



## EMPLOYMENT LAW UPDATE – JANUARY 2010

### **PREGNANT EMPLOYEES AND RISK ASSESSMENTS**

An employer is under a duty to conduct a risk assessment for a pregnant female worker if:-

- i) she tells the employer in writing that she is pregnant
- ii) the work she does is of a type where there is a risk of harm or danger to the health and safety of the expectant mother or her baby
- iii) the risk arises from either the processes, working conditions or physical, chemical or biological agents in the workplace.

A meeting should be held where the obligation arises. The employer must provide the employee with comprehensive and relevant information on the identified risks to her health and safety. This approach has recently been confirmed in the EAT case of *O'Neill –v- Buckinghamshire County Council*.

### **SERVICE RELATED PAY/EQUAL PAY**

In the recent Court of Appeal decision of *Wilson –v- The Health and Safety Executive* it was established that it is open to an employee to challenge both the adoption of length of service as a determinant of pay and also the way in which it is used or applied.

The hurdle is not a high one for the employee who is required to show that her claim has some prospect of success in the sense that there is evidence from which, if established at a hearing, it could properly be found that the adoption or use of length of service is not justified/or is disproportionate.

Employers need to be careful about using length of service as a method of determining pay and they also need to be clear as to why this is being used. This is because women are more likely to take career breaks because of caring responsibilities and are less able than male colleagues to build up unbroken service.

### **WHISTLE BLOWING**

The recent Employment Appeal Tribunal case of *Cavendish Munroe – v- GEDULD* sets out that in order to make a protected disclosure, information has to be disclosed about a situation by conveying facts. It is not enough for an employee to make an allegation.

A disclosure can be made to a person who is already aware of the information.

In this particular case, a letter from the employee's solicitor complaining about his treatment and leading to his dismissal did not contain a disclosure and therefore there was no protected disclosure from which to build a whistle blowing claim.

### **DISABILITY DISCRIMINATION AND REASONABLE ADJUSTMENTS**

Employers do not need to make reasonable adjustments in certain circumstances. This has been reinforced by the Employment Appeal Tribunal decision in the case of *DWP –v- ALAM* which confirmed that two questions arise when deciding whether reasonable adjustments should be considered and these are:-

- i) Did the employer know that the employee was disabled and that the provision, criteria or practice applied by or on behalf of an employer or any physical feature of the premises occupied by the employer were likely to place a disabled person at a substantial disadvantage in comparison with persons who are not disabled, and
- ii) If not, ought the employer to have known the above?

The employer is not under a duty to make reasonable adjustments if the answer to both questions is no.

### **SEX DISCRIMINATION/DRESS CODE**

The Employment Appeal Tribunal case of *DANFIE –v- The Metropolitan Police* is authority for the proposition that requiring a male employee to cut his shoulder length hair when a female would not have to do so in similar circumstances did not amount to sex discrimination or harassment. This is provided that the overall dress code was equally balanced between the sexes.

The Employment Appeal Tribunal confirmed that the correct legal test is whether applying contemporary standards and conventions as well as the specific needs of the profession in question the employer's dress code as a whole was asking its employees to display an equivalent level of smartness between the sexes.

### **IVF TREATMENT AND SEX DISCRIMINATION**

The case of *Sahota –v- The Home Office* considered whether IVF treatment should be treated as the equivalent to pregnancy for the

purposes of the Sex Discrimination Act with no comparator being required. The EAT found a woman undergoing IVF treatment is to be regarded as pregnant for the period following implantation of a fertilised ova until the end of the protected period. Prior to the implantation, less favourable treatment of a woman on the grounds that she is receiving IVF treatment may constitute sex discrimination.

#### **DROP IN ANNUAL COMPENSATION LIMIT**

On 1<sup>st</sup> February 2010 the maximum compensatory award drops from £66,200 to £65,300. The maximum weeks pay for the basic award and redundancy pay remains at £380 per week.

#### **COSTS**

The Court of Appeal case in *St. Alban's Girls School –v- Neary* has established that where an employee is pitched against his or her will into a cost bearing jurisdiction, it would normally be wrong to make a costs order against him or her if the appeal is successful.

#### **RELIGIOUS BELIEF AND SEXUAL ORIENTATION**

The Court of Appeal in the recent case of *Ladele –v- The London Borough of Islington* has held that there is nothing in the Religion or Belief Regulations 2003 entitling the employee, a civil partnership registrar, to insist on her right not to have civil partnership duties assigned to her because of her belief that civil partnerships were contrary to the will of God. The Court of Appeal held that the prohibition of discrimination by the Regulations took precedence over any right which a person would otherwise have by virtue of their religious belief or faith to practice discrimination on the grounds of sexual orientation.

#### **APPRENTICESHIPS, SKILLS, CHILDREN AND LEARNING ACT 2009**

As of 6<sup>th</sup> April 2010, businesses employing more than 250 employees will have to take account of this new piece of legislation which introduces the new apprenticeship structure and a new right for employees to request time off work to undertake study or training.

All employees with more than 26 weeks service will be allowed to make a request for time off to undertake training to improve their effectiveness at work and performance of the business.

This means that the Employment Rights Act 1996 will be amended setting out a new time to train procedure and also protecting employees from dismissal for making such a request or from suffering a detriment for doing so.

The procedure closely mirrors the flexible working procedure and only one application can be made every 12 months.

Employers must consider all requests seriously and can refuse a request for specified business reasons or if they believe that the training would not improve the employee's effectiveness at work or the performance of their business.

### **DISCRIMINATION**

The Employment Appeal Tribunal has held in the case of *McFarlane – v- Relate Avon* that the dismissal of an employee for refusing to work with homosexuals was not direct religious discrimination as the dismissal was based on the employee's refusal to comply with the employer's equal opportunities policy rather than his Christian beliefs. Dismissal was not indirect discrimination as it was a proportionate means of achieving a legitimate aim – serving the community in a non-discriminatory manner. In this instance, the employee worked as a counsellor.

If you require further information or general employment advice in relation to any of the above or you have an employment law or HR query please contact Marlene Hession at [marlene.hession@fdl-law.co.uk](mailto:marlene.hession@fdl-law.co.uk) or 0161 828 1560.

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