one of the most common forms of unfair treatment at work and many employers are unaware of the law and its consequences. Employees are protected against unfair treatment because of their age, the age they are thought to be or the age of someone they are associated with. They are also protected from harassment related to age.

The guidance can be found at www.acas.org.uk/agediscrimination. It offers tips on how to avoid bias and preconceptions based on age, including a 'top ten' list of useful practices and a 'myths v facts' sheet.

Brexit: Employee Passports

Those with less than six months until their passport expires could experience problems if the UK leaves the EU without a deal. Employers should be aware that UK employees who travel to the EU for work could be affected. With approximately 4.8 million people making such journeys in 2017 and with millions of passports set to expire this year, many businesses could be affected by long delays in the processing of applications. Passports should therefore be renewed in good time. Government guidance states that, after 29 March 2019, people should have at least six months left on their passport from their date of arrival. More information can be found [here](#).

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





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